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A

CONCISE, PRACTICAL ABRIDGMENT

OF THE

Common and Statute Law,

AS AT PRESENT ADMINISTERED

IN

THE COMMON-LAW, PROBATE, DIVORCE, AND ADMIRALTY COURTS,

EXCLUDING ALL THAT IS OBSOLETE, OVERRULED, OR SUPERSEDED.

COMPRISING A

Series of Condensed Treatises on the different Branches of the Law,

WITH DETAILED DIRECTIONS, FORMS, AND PRECEDENTS.

AN ALPHABETICAL DICTIONARY OF TECHNICAL LAW TERMS AND MAXIMS, AND A COLLECTION OF WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

THE WHOLE ILLUSTRATED BY REFERENCES TO THE PRINCIPAL CASES IN EQUITY, AND IN THE SCOTCH, AMERICAN, AND IRISH REPORTS, AND THE MOST EMINENT TEXT WRITERS.

SECOND EDITION, RE-MODELLED, AND NEARLY RE-WRITTEN.

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VOL. II.

LONDON:

SIMPKIN, MARSHALL, AND CO.

EDINBURGH: OLIVER AND BOYD. DUBLIN: HODGES, SMITH, AND CO.

1861.

LONDON:
STRANGEWAYS AND WALDEN, 28 CASTLE STREET, LEICESTER SQUARE.

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A Dictionary

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TECHNICAL LAW TERMS AND MAXIMS,

AND WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

AT and From. Meaning of in Policy of Marine Insurance.[1]

ATTAINDER.[2]

(A) *Does not Prevent the Descent of Lands to the Heir on the Death of an Attainted Ancestor*, p. 1.

(B) *And Attainder of Trustee or Mortgagee does not occasion the Lands to Escheat, or be Forfeited*, p. 2.

(C) *Attainder is no Answer to an Indictment for another Offence*, p. 3.

(A) *Does not Prevent the Descent of Lands to the Heir upon Death of the Attainted Person.*

3 & 4 Wm. 4, c. 106, s. 10. "When the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation, if he

Does not prevent the descent of lands to the heir on the death of an attainted ancestor.

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[1] The insertion of the words "at and from" the ship's loading port has the effect of making the insurer answerable for any misfortune which may happen while the ship remains there; as, if she be burnt or lost there, or detained by an embargo. *Rotch v. Edie*, 6 T. R. 413. *Palmer v. Marshall*, 8 Bing. 79; 1 Atk. 548. The insertion of these words, moreover, implies that the ship is either there at the time, or shortly will be there, in default of which the underwriter is discharged. *Hull v. Cooper*, 14 East, 479. *Mount v. Larkins*, 8 Bing. 108. *See*, further, Insurance, Marine; Marshall on Ins. by Shee, 240; and vol. i. p. 574.

[2] This word signifies stained or polluted. It includes in its meaning all those disabilities which flow from a capital sentence. The party is disqualified to be a witness. He can bring no action, nor perform any of the ordinary legal functions. 1 Chit. C. L. 725. These disabilities do not apply to foreign states. Story's *Conflict of Laws*, 1620. Effect as relates to peerage, *see* Sug. R. P. in H. L. 339. For high treason a man forfeits for ever to the Crown all his lands of freehold tenure in fee-simple, and all his rights of entry on lands of the same tenure which he had at the time of the offence committed, or at any time afterwards. And he also forfeits to the Crown the profits of all lands which he had in his own right for life or years. 2 Bl. Com. 290; 4 Steph. Com. 495; Sm. R. & P. Pr. 499. By stat. 26 Hen. 8, c. 13, and 33 Hen. 8, c. 20, if tenant-in-tail in possession, or having a right of entry, was attainted of high treason, the estate-tail was barred, and the lands immediately

had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st day of January, 1834."[1]

(B) *Attainder of Trustee or Mortgagee.*

And attainder of trustee or mortgagee does not occasion the lands to escheat or be forfeited.

13 & 14 Vic. c. 60, s. 46. "No lands, stock, or chose in action, vested in any person by way of trust or by any mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee; but shall remain in such trustee or mortgagee, and survive to his or her co-trustee, or descend or

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vested in the king, who thereby acquired a base fee as long as the person attainted lived, or there were heirs of his body who would have been capable of inheriting the estate-tail. Upon failure of such heirs, the remainderman or reversioner became entitled. 1 Cruise, D. 2, c. 2, s. 36.

He who is attainted for murder forfeits the benefit of all freehold estates during life, but not those in tail, which go to the Crown for a year and a day, during which the Crown may commit waste; but is now usually compounded for. *See* stat. 54 Geo. 3, c. 145; 4 Bl. Com. 378. Leases are forfeited (1 Platt, 535), but the lessee is not absolved from the covenants. 2 id. 353; Cro. Eliz. 213; Noy. 1.

Forfeiture of lands only arises upon attainder, and is caused by a sentence of death or judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice. But the forfeiture relates back to the time of the offence, so as to avoid all intermediate charges and conveyances. Id. 375. Forfeiture of the profits of lands for life is incident to misprision of treason, and striking in Westminster Hall or drawing a weapon upon a judge therein while the Court is sitting. Id. 379.

In the absence of any special enactment to the contrary, copyhold estates are forfeited to the lord of the manor, and not to the Crown. 4 Steph. Com. 499. 1 Scriven. Cop. 154.

When a man commits felony, and then purchases land, and afterwards is attainted, the lord of the fee shall have it by escheat, for he had capacity to purchase it, but not to hold it. If a man is attainted of felony, he has capacity to purchase to him and his heirs, yet he cannot hold it; but in that case the Queen shall have it by her prerogative, and not the lord of the fee, because a man attainted being *civiliter mortuus* has only a capacity to purchase for the benefit of the Crown. Sugd. *Concise View*, 541; Sm. R. & P. P. 501.

Persons convicted of treason or felony forfeit also, on such conviction, the whole of their goods and chattels to the Crown, and nothing but a *bonâ fide* alienation for a valuable consideration, made previously to the conviction, can avert such forfeiture. 4 Bl. Com. 387. *Perkins v. Bradley*, 1 Hare, 219. Forfeiture of chattels, however, has no relation backwards, so that those only which a man has at the time of conviction are forfeited. But if chattels are only collusively and colourably, not *bonâ fide*, parted with between the offence and the conviction, in such a way that the party, if acquitted, could recover them as not parted with for a good consideration, they will belong to the Crown. 4 Bl. Com. 380. When a felony is not capital, the punishment endured has the effect of a pardon (9 Geo. 4, c. 32, s. 3); but the restoration to civil rights does not take effect till the determination of the period of punishment. All personal property, therefore, which accrues to a felon during his transportation is forfeited to the Crown (*Roberts v. Walker*, 1 Russ. & Mylne, 752); but a mere contingent interest will not be forfeited if it do not vest until the expiration of the period of banishment. Wms. *Pers. Pro.* 44. *Stokes v. Holden*, 1 Keen, 145.

By the stat. 5 Geo. 4, c. 84, s. 26, felons whose sentences have been remitted by the governor of the penal colony are protected in the enjoyment of property subsequently acquired by them, not only by their own industry, but also by other means, as where a felon has subsequently acquired property by becoming one of an ascertained class of next of kin, entitled under a will made previous to his conviction. *Gough v. Davies*, 2 K. & J. 623.

Where an escheat has taken place, the Crown is empowered by various statutes to waive the right. *See* 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 96; 6 Geo. 4, c. 17.

[1] The act does not apply to any descent which took place on the death of any person who died before 1st January, 1834. Sec. 11.

By 54 Geo. 3, c. 145, it is enacted, "no attainder for felony which shall take place from and after the passing of this act, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders shall or might have appertained, if no such attainder had been, to enter into the same."

vest in his or her representative, as if no such attainder or conviction had taken place."

Except to the extent of any beneficial interest.

Sect. 47. "Nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in such trustee or mortgagee, so far as relates to any beneficial interest therein, of any such trustee or mortgagee; but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed." *See* Lewin on Trustees, 261.

(C) *Attainder is no Answer to Indictment for another Offence.*

Attainder is no answer to indictment for another offence.[1]

7 & 8 Geo. 4, c. 28, s. 4. "No plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment."

ATTAINING Full Age. *See* Infant.

ATTEMPT to Commit Felony. *See* Felony.

ATTEMPT to Commit Misdemeanour. *See* Misdemeanour.

ATTEMPT to Drown. *See* Drown, Attempt to.

ATTEMPT to Maim. *See* Shooting with Intent; Stabbing, &c.

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ATTEMPT to Shoot, with Intent, &c. *See* Shoot, Attempting to.

ATTENDANCE of Witnesses. *See* Subpœna; Witness.

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ATTESTATION of Attorney. *See* Cognovit; Warrant of Attorney.

ATTESTATION of Deeds.[2]

ATTESTATION of Wills. *See* Wills.

ATTESTING WITNESS.

(A) *If Attestation necessary, Instrument must be proved by Attesting Witness.*[3]

[1] Before the stat. 7 & 8 Geo. 4, c. 28, s. 4, if a man were attainted of treason or felony, while the attainder remained in force he could not, with certain exceptions, be indicted for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for any other offence was considered useless. But by the effect of the above statute the plea of *autrefois attaint* is practically at an end. *See* 4 Bl. Com. 337 n.

[2] It is usual for witnesses to attest the acts of signing, sealing, and delivery of deeds, by the subscription of their names to a form of words to that effect written at the foot, or on the back of the deed. But neither the attestation itself; nor any kind of attestation clause is essential to the validity of any deed, unless it is made in the exercise of a power which has prescribed it as a requisite circumstance (Burton, s. 458), or is required by statute to be attested.

[3] If it were *necessary* that a document should be attested, one of the subscribing witnesses, at least, must be called (if capable of being examined) to prove its execution. This rule applies even to a cancelled (*Breton v. Cope*, Pea. R. 44) or a burnt (*Gillies v. Smither*, 2 Stark. R. 528) deed, and to one the execution of which is admitted by the party to it. *Abbott v. Plumbe*, 1 Dougl. 216. *R. v. Harringworth*, 4 M. & S. 353. *See* also *Mounsey v. Burnham*, 1 Hare, 15 (American cases, *Fox v. Neil*, 3 Johns. 477. *Henry v. Bishop*, 2 Wend. 575); and that too, though such admission be deliberately made, either in open court (*Johnson v. Mason*, 1 Esp. 89), or in a subsequent agreement (*Doe v. Penfold*, 1 C. & P. 536: *per Patteson, J.*: but see *Bringloe v. Goodson*, 5 Bing. N. C. 740: *per Tindal, C. J.*): and *Slattery v. Pooley*, 6 Mee & W. 664; or even in a sworn answer to a bill of discovery filed against the party in the cause. *Call v. Dunning*, 4 East, 53. *Sed vide Bowles v. Langunthy*, 5 T. R. 366, and 1 Dougl. 216, n. f. So also the attesting witness must be called, though subsequently to the execution of the deed, he has become blind (*Crowk v. Frith*, 9 C. & P. 197: *per Lord Abinger*, 2 M. & Rob. 262; S. C.

(B) *Otherwise not.*

It is not necessary to prove instrument by

17 & 18 Vic. c. 125, s. 26. "It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not

See *contra Wood v. Drury*, 1 Lord Raym. 734; Holt, R. 734. *Pedler v. Parge*, 1 M. & Rob. 258); and the Court will not dispense with his presence on account of illness, however severe. *Harrison v. Blades*, 3 Camp. 457: *per Lord Ellenborough. See contra, Jones v. Brewer*, 4 Taunt. 46. The rule in *Slattery v. Pooley*, 6 Mee & W. 664, as to admissions by a party, does not apply, for although he may admit the contents of a document, he cannot, except when made for the purpose of a cause, admit the execution of a deed, so as to dispense with the attesting witness. Best on Ev. 294, 3d ed.

The purpose for which the instrument is produced (*Manners v. Postan*, 4 Esp. 239. *R. v. Jones*, 1 Leach, C. C. 174) cannot vary the rule; as, however, he is rather the witness of the court than of the party, great latitude will be allowed in the mode of examining him. *Bowman v. Bowman*, 2 M. & Rob. 501: *per Cresswell, J.* Nor is the party calling him precluded from giving further evidence in case he denies, or does not recollect, having seen the instrument executed. *Ley v. Ballard*, 3 Esp. 173 n. *Fitzgerald v. Elsee*, 2 Camp. 635. *Lemon v. Dean*, id. 636 n. *Talbot v. Hodson*, 7 Taunt. 251; overruling *Phipps v. Parker*, 1 Camp. 412.

Where there are several subscribing witnesses, it is only necessary at law to call one of them (*Holdfast v. Dowsing*, 2 Str. 1254; Bull. N. P. 264); and the same rule prevails in Chancery (Gresley, *Ev.* 120), excepting in the case of wills, with respect to which it has for many years been the invariable practice of courts of equity to require that all the witnesses who are in England, and capable of being called, should be examined (*Grayson v. Wilkinson*, 2 Ves. 459. *Townsend v. Eves*, 1 Wils. 216. *Ogle v. Cook*, 1 Ves. 177. *Hindson v. Kersey*, 4 Burn. *Ecc. Law*, 116); and applies to issues which are directed by a court of equity to be tried by a jury. *Bowman v. Bowman*, 2 M. & Rob. 501. On such occasions it is unnecessary to say that all the subscribing witnesses must be called.

To the rule requiring the production of the subscribing witnesses there are several exceptions. The first is where the instrument is thirty years old, in which case it is said to prove itself, the subscribing witnesses being presumed to be dead, and other proof being assumed to be beyond the reach of the party. A second exception is, where the instrument is proved to be in the possession of the adverse party, who refuses to produce it pursuant to notice. In this case, the party who is driven to give parol evidence of its contents need not call the attesting witness, though the plea be *non est factum*, and though the name of the witness were mentioned in the notice, and he be actually in court. *Cook v. Tanswell*, 8 Taunt. 450. *Poole v. Warren*, 8 Ad. & E. 588; 3 Nev. & P. 693.

A third exception is where the adverse party, producing a deed pursuant to notice, claims an interest under it in the cause. In such case, the party producing the instrument is not permitted to call on the other for proof of the execution, for by claiming an interest under it he admits its validity. *Pearse v. Hooper*, 3 Taunt. 60. *Rearden v. Minter*, 5 Man. & G. 204. *Carn v. Burdiss*, 1 C., M. & R. 784. *Orr v. Morice*, 3 B. & B. 139; 6 Moore, 347. *Bradshaw v. Bennett*, 1 M. & Rob. 143; 5 C. & P. 48. *Doe v. Wainright*, 5 Ad. & E. 520, 528. *Bell v. Chaytor*, 1 C. & Kir. 162. *Doe v. Hemming*, 9 D. & R. 15. Still, this rule only applies where the party producing the deed claims under it some interest in the subject-matter of the cause. *Doe v. Marquis of Cleveland*, 9 B. & C. 864, 869. *Curtis v. M'Sweeny*, Ir. Cir. R. 343. *Rearden v. Minter*, 5 Man. & G. 204. *Gordon v. Secretan*, 8 East, 548; and see *Collins v. Bayntun*, 1 Q. B. 117. Where both parties claim the same interest under a deed produced on notice, the party calling for its production need not prove its execution (*Knight v. Martin*, 1 Gow, R. 46), and the fact that the party producing the instrument claims an interest under it will sufficiently appear by a statement to that effect made by his attorney shortly before the trial. *Roe v. Wilkins*, 4 Ad. & E. 86; 5 Nev. & M. 434, S. C. This exception, however, does not extend to a case where a party claiming an interest under a deed gives it up to the adverse side some months (*Vacher v. Cocks*, 1 B & Adol. 147, 148), or perhaps any time (*Carn v. Burdiss*, 1 C., M. & R. 785: *per Parke, B.*) before the action; because in such case, the party wishing to make it evidence has had the instrument in his own custody, and may therefore well be prepared to prove its execution.

Further, although the acknowledgment of a deed by a party to it does not in general waive the necessity of calling the attesting witness; still, there are a few instances in which a solemn admission by the adverse party in reference to the cause has been held in itself sufficient proof of execution.

These cases form the fourth exception to the rule. Thus, where a party agreed to admit a warrant of attorney, so as to enable his opponent to enter up judgment thereon, the Court held that judgment might be entered up without an affidavit of the subscribing witness. *Laing v. Kaine*, 2 B. & P. 85. So in an action on covenant, if the defendant pay money into court on one of the breaches, this is such an admission of the validity of the deed as to dispense with the production of the attesting witness, though *non est factum* be pleaded. *Randall v. Lynch*, 2 Camp. 357. In like manner, if a party or his attorney, in order to avoid expense, agree to admit the execution of an instrument which he is called upon by notice to admit, he cannot afterwards require that the attest-

requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

if attesting witness, unless attestation be requisite to its validity.[1]

ATTORN. *See* Attornment, p. 63.

ATTORNEY.[2] *See* Champerty; Maintenance.

I. Clerkship. *See* Articled Clerk, vol. i. p. 546.

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ing witness should be called. 15 & 16 Vic. c. 76, s. 117. It seems also, that if a party solemnly recite a deed or will in an instrument under his seal, and, moreover, has acquired some benefit on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document, to prove its validity by calling the attesting witness. *Bringloe v. Goodson*, 5 Bing. N. C. 738; 8 Scott, 71. *Nash v. Turner*, 1 Esp. 217. See *Fishmongers' Company v. Robertson*, 1 Man. & G. 67–71.

A fifth exception to this rule is recognised when the party, from physical or legal obstacles, is unable to adduce the witness. *R. v. St. Giles*, 1 E. & B. 642. Thus, if the witness be proved to be dead (*Adams v. Kerr*, 1 B. & P. 360); or to be insane (*Currie v. Child*, 3 Camp. 283. *Bennett v. Taylor*, 9 Ves. 381); or to be out of the jurisdiction of the Court (*Barnes v. Tromponisky*, 7 T. R. 265. *Prince v. Blachin*, 2 East, 250. *Glubl v. Edwards*, 2 M. & Rob. 300. *Doe v. Caperton*, 9 C. & P. 115. *Hadnett v. Forman*, 1 Stark. R. 90. *Ward v. Wells*, 1 Taunt. 461); or if he cannot be found after diligent inquiry (*Cunliffe v. Sefton*, 2 East, 183. *Crosly v. Percy*, 1 Taunt. 364. *Earl of Falmouth v. Roberts*, 9 M. & R. 469. *Parker v. Hoskins*, 2 Taunt. 223. *Burt v. Walker*, 4 B. & A. 697); or if he have absented himself from the trial by collusion with the opposite party (*Egan v. Larkin*, 1 Arn. Mac. & Aglo. 403. *Lord Clanmorris v. Mullen*, 1 Craw. & Dix. Abr. Cas. 8), it will be sufficient; but it is necessary to prove his hand-writing. If the instrument be lost, and the name of the subscribing witness be unknown (*Keeling v. Ball*, Pea. *Ev.* App. xxxii.), the execution of the instrument must be proved by other evidence.

Another exception has in several old cases been recognised in respect to deeds, the validity of which depends upon the fact of their being enrolled. Bro. Abr. Faits, enroll. pl. 11, citing p. 7, E. 4, tol. 5, pl. 13. *See* also *Lady Holecraft v. Smith*, 2 Freem. 259; 12 Vin. Abr. 43, 121; 5 Co. 54; 1 Keb. 117. *Thurle v. Madison*, Style, 426. *Smartle v. Williams*, 3 Lev. 387; 1 Salk. 280. No modern case has expressly decided this point, and though in practice it is still not unusual to admit such deeds on proof of enrolment, the principle of thus admitting them, except as against the party on whose acknowledgment they have been enrolled, has been questioned by Mr. Justice Buller, N. P. 255. The degree of diligence required in seeking for the subscribing witnesses is the same as in the search for any lost paper, the principle being in both cases identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the Court under all the circumstances of the case. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found, as also in general of his relatives and others who may be supposed capable of affording information respecting him. See *Earl of Falmouth v. Roberts*, 9 Mee. & W. 469. *Burt v. Walker*, 9 id. 649. *Cunliffe v. Sefton*, 2 East, 183. *Wardell v. Fenner*, 2 Camp. 283. *Willmann v. Worrell*, 8 C. & P. 380. *Wyatt v. Bateman*, 7 id. 586. *Doe v. Powell*, id. 617. *Kay v. Brookman*, 3 id. 555. *Morgan v. Morgan*, 9 Bing. 359. If there be more than one attesting witness, the absence of them all must be duly accounted for in order to let in secondary evidence of the execution of the instrument (*Cunliffe v. Sefton*, 2 East, 183. *Wright v. Doe d. Tatham*, 1 Ad. & E. 21. *Whitelocke v. Musgrove*, 1 C. & M. 511; 3 Sugd. 541, S. C.); but where such secondary evidence is rendered admissible, proof of the handwriting of any one of the witnesses will in general be deemed sufficient to admit the instrument to be read, provided it be accompanied by some evidence of the identity of the party sued with the person who appears to have executed the instrument. *Adam v. Kerr*, 1 B. & P. 360. *Nelson v. Whittall*, 1 B. & A. 19. *Doe v. Paul*, 3 C. & P. 613. *Sewell v. Evans*, 4 Q. B. 626. *Russell v. Smyth*, 9 Mee. & W. 314. *Jones v. Jones*, 9 id. 75. Where the attestation of a deed has been in the usual form, and the signature of the party has been proved, the jury have more than once been advised to presume a due sealing and delivery, and that in cases where the attesting witnesses have denied all recollection of any other form having been gone through beyond the mere signing. *Fasselt v. Brown*, Pea. R. 23. *Grellier v. Neale*, id. 146: *per Lord Kenyon. Talbot v. Hodson*, 7 Taunt. 251. *Burling v. Paterson*, 9 C. & P. 570: *per Patteson, J. Davidson v. Cooper*, 11 Mee. & W. 784: *per Lord Abinger.* This presumption, though formerly treated as one of law, is now properly considered as one of fact, and the question is in all cases left to the jury. Tayl. *Evid.* s. 104.

[1] *See* Reay's Trusts, 1 Jur. N. S. 222, Ch.

[2] One who is put in the place, stead, or turn of another to manage his matters of law. 3 Bl. Com. 25.

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III. The Annual Certificate.

(A) *When Issued, and how long in Force.*

When issued, and how long in force.

23 & 24 Vic. c. 127, s. 22. "Every certificate issued by the registrar between the 15th of November and the 16th of December in any year shall bear date on the 16th of November, and shall take effect on that day for all purposes, provided it be stamped before the 16th of December; and in every such case the 16th of November shall, for the purpose of this act, be deemed to be the date of the payment of the duty; and if such certificate be not so stamped, it shall take effect as regards the qualification to practise on the day on which it is stamped, and every certificate issued at any other time shall bear date on the day on which it is issued, and, subject to the provisions herein contained relating to certificates stamped after the 1st of January in any year, and not produced within a month to be entered by the registrar, shall take effect as regards such qualification on the day on which it is stamped; and every certificate shall be and continue in force from the day on which it shall take effect as aforesaid, until the 15th of November next following inclusive, and no longer."[1]

(B) *Declaration for obtaining Registrar's Certificate.*[2]

[1] In case of certificates stamped at any other time than between the 15th of November and 2d of January, such certificates must, within a month of the payment of the duty, be produced to the registrar, to enable him to make an entry thereof, who signifies the same by a note or memorandum upon the certificate. If such a certificate be not so produced within such period, it has effect only as a qualification to practise from the time when it is produced. The Master of the Rolls may, however, in the case of a solicitor, or one of the superior courts of law at Westminster, or one of the judges, in the case of an attorney, at any time make an order directing that any certificate not so produced shall have effect upon and from the time of stamping the same, or any subsequent period. 23 & 24 Vic. c. 127, s. 21.

[2] The declaration required to be delivered to the registrar for the purpose of obtaining his certificate must further specify the place or places where the attorney or solicitor, by or for whom the certificate is required, carries on his business. 23 & 24 Vic. c. 127, s. 19.

The following form is prescribed by this statute, Sched. B:—

No. ——

I hereby declare that I [*or* A. B.] was admitted an attorney of the Court of in term, in the year and that my [*or* his] place or places of business are as follow:—

Dated the 18

A. B. [*or* C. D. partner, *or* London agent of the said A. B.]

To the Registrar of Attornies and Solicitors.

6 & 7 Vic. c. 73, s. 23. "For the purpose of obtaining such registrar's certificate[1] as aforesaid, a declaration in writing, signed by such attorney or solicitor, or by his partner, or in case such attorney or solicitor shall reside more than twenty miles from London, then by his London agent in his behalf, containing his name and place of residence, and the court or one of the courts of which he is then admitted an attorney or solicitor, together with the term and year in or as of which he was so admitted, shall be delivered to the said registrar, who shall cause all the particulars in such declaration to be entered in a proper book to be kept for that purpose, which shall be open to the inspection and examination of all persons without fee or reward; and the said registrar shall, after the expiration of six days after the delivery of such declaration (unless he shall see cause, and shall have reason to believe that the party applying for such certificate is not upon the roll of attornies or solicitors), deliver to the said attorney or solicitor, or his agent, a certificate, which last-mentioned certificate shall be delivered to and left with the Commissioners of Stamps and Taxes as hereinbefore directed."

Declaration for obtaining registrar's certificate.

(C) *Must be made out in Duplicate.*

23 & 24 Vic. c. 127, s. 20. "The declaration required to be made for the purpose of obtaining the registrar's certificate shall be made out and signed in duplicate, and one of such duplicates shall be delivered to and left with the registrar and the other produced to him, and the duplicates so produced, together with the certificate granted on such declaration, shall be left with the commissioners or their proper officer on applying to have the certificate stamped, and shall be and be deemed the note in writing required by law to be delivered to the commissioners, or their officer, to entitle the attorney to a stamped certificate;[1] and for every such certificate issued by the registrar, and the previous requisite search and enquiry, there shall be paid to him the sum of 5*s.*; and the registrar shall yearly render an account of all sums of money received in respect thereof, and of the application of the same, to the Lords Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, who may from time to time, by order under their hands, diminish such sum as they think fit; and the said Lords Chief Justices and Lord Chief Baron, jointly with the Master of the Rolls, by order under their hands, may also regulate the fees to be taken for the several examinations by this act authorised to be instituted, and may increase or diminish such fees from time to time: Provided always, that a copy of such account so rendered as aforesaid shall be open to the inspection of any attorney or solicitor at the Hall of the Incorporated Society."

Must be made out in duplicate.

(D) *The Certificate.*[2]

The following regulations have been made:—

No declaration can be acted upon which does not contain all the particulars required by the Act of Parliament.

Every declaration must be delivered at the office six days before a certificate can be granted.

No certificate will be delivered out till Nov. 20th.

In the first six days, commencing on Nov. 20th, certificates will be delivered only to such London agents as shall in due time previously have sent the declaration.

These six days will be appropriated among the London agents, according to the letter with which their surnames commence.

On every day subsequent to Nov. 26th the certificates will be delivered to the rest of the profession.

The fee of 1*s.* 6*d.* is fixed by the act for each certificate.

[1] That was, a certificate that an applicant was an attorney. *See* 6 & 7 Vic. c. 73, s. 22, by which it is enacted that "the said commissioners, or their proper officer, shall deliver to the said registrar on the 6th day of April in every year, or as soon afterwards as the registrar shall apply for the same, all such registrar's certificates under the authority of which any stamped certificates shall have been granted or issued since the 15th of November preceding."

[2] *Form of Registrar's Certificate, prescribed by 23 & 24 Vic. c. 127, Sched. A.*

Pursuant to an act made and passed in the seventh year of the reign of Queen Victoria, and intituled [*title of this act*], the Incorporated Law Society [*or the name of the re-*

(E) *The Stamp on Certificate.*[1]

(F) *In case of Neglect for a Year, an Order of the Court or a Judge is necessary.*

In case of neglect for a year, an order of the court or a judge is necessary.

23 & 24 Vic. c. 127, s. 23. "If any attorney or solicitor, after having at any time taken out a stamped certificate, shall, for the space of a whole year from and after the expiration thereof, have neglected to renew the same for the following year, the registrar shall not afterwards grant a certificate to such attorney or solicitor except under an order of the Master of the Rolls, in the case of a solicitor, or of one of the superior courts of law at Westminster, or of one of the judges thereof, in the case of an attorney; and it shall be lawful for the Master of the Rolls, or such court or judge, to direct the registrar to issue a certificate to such person upon such terms and conditions as he or they shall think fit."

(G) *Notice of Renewal of Certificate where more than a Year has elapsed.*[2]

IV. Entry with the Master of Place of Business of London Attorney.

London attorney must enter his place of business with the master.

R. G. (Pr.) H. T. 1853, r. 165. "The masters of the several courts shall cause to be kept an alphabetical book at their offices, to be there inspected by any attorney or his clerk without fee or reward; and every attorney practising in the said courts, and residing within ten miles of the General Post-office, shall enter in such book, in alphabetical order, his name and place of business,

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gistrar for the time being], the registrar of attornies and solicitors appointed under the act of the session holden in the sixth and seventh years of Queen Victoria, "for consolidating and amending several of the laws relating to attornies and solicitors practising in England and Wales," hereby certifies that attorney-at-law [*or* solicitor in Chancery, *as the case may be*], whose place or places of business is [*or* are] at hath this day delivered or left with the secretary of the said society [*or* the said *the name of the registrar for the time being*], a declaration in writing, signed by the said attorney [*or* solicitor, *or* by his partner, *or* by his London agent on his behalf, *as the case may be*], containing his name and place or places of business, and the court or one of the courts of which he is admitted an attorney or solicitor, together with the term and year in or as of which he was so admitted; and the said society [*or* the said *the name of the registrar for the time being*] hereby further certifies that the said attorney [*or* solicitor] is duly enrolled in the Court of Queen's Bench at Westminster [*or as the case may be*], [*or* a solicitor in the High Court of Chancery], and is entitled to practise as such attorney or solicitor upon this certificate being duly stamped as required by law.

Given under the hand of the Secretary of the Incorporated Law Society [*or* the said *the name of the registrar for the time being*], the day of 18

Signature of the Secretary of the Incorporated Law Society [*or signature of the registrar for the time being*].

If the registrar decline to issue the certificate, the attorney may apply to a common-law court, or a solicitor to the Master of the Rolls, for an order with costs. 6 & 7 Vic. c. 73, s. 24.

[1] Instead of separate annual stamped certificates, the stamp duties are now denoted upon the registrar's certificates, the date of the payment of the duty being certified by the proper officer. *See* 23 & 24 Vic. c. 127, s. 18.

The stamp-duty is fixed by the 16 & 17 Vict. c. 63, sched., and is as follows:—

	£	s.	d.
If the attorney shall reside within the distance of ten miles from the General Post-office in the City of London, and if he shall have been admitted for the space of three years or upwards	9	0	0
Or if he shall not have been admitted so long	4	10	0
Or if he shall reside elsewhere, and if he shall have been admitted for the space of three years and upwards	6	0	0
Or if he shall not have been admitted so long	3	0	0

By the 23 & 24 Vic. c. 127, s. 19, "For determining the rate of stamp-duty payable on the certificate," the place or places where the attorney or solicitor shall carry on his business shall be deemed to be the place or places of his residence, within the meaning of the acts relating to the stamp-duties on certificates.

[2] By Reg. Gen. H. T. 1853, "Taking out and renewal of attornies' certificates," reciting that "Whereas by sect. 25 of the stat. 6 & 7 Vict. c. 73, it was enacted, that if any attorney shall neglect to procure an annual stamped certificate, authorising him to practise as such within the time appointed by law in that case, then and in such case, the registrar of attornies and solicitors shall not afterwards grant a certificate to such attorney without the order of

or some other proper place within three miles of the said Post-office, where he may be served with pleadings, notices, summonses, orders, rules, and other proceedings; and as often as any attorney shall change his place of business, or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book; and all pleadings, notices, summonses, orders, rules, and other proceedings which do not require a personal service, shall be deemed sufficiently served on such attorney if a copy thereof shall be left at the place lastly entered in such book with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, the fixing up of any notice, or the entry of any pleadings, notice, summons, order, rule, or other proceedings for such attorney in the masters' offices, shall be deemed a sufficient notice."

V. Consequences of Acting as an Attorney without being duly Qualified.

one of the courts of Queen's Bench, Common Pleas, or Exchequer, or of one of the judges thereof, to issue such certificate: And whereas it is expedient that upon the application of an attorney, having neglected for the space of one whole year to procure or renew an annual stamped certificate, the judge should have means of inquiring into the circumstances under which he has omitted to commence, or has discontinued to practise, and as to his conduct and employment during the term of such omission or discontinuance: *It is ordered*, that from and after the last day of Trinity Term next, every person who shall intend to apply on the last day of term or in vacation for such order shall, three days at least previous to the first day of the term, on the last day of which the application is intended to be made, or in case the application is intended to be made in vacation, shall, previous to the first day of the preceding term, leave at the office of the masters of the court in which he intends to make the application a notice in writing, containing his name and place of abode for the last preceding twelve months; and that before the said first day of term he shall enter, or cause to be entered, a like notice in two books, kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron, and the other at the chambers of the other judges or barons; and shall, before the said first day of term, cause to be filed the affidavit upon which he seeks to obtain or renew his said certificate at the office of the masters aforesaid, and a copy thereof to be also left at the chambers of the Lord Chief Justice of the court of Queen's Bench."

R. 2. "The masters shall reduce such notices into alphabetical order, and add the same to the list of admissions and re-admissions; and the order for the granting the certificate shall be drawn up on reading such affidavit of such copy having been left in compliance with this rule."

R. 3. "Upon an application to dispense with the usual notice, and to take out or renew the certificate of an attorney as aforesaid, a summons shall be served on the registrar of attornies, calling on him to show cause within ten days why such certificate should not be issued; and if no cause be shown to the satisfaction of the judge, an order may be made for issuing such certificate, if the judge shall think proper."

The Court in its discretion will dispense with the notices where the attorney had reason to suppose his agent had taken out the certificate (*Ex-parte Gude*, 1 D. & L. 675; *see* also *Ex-parte Weymouth*, 5 id. 60); but mere inadvertence (*Ex-parte Franks*, 3 Dowl. 319. *Ex-parte Barnes*, 5 D. & L. 294); great importance as regards the applicant's interests (*Ex-parte Barnes*, *supra*); absence abroad (*Ex-parte Watson*, 1 Chit. 208), or pecuniary difficulties and illness, are not sufficient grounds for moving the Court. *Ex-parte Bartlett*, id. 207. See *Ex-parte French*, 5 Dowl. 374. The Court generally grants the order if the attorney has not practised on his own account since the last certificate, and the interval has been satisfactorily accounted for (*Ex-parte Philcox*, 2 Dowl. 450. *Ex-parte Thompson*, id. 160; 5 id. 275. *Ex-parte Clarke*, 2 B. & A. 314. *Ex-parte Mayer*, 5 Moore, 141; 7 id. 495); but if he has so practised, the Court may refuse, especially if he has been guilty of misconduct. *Ex-parte Grey*, 5 D. & L. 275. *Ex-parte Hawdone*, 9 id.; 970. *Ex parte Minchin*, 5 id. 253. *Re Taylor*, 16 Jur. 728. If a long time has elapsed before the application, the Court may require a re-examination. *Ex-parte Robinson*, 2 D. & L. 9. An order obtained from the Master of the Rolls to renew the certificate is not sufficient ground to dispense with the notices in the common-law court. *Ex-parte Seewood*, 8 Jur. 404.

The application for an order on the registrar to grant his certificate is generally made to a judge at chambers, instead of the court. If made to the court, it should be made on the last day of the term, for which the notice has been given. *Ex-parte Moseley*, 4 Dowl. 69. The affidavit should state the time of the applicant's admission, and the nature of his employment since his last certificate expired. *Ex-parte Wentworth*, 2 Dowl. 607. It should state, if such is the case, that he has not since practised on his own account. *Ex-parte Wybrow*, 9 id. 197. *Ex-parte Minchin*, 5 id. 323. *Ex-parte Knipe*, 9 id. 108.

(A) *He is guilty of a Contempt of Court; is incapable of suing for his Services or recovering Disbursements; and is subject to a Penalty.*

He is guilty of a contempt of court, is incapable of suing for his services or recovering disbursements, and is subject to a penalty.

23 & 24 Vic. c. 127, s. 26. "Every person who acts as an attorney or solicitor contrary to the enactment in 6 & 7 Vic. c. 73, s. 2, or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate or the Court for Divorce and Matrimonial Causes, without being duly qualified so to act, shall be deemed guilty of a contempt of the court in which the action, suit, cause, matter, or proceeding, in relation to which he so acts, is brought, had, or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done, or any disbursement made by him in the course of so acting, and shall, in addition to any other penalty or forfeiture, and to any disability to which he may be subject, forfeit and pay for every such offence the sum of 50*l.*, to be recovered, with full costs of suit, by action brought, with the sanction of her Majesty's Attorney-General in the name of the Incorporated Law Society, in any of the superior courts of law at Westminster, or in any county court; and such penalty shall be applied in like manner as fines imposed for practising without a certificate are now by law applicable."[1]

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[1] By the 2d section of the 6 & 7 Vic. c. 73, which is to be read with the above act of 23 & 24 Vic. c. 127, it is enacted, that "no person shall act as an attorney or solicitor, or shall sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person or in his own name, in any court of law or equity in England or Wales, or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard, tried, or determined before any justice of assize of oyer and terminer, &c., unless such person shall have been, previously to the passing of this act, admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall, after the passing of this act, be admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor pursuant to the directions and regulations of this act; and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid."

And by the 35th section, "from and after the passing of this act, in case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall be and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding, shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly."

In *Reg. v. Buchanan*, 6 Q. B. 883, 15 L. J. Q. B. 227, *Lord Denman, C. J.*, observes, with reference to this section, "It deprives a party of the right of bringing an action for his fees and disbursements, &c., which is a provision no doubt obviously unnecessary, as is also that portion of the clause which makes the acting as an attorney without a certificate a contempt of court, which it manifestly would be without any such provision."

Under the 2d section of 6 & 7 Vic. c. 73, it was held that an indictment would lie against a person acting as an attorney without being admitted and enrolled. *Reg. v. Buchanan, supra.* This decision proceeded upon the principle laid down by *Denison, J.*, in *Rex v. Knight*, 1 Burr. 543, that when an offence is not so at common law, but made an offence by act of parliament, yet an indictment will lie when there is a substantive prohibitory clause in such act of parliament, though there be afterwards a particular provision and a particular remedy given, as in this particular instance, by the 35th section, which makes the attorney who acts without being duly qualified incapable of suing for his costs, and liable for a contempt of court. But *see* now the 23 & 24 Vic. c. 127, s. 26 (*supra* in text), imposing a penalty, to be recovered by action in the name of the Incorporated Law Society.

With respect to the right to sue, it was held, prior to the 6 & 7 Vic. c. 73, that the mere non-payment of the stamp-duty at the time of admission does not render such admission void, so as to afford a good defence to an action for work done as an attorney. *Middleton v. Chambers*, 1 Scott, N. R. 99.

In addition to the above sections it is, by the 36th section of 6 & 7 Vic. c. 73, enacted, "that in case any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceed-

(B) *An Uncertificated Attorney is also subject to a Penalty, and incapable of recovering his Charges.*

An uncertificated attorney is also subject to a penalty, and incapable of recovering his charges.

37 Geo. 3, c. 90, s. 30. "If any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any court holding pleas, where the debt or damage shall amount to 40*s.* or more, for fee or reward, or shall act in court as an attorney without having first obtained his certificate as directed by the act, or shall deliver in a false or fictitious place of residence, with intent to evade payment of the higher duties, he shall forfeit 50*l.*, and be incapable of maintaining any action for any fee, reward, or disbursement, on account of prosecuting, carrying on, or defending any action, suit, or proceeding, or any matter or thing relating thereto, without such certificate as aforesaid."[1]

And cannot recover his fees or disbursements.

6 & 7 Vic. c. 73, s. 26. "No person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit at law or equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as aforesaid."[2]

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ings in the court commonly called the County Court, holden in any county in that part of Great Britain called England and Wales, who is not, or shall not then be, legally admitted an attorney or solicitor according to this act, or shall not himself be plaintiff or defendant in such proceeding respectively, such person shall be and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of court in which such action, suit, or proceeding, shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly."

[1] This being a penal enactment, will not, according to the general rule of construction, be extended beyond the strict letter. *Per Tindall, C. J.*: *Middleton v. Chambers*, 1 Scott, N. R. 118. See *Re Hodgson*, 3 Ad. & E. 224. It has been held not to apply to the Sheriff's Court. *Cruss v. Slage*, 6 T. R. 663. *Hodskin v. Mayer*, 6 Ad. & E. 194. *See*, as to the County Court, 6 & 7 Vic. c. 73, s. 36, *supra*.

When two attornies carry on business in partnership, each partner will be liable to a separate action for the penalty, and an action will not be maintainable against them jointly for its recovery. *Edmonson v. Davis*. 4 Esp. 14; S. C. in error, 3 B. & P. 382. *Barnard v. Gostling*, 1 N. R. 245. It must, however, be remembered, that by the subsequent act (44 Geo. 3, c. 98, s. 10), no action can now be brought for penalties incurred by a violation of the laws relating to stamp-duties, unless such action be brought in the name of the attorney-general, or of the solicitor or some other officer of her Majesty's stamp-duties in England. See *Barnard v. Gostling*, 1 N. R. 245.

[2] This section, it may be observed, disables an attorney who is uncertificated only from suing for fees, rewards, and disbursements, for any business, matter, or thing done by him as an attorney or solicitor in such suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings. *Richards v. Lord Suffield*, 2 Ex. 610; 17 L. J. Ex. 362. *Green v. Reece*, 8 C. B. 26. *Jones v. Stevens*, 11 Price, 235. It was held that the plaintiff might sue for a libel upon him as an attorney, although he had omitted to take out his certificate as required by 37 Geo. 3, c. 90. *See* also *Jones v. Smith*, 17 L. J. Ex. 255. *Coren v. Sharpe*, 1 B. & Adol. 306

It seems, moreover, from the cases decided before the above act, that although an attorney cannot avail himself of securities given to him for business done by him whilst uncertificated, yet costs actually paid to him by his client in respect of such business cannot be recovered back. *Nash v. Goode*, 9 Dowl. 929, 932. *Wilson v. Knapp*, 8 id. 426. *Wilton v. Chambers*, 7 Ad. & E. 524.

The above disability, moreover, lies upon the attorney as a punishment for practising without a regular title, and this statutory provision is directed against him, and not against his client (*Reeder v. Bloom*, 3 Bing. 9. *Anon. v. Sexton*, 1 Dowl. 180. *Hilliary v. Hungar*, 3 id. 56. *Glynn v. Hutchinson*, id. 529); and therefore a plaintiff who has made advances to his attorney to the amount of his taxed costs, may recover such costs from the defendant, although the attorney was uncertificated, provided the plaintiff was ignorant of this

(*a*) *Plea of Want of Certificate.*[1]

(C) *And an Attorney is prohibited from acting as such while in Prison.*

An attorney is prohibited from acting as such while in prison.

6 & 7 Vic. c. 73, s. 31. "No attorney or solicitor who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall or may, during his confinement in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, as an attorney or solicitor, in his own name, or in the name of any other attorney or solicitor, sue out any writ or process, or commence, prosecute, or defend any action or suit in any courts of law or equity, or matter in bankruptcy, and such attorney or solicitor so commencing, prosecuting, or defending any action or suit as aforesaid, and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence, prosecute, or defend any action or suit in his name, shall be deemed to be guilty of a contempt of the court in which any such action or suit shall have been commenced or prosecuted, and punishable by the said courts accordingly upon the application of any person complaining thereof; and such attorney or solicitor so commencing, prosecuting, or defending any such action or suit as aforesaid, shall be incapable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him whilst such prisoner as aforesaid, in his own name or in the name of any other attorney or solicitor."[2]

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fact. *Wilson v Knapp*, 8 Dowl. 426. *Reeder v. Bloom*, 3 Bing. 9. But if no advances have been made, no costs will be allowed to the client of the uncertificated attorney on taxation between party and party. *Young v. Dowlman*, 3 Y. & J. 24. *Meekin v. Whalley*, 2 Dowl. 823. *Paterson v. Powell*, id. 738. *Humphreys v. Harvey*, 1 Bing. N. C. 62. *Re Angell*, 6 D. & L. 44.

On the other hand, where an action was continued for the costs after the defendant had paid the debt, the attorney being uncertificated, and the plaintiff having made him no advances, the proceedings were stayed by the court (*Meekin v. Whalley*, 1 Bing. N. C. 59, recognising *Reeder v. Bloom*, *supra*. *Young v. Dowland*, 3 Y. & J. 24); for in such a case the attorney could not recover the costs from his own client; and costs, when recovered, are paid for the benefit of the suitor, and the court will not enforce the payment by the opposite party where the suitor has not incurred any expense or liability, and such payment would be for the benefit of the attorney only. *Humphreys v. Harvey*, 1 Bing. N. C. 62, 67.

In *Punter v. Lord Grantley*, 3 Man. & G. 295, the court annexed the condition of payments of costs by the party obtaining a rule for a new trial, although it appeared that the attorney for the opposite party was not on the roll of attornies when these costs were incurred; observing, that the objection was one to be taken before the master, and was no ground for the interference of the court in the first instance.

Where a proceeding in a cause is taken by and in the name of one who is not qualified to act as an attorney, the proper course appears to be to move for a rule to stay proceedings (*Bayley v. Thompson*, 2 Dowl. 655. *Chadwick v. Slight*, 2 L., M. & P. 662. *Chadwick v. Hough*, 2 C., M. & R. 29, 164) until a proper attorney has been appointed; but the proceedings thus taken cannot be treated as a nullity.

Where, for instance, a declaration was delivered in the name of one as an attorney who in fact was not so, it was held that the defendant could not treat it as a nullity, and sign judgment (*Bayley v. Thompson*, 2 Dowl. 655. *Hill v. Mills*, id. 696), and it has been held that a judgment signed by an uncertificated attorney is not irregular. *Smith v. Bilson*, 1 Dowl. 545. See *Patterson v. Powell*, 9 Bing. 620.

The defence that plaintiff is an uncertificated attorney within the operation of the 26th section of the stat. 6 & 7 Vic. must be pleaded specially. *Hill v. Sydney*, 7 Ad. & E. 956.

[1] *Plea to Action for Bill of Costs that Plaintiff had no Certificate.*

—— the defendant says that the action was brought and is maintained for the recovery of fees, rewards, and disbursements for business, matters, and things done by the plaintiff as an attorney and solicitor for the defendant in suing, prosecuting, defending, and carrying on actions, suits, and proceedings in some or one of the superior courts of Westminster after the passing of the act of parliament, passed in the seventh year of the reign of Queen Victoria, for consolidating and amending several of the laws relating to attornies and solicitors practising in England and Wales, without the plaintiff having previously obtained a stamped certificate then in force, authorising him to practise as an attorney or solicitor.

[2] *See* 12 Geo. 2, c. 13, s. 9, of which the above is a re-enactment. *Kaye v. Denew*, 7 T. R. 671. The certificate may be suspended for misconduct. *Re Blake*, 6 Jur. N. S. 1242.

(D) *Attornies are prohibited from acting as Agents for Persons not duly Qualified.*

Attornies are prohibited from acting as agents for persons not duly qualified.

6 & 7 Vic. c. 73, s. 32. "If any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter, upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as an attorney or solicitor in any suit at law or in equity,[1] knowing such person not to be duly qualified as aforesaid, and complaint thereof shall be made in a summary way to any of the said superior courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath to the satisfaction of the court that such attorney or solicitor had wilfully and knowingly offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting or practising as aforesaid to the prison of the said court, without bail or mainprize, for any term not exceeding one year."[2]

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[1] See *Re Hodgson*, 3 Dowl. 330.

[2] Under the previous stat. 22 Geo. 2, c. 46, s. 11 (now repealed, so far as relates to attornies and solicitors), the words of which are substantially the same as those above set out, the following cases were decided. An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profits instead of a salary. The names of both were painted on the office-door, and bills for business were made out and delivered in their joint names. A rule was obtained calling on the attorney to show cause why he should not be struck off the roll for having acted as the agent of, and having permitted his name to be used by, an unqualified person, and calling upon the conveyancer to show cause why he should not be committed to prison in accordance with the provisions of the stat. Geo. 2, above cited. The court made the rule absolute, observing that the case clearly fell within the mischief which it was the object of the statute to remedy, and they accordingly ordered that the attorney should be struck off the roll, and that the conveyancer should be committed for one month to the prison of the court. *Re Jackson*, 1 B. & C. 270. *Tench v. Roberts*, Mad. & Geld. 145 n. *Re Palmer*, 1 H. & R. 55. In another case the court struck two attornies off the roll for allowing an unqualified person to practise in their names, and *Abbott, C. J.*, remarked, "It is our duty so to do under the terms of the statute, but, independently of the statute, it is equally the duty of the court to strike an attorney off the roll for misconduct of this description; for if we were to suffer a person to remain on the roll who has so conducted himself, we should thereby give him a sanction and credence with the world, and enable him to defraud and impose upon the public." *Re Clark*, 3 D. & R. 260.

Where an application is made to strike an attorney off the roll for suffering an unqualified person to conduct business for him as his clerk, the affidavit in support of such application must state the belief of the applicants that the parties participated in the profits, or, at least, must set forth sufficient grounds for such belief: it will not be sufficient to state facts from which the court may infer that such was the case. *Re King*, 1 Ad. & E. 560: citing, *Re Garbutt*, 2 Bing. 74. *Ex-parte Whatton*, 5 B. & A. 824.

If, moreover, the application be made against the unqualified person only, it will nevertheless be necessary to bring the fact of knowledge home to the attorney in whose name he has been permitted to practise, and when such guilty knowledge is disclosed by the affidavits, the court will take notice of the misconduct of the attorney, and will grant a rule *nisi* against the unqualified party, requiring him to show cause why he should not be committed to prison for a period not exceeding a year, and likewise a rule *nisi* against the attorney, requiring him to show cause why he should not be struck off the roll. *Re Hodgson*, 3 Dowl. 330. The facts on such an inquiry are brought before the court by affidavit in the usual way, and the matter is, in practice, often referred to one of the masters, who will report thereon to the court. *Re Jaques*, 2 D. & R. 64. Where referred to the master, he may be empowered to examine witnesses. *See* 17 & 18 Vic. c. 125, s. 46.

It is clear, that where an attorney has illegally allowed an unqualified person to conduct business in his name, neither the attorney nor the party so conducting it can sue in respect thereof. *Hopkinson v. Smith*, 1 Bing. 13. *See* also *Meekin v. Whalley*,

(E) *Evidence of Qualification.*

List of attornies who have obtained certificates published by Commissioners of Inland Revenue, is *primâ facie* evidence of qualification.

By the 23 & 24 Vic. c. 127, s. 22, it is enacted, that "any list of attornies, solicitors, and conveyancers, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of attornies, solicitors, and conveyancers, who have obtained stamped certificates for the current year, on or before the 1st of January in the same year, shall, until the contrary be made to appear, be evidence in all courts, and before all justices of the peace and others, that the persons named therein as attornies, solicitors, or conveyancers holding such certificates as aforesaid for the current year, are attornies, solicitors, or conveyancers holding such certificates; and the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence as aforesaid that such person is not qualified to practise as an attorney, solicitor, or conveyancer, under a certificate for the current year: but in the case of any person being an attorney or solicitor, whose name does not appear in such list, an extract from the roll of attornies and solicitors kept by the registrar, certified under the hand of the Secretary of the Incorporated Law Society (while such society performs the duties of registrar), or of the registrar for the time being, shall be evidence as aforesaid of the facts appearing in such extract; and in the case of any person being a conveyancer whose name does not appear in such lists, the fact of his being so shall be proved in the way in which it is now by law required to be proved."

VI. Peculiar Privileges and Liabilities of Attornies.

(A) *Exemption from Offices requiring Personal Service.*[1]

1 Bing. N. C. 59. *Wilson v. Knapp*, 8 Dowl. 426. Where an agreement was entered into between two solicitors in Scotland, one of whom could only practise in a superior court, the other only in an inferior court, whereby they undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from the world, the agreement was held to be illegal, and therefore void. *Giffillan v. Henderson*, 2 Clark & Fin. 1. See *Candler v. Candler*, Mad. & Geld. 141.

But an attorney who has employed another attorney to carry on proceedings in a court to which the former is not admitted, is not disqualified from suing for his costs (*Hulls v. Lea*, 10 Q. B. 940. In *Re Ross & Hodgson*, 4 Nev. & M. 763; S. C. 1 Hurl. & W. 265), an attorney who was struck off the roll by reason of having neglected to take out his certificate was held not to be an unqualified person within the meaning of the (repealed) statute, 22 Geo. 2, c. 46, s. 11. The court, however, intimated an opinion that he might have been made amenable for a contempt, in affecting to be one of its officers. In *Re Ross & Hodgson, supra.*

[1] Attornies, as being officers of the court, are entitled to some peculiar privileges and disabilities, one of which is, that they are exempt from all offices requiring personal service, even when the obligation of such service is imposed by act of parliament, and in the most comprehensive words. If the service is ascertained to be personal, the privilege it has been said cannot be taken away, even by act of parliament, without strong and emphatic words clearly conveying the sense of the legislature. *Gerard's case*, 2 W. Black. 1126. An attorney is accordingly privileged from serving as a constable, tything-man, churchwarden, or overseer of the poor (id.), and from filling corporation offices, though resident in the corporation town. *Mayor of Norwich v. Berry*, 1 id. 636. The reason, however, of his exemption ceases to apply where the service required of him is not personal; in such a case, indeed, it has been said, there is no pretence for privilege, and therefore he has been held not to be exempt from serving in the militia, or paying for a substitute in his stead. *Gerard's case*, 2 id. 1123.

An attorney cannot be compelled to serve on juries (6 Geo. 4, c. 60); and until recently he was prohibited from practising whilst serving as under-sheriff. 1 Hen. 5, c. 4; repealed, as to this prohibition, by 6 & 7 Vic. c. 73, sched. 1, pt. 1.

By 6 & 7 Vic. c. 73, s. 33, "no attorney or solicitor shall be capable to continue to be a justice of the peace for any county within that part of Great Britain called England, or the principality of Wales, during such time as he shall continue in the business and practice of an attorney or solicitor;" but by sect. 34 it is provided, that the above prohibitions "shall not extend or be construed to extend to any city or town being a county of itself, or to any city, town, cinque-port, or liberty having justices of the peace within their respective limits and precincts by charter, commission, or otherwise; but that in every such city, town, and place, attornies or solicitors may be capable of being justices of the peace, and in such manner only as they might have been if this act had never been made,

(B) *Privilege to lay the Venue in Middlesex.*[1]

GRACE v. WILMER, 26 L. J. Q. B. 1.

An attorney is entitled to lay the venue in Middlesex.

This was a rule calling on the plaintiff in an action of libel to show cause why the venue should not be changed from Middlesex to Lancashire, on an affidavit that the witnesses on both sides resided there, and that the cause of action arose there. The plaintiff, who was an attorney, relied on his privilege to lay and retain the venue in Middlesex.

Lord Campbell, C. J. "I regret very much that we cannot make this rule absolute, as I have no doubt that the ends of justice would be furthered by our doing so. I think this trial ought to take place in the county where the cause of action arose, and where it would evidently be tried much more conveniently; but I consider that there is still an absolute privilege existing for an attorney to lay and retain the venue in Middlesex. It is clear that this privilege is not taken away by the Uniformity of Process Act; at all events, where the attorney sues in his own name, as this plaintiff does. If, then, he has the privilege at all, I cannot look to any modification of it; for if it could be modified, it would cease to be a privilege."

(C) *And he is entitled to Sue and be Sued in his own Court.*

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anything hereinbefore contained to the contrary thereof in anywise notwithstanding." And *see* 5 Geo. 2, c. 18, s. 4.

[1] "This privilege arises not from any rule of court, but by the common law, and is a consequence of his being an officer of the court." *Pye v. Leigh*, 2 W. Black. 1065. "It will not order the venue to be changed on the common affidavit that the cause of action arose elsewhere, or that the witnesses reside in another county, and if changed, the attorney may have it brought back without undertaking to give material evidence in Middlesex." *Per Littledale, J.: Bradshaw v. Burton*, 7 Dowl. 330. *Pitcher v. Monmouth*, 2 Marsh. 152. Where, however, an attorney sues as a common individual by attorney, and not in person or as an officer of the court, the proceedings in the action must be governed by the ordinary rules of practice. *Mounsey v. Watson*, 7 B. & C. 684. *Harrington v. Page*, 2 Dowl. 164. *Newton v. Rowland*, 1 Ld. Raym. 533. *Jones v. Smith*, 17 L. J. Ex. 255.

In order, however, to entitle an attorney suing in person to retain the venue in Middlesex, it is not necessary to state in the declaration that he sues as an attorney. *Williams v. Powell*, 10 Jur. 966. He will be entitled to his privilege if he sue in person, for as the proceeding by attachment of privilege is now abolished, and an attorney must, therefore, sue in person or by attorney, the presumption is, that an attorney suing does so in his professional character; but if the contrary appear, as if he sue by another attorney, then the presumption ceases, and he loses his privilege. *Per Patteson, J.: Cutts v. Surridge*, 16 L. J. Q. B. 2; S. C. 4 D. & L. 373. *Wright v. Skinner*, 1 Mee. & W. 144. *Williams v. Powell*, 10 Jur. 966. But the privilege belongs only to the party on whose account the action is brought (*per Tindal, C. J.: Newton v. Harland*, 4 Bing. N. C. 407. *See* also *Roberts v. Mason*, 1 Taunt. 254), and seems confined to actions by an attorney in his own right (*per Holt, C. J.: Newton v. Rowland*, 1 Ld. Raym. 533); and accordingly, if a privileged person bring a joint action with others that are not privileged, he loses his privilege, because the others are not officers of the court. Gilb. C. P. 211.

If, therefore, in an action by an attorney suing in person, but without describing himself as such, a rule be obtained to change the venue upon the usual affidavit, such rule will be discharged upon a counter one, stating that "the plaintiff was at and before the commencement of this suit, and still is, an attorney of this honourable court, and that he has declared in this action against the above defendant in person, and not by attorney." See *Cutts v. Surridge*, *supra*.

If the attorney originally lay the venue in some other county, he will not be afterwards allowed to amend by changing it to Middlesex. *Lewis v. Shelley*, 7 Taunt. 146. The privilege is confined to Middlesex, and does not extend to London. *Newton v. Harland*, 4 Bing. N. C. 406. Therefore, an attorney plaintiff has no privilege to retain the venue in *London*, in an action brought by him. *Bradshaw v. Burton*, 7 Dowl. 329.

Further, the privilege of retaining the venue in Middlesex does not extend so as to enable him, when *defendant* in an action, to change the venue to that county (*Mills v. Johnson*, Cas. Pr. C. B. 419. *Yeardley v. Roe*, 3 T. R. 573. *Pope v. Redfearn*, 4 Burr. 2027), except, of course, upon the ordinary affidavit that the cause of action arose therein, and in the same manner as any ordinary person.

(*a*) *Privilege to Sue therein.*[1]
(*b*) „ *to be Sued therein.*[2]
(D) *Privilege from Arrest.*[3]

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[1] An attorney possesses the right of suing and being sued in his own court. This privilege appertains to him as an officer of the court, and is founded upon the supposition that he is always in attendance there whilst engaged in his professional avocations. *See* 4 Inst. 71. *Earl of Lonsdale v. Littledale*, 2 H. Black. 270. It is, therefore, the privilege (in truth) of the client as well as of the attorney. With respect to an attorney-plaintiff, besides the ordinary right of suing in whichever of the superior courts in which he is admitted he pleases, he has been held not compellable to sue in an inferior court, as a Court of Requests, unless the legislature has expressly abrogated his privilege by the terms of the particular statute. *Johnson v. Bray*, 2 B. & B. 698. *Board v. Parker*, 7 East, 47. But an attorney is not exempted from the provisions of the County Courts Acts, 12 & 13 Vic. c. 101, s. 18. *Lewis v. Hance*, 11 Q. B. 283. *Jones v. Brown*, 2 Ex. 329. An attorney who sues without describing himself as such, does not lose his privilege of suing in his own court. *Willoughby v. Fenton*, 2 Jur. 1041. *Wright v. Skinner*, 1 Mee. & W. 144.

When an attorney of one court sues an attorney of another, and there is thus privilege against privilege, that court which was first possessed of the cause shall retain jurisdiction of it. *Danser v. Berryman*, 2 W. Black. 1325.

[2] An attorney enjoys the privilege of being sued in that court only in which he happens to be admitted—a privilege which it has been held is not taken away by the Uniformity of Process Act (2 Wm. 4, c. 39). *Prior v. Smith*, 6 Dowl. 299. *Lewis v. Kerr*, 2 Mee. & W. 226. *Pitt v. Pocock*, 2 C. & M. 146. *Dyer v. Levy*, 4 Dowl. 630. *Davidson v. Chelman*, 1 Bing. N. C. 297. The particular privilege which the officers of each court enjoy is not to be drawn out of their own court to be impleaded elsewhere; for, as their attendance is constantly to dispatch the business of the court to which they belong, if they might be sued in any other place their causes must suffer, because they could not be spared from their own court to defend them. But this is to be understood when the plaintiff can have the same remedy against the officer in his own court as in that where he sues him. Gilb. C. P. 209, 210. *Ridge v. Hardcastle*, 8 T. R. 417. *Gardner v. Jessop*, 2 Wils. 44.

An attorney has no privilege from being sued in the county courts (12 & 13 Vic. c. 101, s. 18), or in the London Small-debt Court. See *Borradaile v. Nelson*, 14 C. B. 655. *Jefferies v. Beart*, 17 L. J. Q. B. 290.

With reference to the privilege of being sued in his own court the following points have been decided:—

An attorney is not entitled to privilege when sued in *auter-droit*. *Newton v. Rowland*, 1 Ld. Raym. 533; Gilb. C. P. 211.

But he may plead his privilege of being sued in his own court in a *qui tam* action (which is, in truth, a proceeding at suit of the party), but not in an information or proceeding at the suit of the Crown. *Kirkham v. Wheeler*, Cowp. 319.

A defendant who is an attorney of two of the superior courts, may be sued in either, at the option of the plaintiff. *Walford v. Fleetwood*, 14 Mee. & W. 449; S. C. 3 D. & L. 65.

Where an action was brought in the Common Pleas against three persons, all of whom were attornies of the Court of Queen's Bench, and one of whom was also an attorney of the Court of Common Pleas, it was held that a plea of privilege by one of the parties, who was an attorney of the Queen's Bench only, was bad, for the rule is, that a privileged person sued with one who is unprivileged loses his privilege; and if this were not so, it might be in the power of parties sued upon a joint contract to suspend the proceedings altogether, by each setting up his particular privilege, to be sued only in the court in which he practises. *Rostwick v. Beckwith*, 8 Scott, N. R. 716; S. C. 2 Dowl. & L. 624.

The plea of privilege by an attorney sued in a court other than that in which he is admitted, is a plea in abatement, and, if not verified by affidavit, may be treated as a nullity. *Davidson v. Chelman*, 1 Bing. N. C. 292.

[3] An attorney has not now the permanent privilege from arrest which he formerly had, but only the temporary immunity whilst attending in court on his client's business, *Thompson v. Moore*, 8 Dowl. N. S. 283. *Flight v. Cook*, 1 D. & L. 714. This privilege is only allowed him for the benefit of his clients. It is necessary, therefore, when a party seeks to avail himself of it, that he should show himself to have been actually practising at the time (*per Tindal, C. J.: Anon.* 1 Dowl. 208. *Thompson v. Moore*, 1 id. N. S. 283. *Brooke v. Bryant*, 7 T. R. 25. *Skirrow v. Tagg*, 5 M. & S. 281. *See* also 2 Wils. 232. *Byles v. Wilton*, 4 B. & A. 88. *Gascoyne's case*, 14 Ves. 183) of his arrest. In *Brooke v. Bryant*, 7 T. R. 25, cited 5 Scott, N. R. 899, it was said that "the privilege of an attorney does not necessarily attach upon a person investing himself with that character, but he must be a practising attorney; and, in order to preserve the privilege, the party must continue to act as such." "No doubt," said *Lord Langdale, M. R.*, "a solicitor who is proceeding to court to attend to his professional business there pending, is privileged from arrest, and the question always is, whether, at the time of the arrest, he was *bonâ fide* proceeding in a direct line to or

FLIGHT v. COOK, 1 D. & L. 714; S. P. THOMSON v. MOORE, 1 Dowl. N. S. 283.

Since 1 & 2 Vic. c. 110, an attorney who is going abroad is not privileged from arrest on mesne process.

The defendant, who was an attorney, had been arrested by virtue of an order made by a judge under the 1 & 2 Vic. c. 110, s. 3, on an affidavit, stating that the defendant had given up his place of business, that there was great difficulty in finding him, and that he was about to quit England. A rule was obtained to rescind the order.

Wightman, J. "As to the point, whether the defendant was privileged from arrest as being an attorney, I fully agree with the decision of my brother Patteson, in *Thomson v. Moore*, 1 Dowl. N. S. 283, that there is no privilege for an attorney who is going abroad. The privilege of the attorney is for the benefit of the client; but how can the client be said to derive any benefit from an attorney who is going abroad, or to sustain any injury from his arrest. I, therefore, think that the defendant was not privileged."

(E) *Privileged Communications not to be Divulged.*[1]

from the court" (*Attorney-General v. Leather-Sellers' Co.* 7 Beav. 158. *Jones v. Rose*, 11 Jur. 379. *Strong v. Dickenson*, 1 Mee. & W. 488), or to or from the place at which the client's business has to be transacted. To justify the attorney's arrest on the ground of deviation, it must be clearly and distinctly shown that there was a substantial deviation. *Williams v. Webb*, 5 Scott, N. R. 898; and see *per Lord Denman, C. J., Pitt v. Coomes*, 5 B. & Adol. 1078.

It has been held that an attorney is privileged from arrest while in attendance at the master's office taxing costs, as well as returning therefrom. *Re Hope*, 9 Jur. 856. This rule was held to apply even where the attorney was admitted in the Queen's Bench only, and the cause was in the Common Pleas, the question as to whether he was legally entitled to the costs being for the master. See *Re Hope, supra.* So an attorney is privileged whilst attending at a judge's chambers (*Harrison's case*, Barnes, Pr. Ca. 378); or at the county court (*Clutterbuck v. Hulls*, 15 L. J. Q. B. 310). But an attorney's clerk going to or returning from judge's chambers on business having reference to a pending suit, is not privileged from arrest. *Phillip v. Pound*, 7 Ex. 881; 21 L. J. Ex. 277.

Where a cause is referred by deed of submission by the parties, containing a clause that the submission may be made a rule of court, the attornies of the parties and witnesses are privileged from arrest during the period of their attendance on the arbitration. And an attorney who was arrested whilst in attendance on an arbitration in his professional capacity, and entitled to his privilege, does not waive his right to be discharged by delaying to apply to be discharged for twenty-three days, where the situation of the other party has not been changed; but where an attorney had been thus arrested and was discharged out of custody, the court refused to allow costs against the plaintiff. *Webb v. Taylor*, 1 D. & L. 676.

Where it appeared that an attorney who had been regularly admitted in the Queen's Bench was attending the county court in the discharge of his professional duties at the time of his arrest, this was held sufficient to throw upon the other side the *onus* of answering the *primâ facie* case of privilege thus made out, although the affidavit did not show that the attorney had signed the roll of attornies kept in the county court (*Clutterbuck v. Hulls*, 15 L. J. Q. B. 310; S. C. 4 D. & L. 80); and the party arrested was accordingly discharged from custody. So where the defendant, an attorney, whilst attending his client's business at Westminster, was arrested upon an attachment for contempt in not paying money, he was ordered to be discharged from custody (*Rex v. Sheer*, Pract. Reg. Cas. C. P. 48); and an attorney taken upon a *ca. sa.* whilst attending the execution of a writ of inquiry was in like manner discharged. *Pigot v. Charlwood*, id. 41; S. C. Barnes, Pr. Ca. 200.

[1] The general doctrine is, that where an attorney is employed by a client professionally to transact professional business, all the communications that pass between the client and the attorney in the course and for the purpose of that business are privileged communications. The privilege is the privilege of the client, and not of the attorney. *Per Lord Lyndhurst, C.: Heming v. Clobery*, 1 P. C. 91. *Cromack v. Heathcote*, 2 B. & B. 4. And with reference to the applicability of the rule thus laid down, the existence or non-existence of any suit, claim, or dispute, is altogether immaterial. Judgment, *Pearce v. Pearce*, 16 L. J. C. 153.

The principle upon which this regulation is based is, that communications between a party and his professional adviser, with a view to legal proceedings, should be unfettered, and that they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to the client's prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party. *Per Lord Lyndhurst, C.: Holmes v. Baddeley*, 1 P. C. 480.

(*a*) *Communications made to an Attorney in his Professional Character by a Client are privileged.*

CLEAVE v. JONES, 7 Ex. 421.

Communications made to an attorney by his client in his professional character are privileged, and cannot be divulged.

Action on a promissory note by payee against maker.

Plea, the Statute of Limitations.

The plaintiff was employed by the defendant as her attorney in winding up the affairs of her late husband, of whom she was executrix. In the course of that business the plaintiff requested the defendant to let him have a statement of the debts of her late husband, and what had been paid, in order to prepare a case for counsel. The defendant, in consequence, sent him an account-book, which contained an item of interest paid on the promissory note which had been given by her to the plaintiff for money advanced. The defendant tendered the account-book in evidence, in order to defeat the plea of the Statute of Limitations.

Parke, B. " It was objected that this was a privileged communication, and the judge received evidence to show that it was; and after hearing the evidence on the subject, he decided that this account was given by the defendant to the plaintiff, not in his character of creditor, and for the purpose of showing how the account stood between them, but in his character of attorney, in order that

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In *Greenough v. Gaskell* (Ry. & R. 98; *see* also *Herring v. Cloberly*, P. C. 91. *Jones v. Pugh*, id. 96. *Peile v. Stoddart*, id. 225), where the plaintiffs by bill in equity sought to charge an attorney with a fraud practised upon them on his client's behalf, the rule as to privileged communications was much considered, and after stating the general rule that attornies and solicitors cannot be compelled to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of, *Lord Chancellor Brougham* observed, that " as regards them it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a professional communication in their professional capacity, either from a client or on his account, and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."

There are, indeed, as further remarked by his Lordship, some apparent exceptions to the general rule; which rule, however, he found to range themselves within the qualifications above laid down, namely, that the privilege shall be excluded when the communication is not made or received professionally, and in the usual course of business.

In *Carpmael v. Powis* (9 Beav. 20), *Lord Langdale* also laid it down that any communication of a confidential nature between attorney and client is privileged, and that it is not necessary that the matter in respect of which it took place should be a matter either in litigation or in contemplation of litigation; and further, that when a statement is confidentially made to a party who is the medium of communication between the attorney and his client, such statement is also privileged, and within the general rule. " It is," observed his Lordship, " the privilege accorded to the client that his communication with his solicitor should be in confidence, and should not be disclosed; and it is the duty of the solicitor to protect that privilege. If the client is content to waive it, and permits the solicitor to speak, then no wrong would be done to the client by his solicitor disclosing the matters reposed in him, for the solicitor has no privilege personal to himself." If the attorney became acquainted with the fact before or irrespective of his employment as attorney, he is in the same position as other witnesses. Bull. N. P. 284. *Cuts v. Pickering*, 1 Vent. 197.

An attorney has been held bound to state whether a document is in his possession. *Dwyer v. Collins*, 7 Ex. 639.

In *Marston v. Downes* (6 C. & P. 381), an attorney who was called as a witness refused to produce a mortgage-deed, because it was the title-deed of his client. Being asked as to its contents, however, he at once stated them, and this evidence was objected to, not on the ground that the attorney was privileged, but that secondary evidence was inadmissible, inasmuch as the deed itself was in existence, but,—

Patteson, J., held that secondary evidence might be received, because the party might

he might prepare a case for counsel. That ruling was perfectly correct, for the account was not made out until after the defendant's letter requesting to have it. Therefore the whole contents of that book are privileged, for it was given in the course of that free and unreserved communication which the law protects, in order that the entire facts may be disclosed by the client to the attorney. Then, is the present case excepted from that rule? It is argued that it ought to form an exception, because the fact of the payment of the 17*l.* 10*s.* was known to the plaintiff. No doubt the plaintiff might make use of his own information *aliunde* to prove the payment, but he cannot make use of that account. Upon this collateral issue the judge was right; and this being a privileged communication, the plaintiff cannot use the information so acquired to the prejudice of his client."

The rest of the Court concurring, a rule for a new trial was discharged.

VII. Peculiar Liabilities of Attornies.[1]

withhold his title-deeds, and that if the attorney chose to disclose the contents of the deed his evidence was receivable. At the time of an ejectment certain mortgage-deeds were in court in the hands of the mortgagee's solicitor, who declined to produce them; and an examined abstract was also in court in the hands of the solicitor of a party who had been engaged in negotiations, which had subsequently gone off, for an exchange of the mortgaged property: the solicitor of this latter party did not object to produce the abstract, but stated that he had not received permission from his client so to do. It was held that the production of the abstract was proper, as no title was affected thereby, and no instructions to the contrary from the client had been received. *Doe d. Earl of Egremont v. Langdon*, 18 L. J. Q. B. 17. *M'Intosh v. Great Western Railway Co.* 13 Jur. 179.

The rule upon this subject, therefore, is, that if an attorney who has been served with a *subpœna duces tecum* to produce his client's title-deeds refuse to do so, although he cannot be punished for such refusal, secondary evidence of their contents may be given. But if he has not been served with a *subpœna duces tecum*, then secondary evidence is inadmissible, because the party proposing to give it has not done all in his power to get the original deed. *Hibberd v. Knight*, 17 L. J. Ex. 119, citing *Ditcher v. Kenrie*, 1 C. & P. 161. *Doe d. Gilbert v. Ross*, 7 Mee. & W. 102.

G., a solicitor, being a trustee in a deed of settlement in which M. and H. were respectively interested, was ordered, on bill filed by M. against H. and G., to produce letters admitted by G.'s answer to be in his possession, and which were written by him whilst acting as H.'s solicitor during negotiations respecting the settlement, as well prior as subsequently to its execution, notwithstanding the affidavit of G. alleging that the letters were not written by him in his character of trustee under the settlement, but as solicitor to H. The principle of this decision being that a trustee must stand in a position of strict impartiality towards all parties interested in the subject-matter of the trust, and cannot be permitted under the plea of privilege to withhold the disclosure of communications carried on clandestinely with one of the *cestui que trusts*. *Tugwell v. Hooper*, 16 L. J. Ch. 171.

Again, in *Weeks v. Argent* (16 L. J. Ex. 209) it was held, that where an agreement is made between the parties in the presence of their respective attornies, the communications made by one party to his attorney in the hearing of the others are not privileged.

But where a statement was made during the assizes by the plaintiff's attorney in the course of conversation with respect to the nature of the plaintiff's claim in an action for trial at those assizes, such statement not having been expressly made for the purpose of being used as evidence, was held to be inadmissible. *Petch v. Lyon*, 15 L. J. Q. B. 393. An action is maintainable against an attorney for damages resulting from a breach of confidence reposed in him. *Taylor v. Blacklow*, 3 Bing. N. C. 235.

[1] An attorney is liable at common law to an action at suit of his client for damages occasioned by gross negligence, unskilfulness, or ignorance in the discharge of his professional duties. It is, however, of the very essence of such an action that *erassa negligentia*, gross negligence, or ignorance in the performance of his duty as an attorney, be proved against him, and he will, therefore, be liable in those cases only in which he has displayed such negligence or ignorance, or where he has shown a want of that skill which he might reasonably be expected to possess. *Purves v. Landell*, 12 Clark & Fin. 91. See *Allen v. Lowe*, 4 Q. B. 66. Add. on *Torts*, 251; 2 Hill on *Torts*.

"Professional men," said *Lord Cottenham, C.*, "possessed of a reasonable portion of information and skill according to the duties which they undertake to perform, and exercising what they possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore,

(A) *To be Sued by Client for Negligence.*

GODEFROY v. DALTON, 6 Bing. 467.

He is responsible for ordinary skill, diligence, and care in the exercise of his profession, and is liable to an action if he fail to use them.

Tindal, C. J. "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is founded; or to trace precisely the dividing line between ought to depend upon its own peculiar circumstances; and where an injury has been sustained which could not have arisen except from the want of such reasonable skill and diligence, or the absence of the employment of either on the part of the attorney, the law holds him liable. In undertaking the client's business, he undertakes for the existence and for the due employment of these qualities, and receives the price of them." *Hart v. France*, 6 Clark & Fin. 210. See *Godefroy v. Dalton*, 6 Bing. 467.

The following cases will sufficiently illustrate the general doctrine above laid down, and show how it is practically applicable:—

Where certain master-manufacturers employed an attorney to take proceedings against their apprentices for misconduct under the stat. 4 Geo. 4, c. 34, and the attorney proceeded under the third section of the act, which relates to servants, instead of under the first section, which concerns apprentices, this mistake was held to display such great negligence as to render the attorney liable to make good to his clients the damage and costs occasioned by the error. *Hart v. France*, 6 Clark & Fin. 193. *Stevenson v. Rowand*, 2 Dow & Clark 104.

In another case an attorney undertook to conduct a prosecution, charging his client money out of pocket only. The client accordingly advanced money to the attorney during the course of proceedings, which was properly expended in carrying them out. By gross negligence in the attorney in preparing a defective indictment the prosecution, however, failed, and it was held that the attorney was not entitled to recover money out of pocket paid by him, by reason of the negligence of which he had been guilty. *Lewis v. Samuel*, 8 Q. B. 685. *See* also *Hunter v. Caldwell*, 10 Q. B. 69; 16 L. J. Q. B. 274. *Russell v. Palmer*, 2 Wils. 325. In *Long v. Orsi*, 18 C. B. 610, an attorney retained to sue the acceptors of certain foreign bills of exchange, sued out writs in the name of a firm to whom they had been handed, but without being specially indorsed as required by the law of France. The absence of their names from the bill did not come to his knowledge until after the writs were issued. The court held that the suing in the name of these parties without first ascertaining that they were in a position to maintain an action on the bills was such gross negligence as to disable the attorney from recovering the costs of the abortive action.

It will be clearly gross negligence in an attorney if he sues in a court which has no jurisdiction over the cause of action. *Williams v. Gibbs*, 5 Ad. & E. 208.

So where assumpsit was brought upon a deed, and a fresh action was consequently rendered necessary, the costs thus uselessly incurred were ordered to be disallowed upon taxation (*Cliffe v. Prosser*, 2 Dowl. 21); and an action will lie against an attorney for negligence in not appearing at the trial, and allowing a verdict to pass against his client. *Jones v. Lewis*, 9 Dowl. 143. So if the proceedings be futile by reason of his having instituted them, without previous inquiry, in a court which has not competent power to deal with the suit. *Cox v. Leach*, 1 C. B. (N. S.) 617; 26 L. J. C. P. 125.

Where the plaintiff's attorney suffered the case to be called on at Nisi Prius, without previously ascertaining whether a material witness whom the plaintiff had himself undertaken to bring into court had arrived, and the plaintiff was nonsuited by reason of the absence of the witness, the question for the jury in an action against the attorney for negligence was held to be, whether the attorney had used reasonable care and diligence in conducting the cause, and the jury having found in the negative, the court refused to disturb their verdict. *Reece v. Righy*, 4 B. & A. 202.

An attorney is not, however, answerable for the temporary absence of his counsel, in consequence whereof his client's cause is struck out of the list. *Lowry v. Guilford*, 5 C. & P. 234.

Where, in an action on an attorney's bill, the principal ground of defence was that the plaintiff, by his negligence in not being prepared with a certain document at the trial, had rendered the work done wholly useless, his client having been nonsuited for want of that evidence, the Lord Chief Justice told the jury that if the plaintiff had been guilty of gross negligence, which had rendered the whole work useless, the defendant (the client) was entitled to the verdict. And this ruling was upheld by the court *in banc.*, the question as to the total failure of consideration being in their opinion for the jury, and rightly submitted to their consideration. *Bracey v. Carter*, 12 Ad. & E. 373. See *Bulmer v. Gilman*, 4 Scott, N. R. 781.

An attorney will, however, be protected if he acts to the best of his skill and knowledge (*Pitt v. Yalden*, 4 Burr. 2060. *Russell v. Palmer*, 3 id. 1788), and will not, therefore, be liable for a mistake respecting a nice and difficult point of law; for to such mistakes all lawyers must be liable. *Stevenson v. Rowand*, 2 Dow & Clark, 104, 119. *Elkington v. Holland*, 9 M. & W. 659.

that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar, appear to establish in general that he is liable for the consequences of ignorance or nonobservance of the rules of practice of this court, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the

The skill required has reference to the character of the business which he undertakes to do.

Backer v. Chandless, 3 Camp. 17. *Laidler v. Elliott*, 5 D. & R. 635. Moreover, it is due to professional men to suppose that they did attend to the interests of their client, and that they satisfied themselves that what they were doing for their client was what it was for his interest to do. *Per Lord Cottenham, C.: De Montmorency v. Devereux*, 7 Clark & Fin. 228.

But the attorney's liability must necessarily in every case depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting another, when the law would presume him to have the knowledge himself (*Godefroy v. Dalton*, 6 Bing. 469); and if he do consult another, as where counsel is employed, it will be the bounden duty of the attorney to lay the entire facts of the particular case fully and fairly before him.

Hence, although it may not be part of the duty of an attorney to understand the legal operation of conveyances in cases of more than ordinary complexity, yet it will be his duty to lay all the deeds connected with the case in question before the counsel whom he consults; and if he omits to do so by reason of his own wrong construction of any particular deed, and counsel thereupon gives an opinion which would not in all probability have been given if all the facts had been before him, and from the adoption of which damage ensues to the client, the attorney will be liable for the same; and will draw conclusions as to the importance of any particular abstract or document at his own peril. See *Ireson v. Pearman*, 3 B. & C. 799, 812. *Tray v. Foster*, 1 F. & F. 681.

Akin to the preceding is the duty cast upon an attorney of duly cautioning his client against the legal consequences of any measure with regard to which he may be consulted, of explaining the liabilities which may result from it, and of looking on all such occasions faithfully and diligently to his interest and his security. If, therefore, an attorney employed by a vendor to settle on his part the assignment of a term allow him to execute an unusual covenant without explaining the liability incurred thereby, such attorney will be responsible for consequent loss, although the client may be himself, at the time of the assignment, aware of the fact, in consequence of which he afterwards incurs liability on his covenant. "It may be assumed," said *Tindal, C. J.*, "in this case, as a general principle, that an attorney, by reason of the emolument he derives from the business in which he is employed, undertakes and is bound to take care that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or, at all events, that he does not do so till the consequences have been explained to him, which might probably ensue from executing the covenant." *Stannard v. Ullithorne*, 10 Bing. 491, 503.

An attorney who is employed to obtain an investment for money on security, will be liable to an action if he does not exercise due care and diligence in ascertaining the nature and sufficiency of such security, should any loss be incurred by the lender in consequence of his negligence. *Brooks v. Day*, Dick. 572; but see *Brumbridge v. Massey*, 28 L. J. Ex. 59. Where, for instance, an attorney is employed by a mortgagee, it is not enough to investigate the title of the mortgagor, but he should see that the security is sufficient for the amount advanced; and if he do not, he will be liable for breach of the implied duty resulting from and cast upon him by his retainer. *Hayne v. Rhodes*, 15 L. J. Q. B. 137; S. C. 8 Q. B. 342; and see *Green v. Dixon*, 1 Jur. 137. *Dartnall v. Howard*, 4 B. & C. 345. *Craig v. Watson*, 8 Beav. 427.

An attorney who was the ordinary attorney for a person borrowing money, also acted in effecting a particular loan for the lender, but did not make any charge against the latter for his services; the security he took was not sufficient, and it was held that as an attorney acting on the retainer and in the employment of the lender, he was liable for the loss suffered through the insufficiency of the security. *Donaldson v. Haldane*, 7 Clark & Fin. 762. See *Waine v. Kempster*, 1 F. & F. 695.

So if an attorney acts for a client who advances money on the security of a legacy given under a will to the borrower, he will not be justified in relying upon a partial extract from the will furnished by the client, unless the latter agree to take the responsibility upon himself. *Wilson v. Tucker*, 3 Stark. N. P. C. 154. And where a solicitor took an insufficient security for his client, and the nature of the transaction was such as, in the opinion of the court, to create a case of combined agency and trust, the court held him personally responsible for the deficiency; for it was his plain duty, in his character of solicitor and agent, only to invest the money on proper security, and to use no fraud, misrepresentation, or deceit, but having obtained the money, he constituted himself trustee of it, and ought to be treated as trustee from the time when he

conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually submitted to men in the higher branch of the profession of the law." *See* 2 Hill on *Torts*, 573; Add. id. 252. *Purves v. Landell*, 12 Clark & Fin. 98. *Shilcock v. Passmore*, 7 C. & P. 292. *Kemp v. Burt*, 4 B. & Adol. 431. *Ireson v. Pearman*, 3 B. & C. 812. *Cox v. Leech*, 1 Q. B. (N. S.) 617. *Long v. Orsi*, 18 C. B. 610.

(*a*) *And in some cases will be required by the Court, on Summary Application, to make Satisfaction.*[1]

(B) *Responsibility and Punishment for Fraud.*[2]

(*a*) *The Fraudulent Representation of his Partner as to the Investment of Money intrusted to the Firm.*

obtained the possession of it, or the power over it. *Craig v. Watson*, 8 Beav. 427, 433.

Further, an attorney is liable for the negligence of his agent (*Collins v. Griffin*, Barnes, 37. *Anon.* id. 38), according to ordinary principles, it being the duty of the country attorney to employ a proper agent; but in such a case the remedy must be against the former, for there is no privity between the agent and the client. *Ex-parte Jones*, 2 Dowl. 161. *Grey v. Kirby*, id. 601.

In an action against an attorney for negligence, it has been established that the cause of action must be considered to have arisen at the time when the negligence occurred, and not at the time when the negligence was discovered, or the consequential damage resulting from it ensued. *Smith v. Fox*, 6 Hare, 386, recognising *Howell v. Young*, 5 B. & C. 259.

Declaration against an Attorney for Negligence.

—— that in consideration that the plaintiff retained the defendant as and being an attorney of the Court of to conduct an action in that court at the suit of the plaintiff against C. D., for the recovery of money claimed to be due to the plaintiff from the said C. D. for reward to the defendant, the defendant accepted such retainer, and promised the plaintiff to conduct the said action with due and proper care, skill, and diligence; yet the defendant did not conduct the said action with due and proper care, skill, and diligence, whereby the plaintiff was obliged to suffer himself to be nonsuited thereon, and wholly lost the costs and expenses incurred by him in prosecuting the said action, and was obliged to pay the costs incurred by the said C. D. in defending the same, and the plaintiff has been delayed in recovering the said money, and is likely to lose the same. *See* Forms, B. & L. Pl. 46.

[1] Besides the remedy by action which a client has against his attorney for gross negligence in the conduct of a cause, the court will in some cases proceed in a summary way to visit such negligence with punishment. See *per Lord Mansfield, C. J.*, 4 Burr. 2061. Where, for instance, a cause which was meant to be defended, was called on and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court granted a new trial only upon the terms of the payment by the defendant's attorney out of his own pocket of all costs as between attorney and client. *De Roafigny v. Peale*, 3 Taunt. 484. *White v. Sandell*, 3 Dowl. 798. But see *Watson v. Reeve*, 6 Scott, 783. S. C. 5 Bing. N. C. 112. *Nash v. Swinburne*, 4 Scott, N. R. 326. So where an attorney discharged a party who had been arrested at the suit of his client out of custody upon receiving a security, which at the time of taking it he knew to be worthless, a rule was made absolute for compelling the attorney to pay to his client the sum for which the party had been arrested, together with the costs of the application; the court observing, "It is highly reasonable that an attorney who misbehaved in so gross a way should make a satisfaction to his client." *Rex v. Bennett*, Say. 169. See *Stone v. Stone*, 4 Taunt. 601. So where an attorney, after receiving money from his client for the conduct of a cause, and giving notice of trial, neglected to retain counsel or to attend the trial, and the plaintiff was consequently nonsuited and afterwards thrown into gaol, a rule for an attachment against the attorney was made absolute, the attachment being ordered to lie in the office for a few days, in order that the attorney might have an opportunity of making satisfaction to his client. *Rex v. Tew*, Say. 50. *See* also *Mordecai v. Solomon*, id. 172. *Garner v. Lawson*, 1 Barnard, 101. In Chancery, 4 Dow. 614.

It is clear, however, that the court will not interfere to compel an attorney to reimburse his client for costs unnecessarily incurred, unless he has been guilty of gross negligence; and if the existence of such a degree of negligence on his part is not made manifest to the court, and it be doubtful whether an action would lie, the attorney would be entitled to have the case investigated by a jury, and the client will therefore be left to his ordinary remedy. *Meggs v. Binns*, 2 Bing. N. C. 625. *Pitt v. Yalden*, 4 Burr. 2061. *Beecher v. Butler*, 2 W. Black. 780. See *Re Jones*, 1 Chit. 651.

[2] The 20 & 21 Vic. c. 54, s. 2, declares,

BLAIR v. BROMLEY, 16 L. J. Ch. 495.

An attorney is civilly responsible for the fraudulent representation of his partner as to the investment of money intrusted to the firm.

The plaintiffs in equity, who were the executors and trustees of a testator, in the year 1829 employed A. & B., a firm of solicitors, to procure investments for the assets of the testator. A. wrote to the plaintiffs, naming one S. as a proposed mortgagor for a sum of 4500*l.* of freehold property, whereupon the plaintiffs forwarded to A. a check for 4500*l.* to be so invested, and this check was paid into the bank to the partnership account. The necessary mortgage-deeds were prepared, but S. afterwards declined to complete the transaction.

In April 1830, A., however, wrote to the plaintiffs, giving a list of the securities upon which he alleged that the testator's assets were invested; and,

"that if an attorney, entrusted for safe custody with the property of another, does, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to his own use such property, he will be guilty of a misdemeanour." And he is liable for any fraud practised on his client, or any act savouring of fraud, and showing an abuse of that confidence reposed in him professionally, which courts, both of law and equity, alike protect with the utmost jealousy. The machinery of courts of equity being, however, better adapted to the unravelling of fraudulent transactions than the mode of proceeding at common law, the remedy against an attorney or solicitor for any fraud or imposition upon his client will usually be most effectually enforced in the former courts.

On a contract for sale of *part* of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relative and heir-presumptive, and who had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised that the fine should be levied of the whole of the vendor's estate, without explaining to him the effect of such a fine as operating to revoke a will previously made. The fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will made prior thereto, and by which he had devised the whole estate to his wife, who survived him, and the attorney thereupon claimed the estate as heir-at-law. The fraudulent conduct of the attorney having been established at the trial of an issue directed out of Chancery, that court decreed that the attorney should be a trustee for the devisee under the will of the hereditaments which so descended to him as heir-at-law; and the House of Lords, in affirming this decree, applied to attornies the principle of equity applicable to trustees, viz. that they shall give all the information which they ought to give; and, further, that they shall not plead ignorance of that which they ought to know: the relief prayed in this case was therefore held to have been properly granted on either of the grounds of fraud or professional ignorance in the attorney. *Bulkley v. Wilford*, 2 Clark & Fin. 102.

B. being desirous to sell an estate, gave instructions to A., his attorney and land-agent, for that purpose, and in a letter to him expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, and a land-valuer, whose valuation was not shown to have been communicated by A. to B., valued the two portions separately at sums which together exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, and then purchased the other portion for a sum less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, and the conveyance by B. was executed to that relative, and a re-conveyance was subsequently made to A., containing a recital that the purchase-money for the land conveyed was furnished by A. These facts did not come to light until thirty-seven years after the transaction, and then B. filed his bill against the representatives of A. (who had died seventeen years before), to set aside the latter conveyance, and for an account. It was held in the House of Lords that the circumstances of the transaction being of a fraudulent nature, furnished an answer to the objection arising from the length of time during which the transaction had remained unimpeached. The principle of this decision is thus shortly stated: that where an agent employed to sell becomes himself the purchaser, he must show that he became so with the knowledge and consent of his employer, or that the price paid was the full value of the property purchased; and this must be shown with the utmost clearness, and beyond all reasonable doubt. *Charter v. Trevelyan*, 11 Clark & Fin. 714.

So where an attorney acted in that capacity for his client, the mortgagor, and also for himself, the mortgagee, *Sir E. Sugden* observed, that "nothing can be more unwise on the part of a solicitor than such conduct, and that if a solicitor wishes to deal with his client for a mortgage, as no doubt he may, he is bound not only to see that his client has full information upon every point within his own knowledge as such solicitor; but he should, in justice to himself, take care that his client, by means of another solicitor, should have that protection against himself which he, the client, would have had through him in a transaction with a third party. He is not, in fact, at liberty to act in a matter relating to his own benefit as the

amongst others, stated S.'s mortgage "4500*l.* 3d October, 1829." In 1834, A. & B. dissolved partnership, and the plaintiffs continued to employ A. as their solicitor, who regularly paid interest on the 4500*l.* down to 1841. A. became bankrupt in 1844, and the plaintiffs then first discovered that the mortgage to S. had never been effected. On bill by the plaintiff's against B. to recover the sum paid over as above stated, it was held that the fraudulent representation of A. must be taken to be the act of the firm; that the relief was properly in equity; and that the defendant, although morally innocent, was civilly liable for the fraud of his co-partner.

(C) *Summary Jurisdiction of Court over Attornies.*[1]

(*a*) *To enforce Undertakings.*

Reg. Gen. H. T. 1853, r. 3. "An attorney not entering an appearance in pursuance of his undertaking shall be liable to an attachment.[2]

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solicitor for both parties; and, if he will do so, he must be content at all times to have the transaction examined with great jealousy, in order that the court may be satisfied that the client had the same protection which he would have had had he been represented by a regular solicitor of his own, acting only for the advantage of his client. *Lawless v. Mansfield*, 1 D. & W. 600, 601. See *Jones v. Roberts*, 9 Beav. 420. *Carter v. Palmer*, 8 Clark & Fin. 657.

[1] The courts exercise a summary jurisdiction over an attorney, as their officer, wherever it is necessary in order to enforce performance either of his general duty towards his client, or of a specific undertaking. To compel the latter, when given under such circumstances as to bring him within the summary jurisdiction of the court that is given by him as an attorney, application may be made to any court in which he is admitted or practises. *Sharp v. Hawker*, 3 Bing. N. C. 66. *Cole v. Grove*, 4 Scott, N. R. 30. *Thompson v. Gordon*, 1 D. & L. 49. When, however, the undertaking has been given in the course of proceedings in a cause, the application is in practice usually made to that court in which the cause is actually pending, or to a judge at chambers. Unless there is a cause in court, the application cannot, however, be made to a judge at chambers (*Ex-parte Higgs*, 1 Dowl. 495). In *Ex-parte Bodenham*, 8 Ad. & E. 959, an attorney attending a commission of lunacy on behalf of the petitioner, promised the under-sheriff to pay the fees due to him as well as to the commissioner and jury on the inquisition being returned, and having failed to do so after request made, the Court of Queen's Bench granted a rule calling upon him to pay the fees, being of opinion that their jurisdiction was not taken away by reason of the undertaking having been given in a proceeding in another court. And in another case, an application appears to have been made with success to the Court of Queen's Bench against an attorney of that court, who improperly withheld money received by him whilst conducting a suit in the Exchequer. *See* 3 Bing. N. C. 66; and *per Wightman, J., Ex-parte Randall*, 17 L. J. Q. B. 232. In *Re Garland*, 6 Dowl. 512, however, *Williams, J.*, refused summarily to enforce an undertaking given by an attorney, who was also a solicitor in a suit in Chancery.

The motion to compel the performance of the undertaking must be supported by affidavit setting forth the facts of the case and the undertaking, and there must also be an affidavit of the attesting witness (if any) to the latter, in default of which the rule *nisi* will be discharged, and in such a case the application cannot subsequently be renewed on amended materials. *Ex-parte Hasleham*, 1 Dowl. N. S. 792. If the object of the application be to compel the attorney to pay over to the plaintiff the debt and costs recovered in an action and received by him, the motion will be granted almost as of course, provided an affidavit be produced, setting forth the facts necessary to fix the attorney with the receipt and non-payment of the money; and in these cases, as payment of the costs of the application usually forms a part of the rule, the proceeding should be by motion in court, and not before a judge at chambers. *See* Bagl. *Chamb. Pr.* 46.

The affidavit may be entitled, "In the matter of A. B." (the attorney). *Ex-parte Randall*, 17 L. J. Q. B. 323; citing *Re Macey*, 5 D. & L. 276. *Re Stillwell*, 6 Dowl. P. C. 305. See *Bland v. Dax*, 15 L. J. Q. B. 1.

[2] See *Jacob v. Magney*, 12 L. J. Q. B. 93. *Seecole v. Grose*, 1 Scott, N. R. 30. *Morris v. James*, 6 Dowl. 514. *Sedgworth v. Spicer*, 4 East, 568. *Lewis v. Knight*, 1 Dowl. 261. The court will not on motion interfere to compel an attorney to pay counsel's fees. 29 L. J. C. P. 227.

Where the defendant's attorney gave the usual undertaking, made on a judge's order, to pay the plaintiff the amount of his debt and costs on the proceedings being stayed, and the defendant died before taxation, it was held that the attorney was, nevertheless, bound to perform his engagement. *Hellings v. Jones*, 10 Moore, 360. But it was held before the above rule of court, that an attorney who gives an undertaking for another in a cause in which he is not concerned as attorney, will not be compelled summarily to fulfil it, but the party to whom it was given will be left to his re-

(*b*) *In case Attorney has been Convicted of a Crime.*

RE KING, 8 Q. B. 129.

This was an application to strike an attorney off the roll.

If convicted of an infamous indictable of-

Lord Denman, C. J. "The attorney in this case has been convicted of a

medy by action. *Walker v. Arlet*, 1 Dowl. 61. *Ex-parte Watts*, id. 512. *Northfield v. Orton*, id. 415.

Where an attorney, being employed to sue a defendant, gave his undertaking for the debt sought to be recovered to his own client, the court refused to enforce the fulfilment of that undertaking by attachment (*Ex-parte Evans*, 9 Dowl. 106), and, of course, the usual consequences of waiver, either express or implied by the party to whom an undertaking is given, will operate to relieve the attorney from liability in respect thereof. *Starte v. Haddon*, 9 Dowl. 995. *Miller v. James*, 8 Moore, 208.

It is, however, essential to show that the undertaking in question was given by the attorney in that character, for "there is no doubt that if a man give an undertaking, the mere fact of his being an attorney does not make it an undertaking as attorney so as to render him amenable to the summary jurisdiction of the court. For instance, if a party make a compromise with another, and want a surety, and go to an attorney, who signs an undertaking for him, it would be absurd to say that the rule applied to such a case; and the question, therefore, will, in each particular case, be one of fact, whether the undertaking was given as attorney in the transaction in dispute." *Per Williams, J. : Re Fairthorne*, 3 D. & L. 552, 553.

Where an attorney, being entrusted by executors with a sum of money for the payment of certain legacy-duties, gave an undertaking to apply the money for the purposes of the deposit, but failed in so doing, and it was sworn that he, being an attorney of the court, was retained and employed by and on behalf of the deponents as such attorney to act for these deponents in the matters relating to the said estate, and that the money was also paid to him for the purpose mentioned as such attorney as aforesaid, but the affidavit did not state any circumstances showing that any work had been done for the executors by the attorney in his professional capacity, the court (*Coleridge, J.*) refused to interfere summarily to compel him to refund the money, on the ground that the matter in question was not so connected with his employment as an attorney as to justify the court in exercising its summary jurisdiction in the manner prayed for. *Re Webb*, 2 D. & L. 932. *Re Aitkin*, 4 B. & A. 47. *Ex-parte Bodenham*, 8 Ad. & E. 959.

An attorney had been employed by A. to collect and get in the effects due to him as administrator of a third party, and the affidavits in answer to the application stated that the attorney had never been employed by the said A. in prosecuting or defending any cause or suit, or other proceeding, in any court of law or equity, *Abbott, C. J.*, however, made the rule absolute, observing that "when an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction. And the case (*Strong v. How*, 1 Stra. 621) where the court compelled the attorney to deliver over deeds placed in his hands for the purpose of making a conveyance, proceeds upon this ground; for, inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client in the party in respect of his being an attorney. *Re Aitkin*, 4 B. & A. 47.

Where, however, a party allowed his name to be made use of as one of the lessors of the plaintiff in an action of ejectment, upon an undertaking from the attorney who conducted the action that he should be indemnified against costs, *Littledale, J.*, refused to interfere summarily to compel the performance of this undertaking (*Ex-parte Clifton*, 5 Dowl. 218), observing, that an action must be brought against the attorney on his contract of indemnity. "This," said his lordship, "is a very different case from those in which the court has been in the habit of interfering summarily against attornies. The utmost extension of that, however, was in the case of *Re Aitkin* (*supra*); there the court interfered, because the employment of the attorney was so connected with his professional character as to afford a presumption that his employment was in consequence of that character, and thus he was compelled in a summary way to execute the trust reposed in him. But that was a very different case from an indemnity. It is not because he is an attorney that, therefore, he is to be compelled summarily to perform his contract of indemnity."

In like manner, where an attorney, for the purpose of securing payment of a balance due to him from a client, effected a policy of insurance on the client's life, and charged the premium to him, and on the client's death received the amount insured, the court refused to interfere summarily to compel the attorney to account with the administrator of the client, and deliver up the policy. *Re Lord Cardross*, 5 Mee. & W. 645. "The rule," said *Parke, B.*, "is that laid down in *Re Aitkin*, that where an at-

fence, though the indictment be bad, he will be dealt with summarily.

misdemeanour, and the indictment sets forth acts amounting to very fraudulent practices. The Exchequer Chamber thought the indictment bad. We are now

torney is employed in preparing deeds or conveyances, or any other business properly belonging to the profession of the law, the obligation to discharge which faithfully arises out of the duty imposed on him in that character, and he receives money in that capacity, he must account with his principal for it;" and his lordship then proceeded to distinguish the case before him from that which he had cited.

Again, where an attorney borrowed money for his client on security, the nature of which did not appear, *Coleridge, J.*, refused to compel him to pay it over; observing, that if the security was merely personal, as was most likely to be the case, there was nothing to show that the attorney had been retained in his professional capacity in the transaction; but that if it had been shown that there was a deed to be prepared and perused by the attorney on behalf of his client, that state of facts might have justified the court in interfering to compel payment. A rule, however, was in this case granted, calling on the attorney to answer the matters in the affidavit. *Re Anon.* 11 Jur. 396.

In conformity with the general rule above laid down, it has also been held that the mere accidental circumstances of a steward acting as an attorney at the time of receiving money in the character of steward does not render him liable to be called on summarily to refund the same. *Ex-parte Faith*, 9 Dowl. 973. *Ex-parte Schwalbanker*, 1 id. 182. Nor will a steward, who happens to be an attorney, be compelled to deliver up papers received in the former character. *Cocks v. Harman*, 6 East, 404. Neither will the court try a disputed claim to the custody of deeds upon a motion to compel an attorney to deliver them up to one of the claimants. *Duncan v. Richmond*, 7 Taunt. 391. See *Pearson v. Sutton*, 5 id. 364.

The court will not interfere summarily to compel an attorney to pay over or account for monies received by him during his clerkship. *Ex-parte Deane*, 2 Dowl. 533.

Where, however, an attorney was employed to arrange terms for the settlement of an action, and accordingly drew up a promissory note for the amount of the debt and costs, which the defendant signed, and the attorney also gave his undertaking to pay on default in so doing by the defendant, this was held to be an undertaking given in the character of an attorney, although it appeared that the party giving it was not employed as attorney in the action, and it was sworn that no charge had been made by nor anything paid to him by the defendant, or on his account, for preparing the note and undertaking, and that the attorney had never previously acted as attorney for the defendant. *Re Fairthorne*, 3 D. & L. 548; S. C. 15 L. J. Q. B. 131. See *Re Gee*, 2 id. 997. So where the defendant's attorney had given an undertaking to pay the debt, in consequence of which the plaintiff stayed proceedings, the court enforced the undertaking, although it was void under the 4th section of the Statute of Frauds. *Re Hilliard*, 2 D. & L. 919. *Re Greaves*, 1 C. & J. 374. *Re Paterson*, 1 Dowl. 468. *Re Stearnes*, 11 Jur. 521. "It seems to me," said *Coleridge, J.* (in *Re Hilliard*), "that the court does not interfere merely with a view of enforcing contracts on which actions might be brought in a more speedy and less expensive mode, but with a view to securing honesty in the conduct of its officers in all such matters as they undertake to perform, or see performed, when employed as such, or because they are such officers. The court acts on the same principle, whether the undertaking be to appear, to accept declaration, or other proceedings in the course of the cause, or to pay the debt and costs. It does not interfere so much between party and party to settle disputed rights, as criminally to punish by attachment misconduct or disobedience in its officers. . . I have no desire to narrow the jurisdiction of the court as to these undertakings on any such ground as the present; they are very often most beneficially made for both parties in a cause, and there would be a great injustice in letting the attorney loose from them after the party has foregone the advantage and paid the price which was the consideration, whilst there is no hardship on the attorney in enforcing them. He is never compelled to enter into them; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act."

Where, after judgment obtained in an action between H. and J., a rule was obtained calling upon the plaintiff and his attorney to show cause why he or his attorney should not refund a sum of money paid in the cause to the attorney, and it appeared that the plaintiff had died since the commencement of the suit, the court, nevertheless, held that the attorney, as an officer of the court, was bound to answer the affidavits on which the rule had been obtained. *Haigh v. Jones*, 1 D. & L. 81; S. C. 6 Scott, N. R. 696.

So it has been held to be no objection to a rule calling on an attorney to pay a sum of money pursuant to his undertaking, that nearly three years have elapsed since it was given, repeated applications having been made to him from time to time, and up to a recent period, for payment. With regard to costs, the general rule will, under such circumstances, be followed, viz. that when a party ought to pay a sum of money, but does not do so, and the intervention of the court is necessary to compel him, the party

pressed with the argument that all done under the indictment is to be set aside. But the reversal does not interfere with the verdict of the jury finding the facts. The present proceeding, as was laid down in *Ex-parte Brunsall*,[1] is not a punishment for a legal crime, but an exercise of the discretion of the court upon the question, 'whether a man whom they formerly admitted is a proper person to be continued on the roll or not.' In this case, it is not very clear that King did not commit the acts charged in his professional character of attorney; for one part of the fraud imputed to him was said to be effected by taking out warrants of attorney. We think that the indictment and the verdict must be valid, to the extent of preventing the attorney from having our sanction to practice. In the affidavit, he denies being a party or privy to criminal conduct,

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coming to the court for assistance is entitled to the costs of his application. *Titterton v. Sheppard*, 3 D. & L. 775–778. *Re Swan*, 15 L. J. Q. B. 402.

Where an attorney received a promissory note from the father of a clerk articled to him, as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he did negotiate it contrary to his undertaking, the court compelled him to take it up. *Ex-parte Gardner*, 2 Dowl. 520. *Ex-parte Hughes*, 5 B. & A. 482.

The jurisdiction of the court is not taken away by reason of the undertaking having been given in a proceeding in another court. *Ex-parte Bodenham*, 8 Ad. & E. 959. *Re Aitkin*, 4 B. & A. 47, *supra*. See *Re Garland*, 6 Dowl. 512. Where an attorney signed an undertaking in that character respecting the payment of a debt and costs recovered under a judgment in the Court of Exchequer, it was held that, having thus given the court jurisdiction, he could not successfully set up in opposition to an application to compel the performance of this undertaking the fact that he was not an attorney of the above court. *Thompson v. Gordon*, 4 D. & L. 49; 15 Mee. & W. 610: but see *Sharp v. Hawker*, 3 Bing. N. C. 66; 5 Dowl. 186. *Cole v. Grove*, 1 Scott, N. R. 30.

If, moreover, a man be once an attorney, he cannot, by ceasing to be an officer of the court, get rid of the summary jurisdiction of the court with respect to what he has done whilst an attorney. The rule is, once an attorney always an attorney for that purpose. *Per Patteson, J.: Simes v. Gibbs*, 6 Dowl. 310.

But a party who has successfully denied the employment of another as attorney cannot afterwards be heard to allege that he is one, in order to ground thereupon an application to the summary jurisdiction of the court. *Ex-parte Maxwell*, 4 Dowl. 87.

The court likewise will not, in general, interfere in a summary way to compel an attorney to perform his undertaking, or to refund money where the transaction between himself and the party making the application really involves the question of damages, or where the facts are doubtful; and the whole matter is therefore more proper for the opinion of a jury than for the adjudication of the court. For instance, final judgment having been signed against G., his attorney wrote to the plaintiff as follows:—"In consideration of your agreeing to suspend execution upon this judgment, I hereby undertake to make an arrangement with you respecting payment of the debt and costs prior to G., being discharged from prison under his present detainer; or, in the event of your not agreeing to the terms offered by me, to inform you in sufficient time of G.'s intended discharge, so that you may not be deprived of your power of lodging a detainer against him." On breach of this undertaking the court refused to interfere in a summary way, because such breach rather afforded matter for an action, in which the proper amount of damages would be determined by the jury, the court itself being unable to assess them. *Thompson v. Gordon*, 4 D. & L. 49; 15 L. J. Ex. 344. See *Ex-parte Clifton*, 5 Dowl. 218.

Where a person whilst in prison employed an attorney to procure his discharge as an insolvent, and the attorney refused to proceed in the matter until the party had signed a promissory note, which he did under protest, and after the discharge of the prisoner an action was brought against him upon the note in the name of the attorney's clerk, who it was sworn was believed not to be interested therein, the court refused to grant a rule calling upon the attorney to give up the note, on the ground that if there were fraud or duress in the transaction, it would afford a good defence to the action. *Watts v. Blayney*, 1 D. & L. 203.

[1] 2 Cowp. 829. In that case the attorney, who had been convicted of felony, was struck off the roll, notwithstanding he had five years previously undergone the punishment awarded to his offence, and although no misconduct had been since imputed to him. *See* also *Rex v. Southerton*, 6 East, 126. *Smith v. Gillett*, 3 Dowl. 364. *Re Anon.* 1 id. 174. *Re Hawdone*, 9 id. 970.

It may be proper here to add, that by the stat. 12 Geo. 1, c. 29, it is enacted, that if any person convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney, solicitor, or agent, in any suit or action in any court of law or equity in England, the judge may transport the offender for seven years by such process and under such penalties as felons.

or that the indictment contains an offence punishable by the law of the realm; but he does not deny the commission of the acts charged in the indictment. We must not, merely because the indictment is bad in point of law, shut our eyes to the fact that the jury have convicted him of conduct unbecoming an attorney."

(1) *He will not, however, be required to Answer the Matters of an Affidavit which would expose him to a Criminal Prosecution.*[1]

(c) *In case he has been guilty of Dishonest Conduct, Abuse of Process, &c.*[2]

[1] An attorney will not be compelled before trial to answer the matters of an affidavit, when the facts disclosed constitute an indictable offence. The general rule laid down upon this subject seems to be, that where the facts stated upon affidavit charging professional misconduct are such as constitute an indictable offence, the court will not, before criminal proceedings have been taken against the attorney, grant a rule requiring him to answer the matters of an affidavit, the effect of which might be to compel the party to criminate himself by furnishing in his affidavit in answer to the application, or in his answers to the interrogatories after attachment, matters which could at a future period be used as evidence against him. *Stephens v. Hill*, 10 M. & W. 28. *Short v. Pratt*, 1 Bing. 102. *Re Knight & Hall*, id. 42. It is, therefore, considered more satisfactory under such circumstances to let the case proceed to trial in the ordinary way, unless, indeed, there be some admission on the part of the attorney which would render the interposition of a jury unnecessary. *Re Anon.* 3 Nev. & P. 389. Where accordingly the facts alleged are such that, if true, the attorney was indictable for subornation of perjury, or for joining in a conspiracy to produce a false receipt, *Coleridge, J.*, refused to put in motion the summary powers of the court, by compelling the attorney to answer the matters of the affidavit. *Robertson v. Mills*, 1 Dowl. N. S. 772. To a like effect also *Lord Abinger* remarks, that when an attorney has been guilty of an indictable offence in the course of proceedings by him as attorney, the proper mode of proceeding against him is by a rule to strike him off the roll, and not by a rule calling upon him to answer the matters of an affidavit, for the first-mentioned course gives him a full opportunity of clearing himself, if he can, from the imputation, while it does not compel him to criminate himself. But if he were called on to answer the matters of an affidavit, he would by non-compliance be guilty of a contempt punishable by attachment, and thus be forced *prodere seipsum*. See *Hind's case*, 3 Bulst. 50. If, moreover, an attorney has been guilty of some professional misconduct, and at the same time of something indictable in itself, but not connected with his character and profession of attorney, the court will not, it seems, before conviction, inquire into such misconduct with a view of striking him off the roll, but would leave the party aggrieved to his remedy by a criminal prosecution. *Per Lord Abinger, C. B.: Stephenson v. Hill*, 10 Mee. & W. 32.

[2] Not only for an offence cognisable by law, but likewise for conduct which, though not amenable thereto, is marked by dishonesty or turpitude; as, for bribery of a witness (*Ex-parte Macey*, 5 D. & L. 276, n. b. See *Ward v. Simeon*, 2 C. B. 342), the court will interpose its authority to punish the delinquent, or to prevent the damage which might otherwise result from a want of confidence or a violation of professional integrity. "It is undoubtedly the duty of the court," said *Lord Langdale, M. R.*, "to protect solicitors in the fair and honest discharge of their difficult and delicate duties; but where a solicitor is found to have availed himself of his honourable and confidential position for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the court to withdraw from him those privileges and that certificate of character which are afforded by his being permitted to remain on the roll of solicitors." *Re Martin*, 6 Beav. 341, 342.

Where, for instance, an attorney had wholly prepared and signed a bond to pay money to his client, and the bond was upon a wrong stamp, he was compelled, upon motion, to put a proper stamp upon it. *Guillian v. Barnett*, 2 Smith, 155.

So where an attorney, knowing that bail were insufficient, put them in, and gave notice of justification, the court compelled him to pay the costs of the opposition. *Blundell v. Blundell*, 5 B. & A. 533. And where an attorney had obtained from an old lady, seventy-five years of age, in the absence of her attorney, her signature to a paper, whereby she agreed to abandon a judgment in ejectment which she had obtained by default of the tenant in possession, and to allow the question of title to be fairly tried as between her and the landlord of the tenant, who was the attorney's client, the court compelled him to give up the instrument to be cancelled; "for," remarked the Lord Chief Justice, "the practice of the officers of this court would be very impure, and often fraudulent, if we permitted things of this sort to be done." *Re Oliver*, 4 Nev. & M. 471, 476. So where the plaintiff's attorney put in bail for the defendant, and acted on both sides, deluding the parties and preventing an interview, the court set aside the

proceedings and made the attorney pay the costs. *Berry v. Jenkins*, 3 Bing. 423.

In general, where an attorney misconducts himself by abuse of the process of the court or otherwise during the course of an action, and his conduct is not of so flagrant a description as in the opinion of the court to justify them in making absolute a rule for striking him off the roll, they will, nevertheless (if it appear that he has been guilty of a certain degree of criminality), in discharging the rule order the attorney to pay all the costs occasioned by the proceedings. See *Dicas v. Warne*, 2 Dowl. 812. *Clarke v. Gorman*, 3 Taunt. 492. *Rolfe v. Rogers*, 4 id. 191. *Neal v. Holden*, 3 Dowl. 493. *Smith v. Gillett*, id. 364. As to an attorney's liability for pleading a sham-plea, see *Blewitt v. Marsden*, 10 East, 237. *Vincent v. Groome*, 1 Chit. 182. As to the liability of an attorney for bringing an action in the name of a non-existing person, see *Hoskins v. Phillips*, 16 L. J. Q. B. 339.

In the following cases the court has declined to interfere:—

A verdict having been obtained in an action against an attorney for libel of a very aggravated nature, in which, however, the jury gave only one shilling damages, the court refused to strike him off the roll on the mere ground of the publication of the libel. *Ex-parte Anon.* 2 Dowl. 110. See *Re Hawdone*, 9 id. 970.

The court will not entertain a motion to strike an attorney off the roll on the application of a party who has been his client, on the suggestion of gambling frauds committed since the termination of the business which the attorney conducted for him, there being also proceedings pending in equity in respect of the same frauds. *Re* ——, 12 L. J. Q. B. 331. See *Ex-parte A. B.*, 4 Jur. 630.

Where an attorney is in contempt for disobeying a rule of court, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Ex-parte Townley*, 3 Dowl. 39. *Ex-parte Grant*, id. 320.

"Where an attorney," says *Littledale, J.*, "has disobeyed a rule of court, he is in contempt, and the proper course is to apply for an attachment against him. If he continue in contempt, the question will then arise as to the propriety of his continuing any longer on the roll; but we cannot at once merely for a contempt compel him to show cause why he should not be struck off the roll." *Ex-parte Townley*, *supra*.

Where, however, an attorney who had been directed by a master of the Court of Queen's Bench, to whom certain matters had been referred, to refund a sum of money, disobeyed this direction, and kept out of the way, the court ordered him to be struck off the roll. *Re Anon.* 10 Jur. 198.

Excessive and extortionate charges in a bill of costs form no ground for a summary application against the attorney in the absence of wilful fraud, the suitor being sufficiently protected by the taxation of the bill. *Meux v. Lord*, 2 C. B. (N. S.) 409.

The court refused to call upon an attorney to answer the matters of an affidavit imputing that he had received an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, being satisfied that he had no personal knowledge of the matter; at the same time, however, they required him to pay the overplus and the costs of the application. *Re Eyre*, 1 C. B. (N. S.) 151.

Where an attorney being applied to by B. to invest a sum of money for him, borrowed it upon his own security and the deposit of a mortgage-deed, and afterwards committed a fraud upon B. in receiving the money due upon the mortgage without communicating that fact to B., and in continuing to pay interest to him, the court suspended his certificate for two years, though the transaction was not strictly between attorney and client. In *Re Francis Blake*, 6 Jur. N. S. 1242.

In order to induce the court to strike an attorney off the roll on the ground of misconduct, it is not in all cases necessary that the transaction should be strictly one between attorney and client. He may be guilty of such a fraud that, although not connected with his relation to the party as attorney, and although it fall short of being an indictable offence, yet it may be ground for suspending his certificate, or even for striking him off the roll. *Re Blake*, 36 L. T. 429.

In a recent case the facts were as under. The defendant's attorney had been served by the plaintiff with a *subpœna duces tecum* at Chelsea, just before ten o'clock at night, to attend at Westminster at nine o'clock the next morning (Feb. 3), to produce certain documents which were at his office in Symond's Inn. On the morning of the trial the attorney, who was clerk to the guardians and vestry clerk to the parish of Chelsea, before knowing that the cause would be on the paper on Feb. 3d, had made arrangements to attend the board meeting in his official capacity, believing that after having performed his official duties he would be able to reach Westminster in time to be examined as witness in the cause. The cause, however, was called on sooner than had been expected, and the plaintiff was obliged to withdraw the record by reason of the attorney's absence. The court (*Wightman, J.*), upon this state of facts, made absolute a rule for an attachment against the attorney, observing that it was his paramount duty to have attended pursuant to the subpœna and that he had no right to speculate upon the chance of being in time after the performance of his other duties. *Jackson v. Seager*, 2 D. & L. 13.

Where the attorney has been guilty of misconduct, the application may, according to circumstances, be either for a rule calling upon him to answer the matters of the affidavit (but see *Belcher v. Goodered*, 4 C. B. 474. *Burton v. Earl of Chesterfield*, 9

Jur. 373), or for an attachment, or to strike him off the roll; such an application must, moreover, always be by motion to the court in term, and not on the last day of term. *Re Turner*, 3 Dowl. 557. *Anon.* 1 Ex. 453. It must be made by counsel (*Ex-parte Pitt*, 5 B. & Adol. 1077; 2 Dowl. 439) to the court, and cannot be entertained by a judge at chambers. If in the first of these cases the attorney does not by his affidavit give a satisfactory answer to or explanation of the facts alleged against him (*Wadworth v. Allen*, 1 Chit. 186), or if he swear in his exculpation to an incredible story (*Re Crossley*, 6 T. R. 701), an attachment will be directed to issue. And with respect to the costs in such cases, the court will sometimes refuse them to the attorney, even though it should turn out that there was no actual foundation for imputing misconduct to him, provided there was reasonable and sufficient ground for bringing the matter before the court. *Doe d. Thwaites v. Roe*, 3 D. & R. 226. The affidavit in support of a rule calling upon an attorney to answer the matters of an affidavit should be entitled in the matter of the attorney, and affidavits in answer to the rule must be entitled in the same manner as the rule which they are produced to oppose. *Re Grantham*, 4 D. & L. 427. It is in general advisable not to mention the name of the attorney in open court in moving for its summary interference on the ground of imputed misconduct. *Re* ——, 8 W. R. 530; 36 L. T. 432.

Where the attorney is in contempt by disobeying a rule of court requiring him to do a particular act, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Ex-parte Townley*, 3 Dowl. 39. *Ex-parte Grant*, id. 320. The motion must be made by counsel (*Ex-parte Fenn*, 2 id. 527); and where a rule of court ordering the payment of certain costs by an attorney contained these words—"And it is further ordered, that if he does not pay the said costs within the said time an attachment shall issue," the clause was held to entitle the party applying to a rule absolute for an attachment in the first instance. *Ex-parte Grant*, *supra*. In general, however, the rule for an attachment against an attorney for disobedience to a rule of court is in the first instance *nisi* only (*Ex-parte Townley*, *supra*. *Ex-parte Grant*, *supra*. See *Hatfield v. Hatherfield*, 1 D. & L. 809), and must be personally served (*Re Pyne*, 1 id. 703. *Wilkinson v. Pennington*, 6 Dowl. 183. *Albin v. Tomer*, 3 id. 563. *Birkett v. Holmes*, 4 id. 556) before it can be made absolute. But where money had been wrongfully detained by an attorney from his client, and a rule requiring him to pay the money over had been made absolute, and it was shown that, although the rule absolute had not been served, the attorney was aware of what it required him to do, *Patteson, J.*, granted a rule for an attachment absolute in the first instance against the attorney (*Ex-parte Burgin*, 1 Dowl. N. S. 292. See *Re Bower*, 1 B. & C. 264); and, under peculiar circumstances, the rule *nisi* for an attachment has been made absolute without having been personally served. *Re Pyne*, *supra*. *Re Bower*, *supra*. *Re Barwick*, 3 Dowl. 703.

In order, then, to compel an attorney to perform his undertaking to pay money, or to deliver up papers, the applicant must, under ordinary circumstances, proceed step by step: he must, in the first instance, obtain a rule *nisi* calling upon the attorney to show cause why he should not do the act in question, and upon the rule being made absolute by the court, a separate application must be made for an attachment against the attorney should he refuse compliance with the rule, and the rule *nisi* for an attachment thus obtained will, after personal service and in default of cause shown, be made absolute. See *Roscoe v. Hardman*, 5 Dowl. 157. The attorney may be arrested under the writ, and, when committed, he will be compelled to answer interrogatories exhibited against him by the party at whose instance the proceedings have been had; the examination, when taken, is referred to the master, who reports upon it; and if the attorney be reported in contempt, the court thereupon gives judgment according to their discretion, in the same manner as upon a conviction for a misdemeanour at common law. *See* Attachment, vol. i. p. 575.

(1) *Form of the Writ of Attachment for Contempt against an Attorney in the Queen's Bench, Common Pleas, or Exchequer.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the sheriff of greeting.

We command you that you do not forbear, by reason of any liberty in your bailiwick, but that you attach C. D., gentleman, one of the attornies of our court, before us at Westminster, so that you may have him before us at Westminster, on the day of next, to answer to us for certain trespasses and contempts brought against him in our court before us at Westminster; and have you there then this writ.

Witness [*name of Chief Justice or Chief Baron*] at Westminster, the day of A. D. 18

The form of interrogatories is as under:

Form of Interrogatories.

In the Q. B. [*or* C. P. *or* Exch. of P.]

—— Term in the year of the reign of Queen Victoria.

A. B. *v.* C. D. Gentleman, &c.

Interrogatories to be administered to C. D. of Gentleman, one of the attornies of the court of our Lady the Queen, before the Queen herself [*or in C. P.*, of the Bench; *or in Exchequer*, of the Exchequer of Pleas] at Westminster, touching and concerning a contempt supposed to have been by him committed against the said court. [*Here*

(D) *Striking Attorney off the Roll.*[1]

insert such interrogatories as are adapted to the case, concluding with the jurat as follows]:

The above-named C. D. was sworn the day of 18 true answer to make to such questions as should be asked him on his examination on the above interrogatories, before me at my chambers, Rolls' Gardens.

[*Judge's name.*]

[1] The application to strike an attorney off the roll for misconduct, which, as already observed, will only be successful in extreme cases, is by motion in court, which cannot be made on the last day of term (See *Re Turner*, 3 Dowl. 557. *Bailey v. Jones*, 1 Chit. 744. See *Garry v. Wilks*, 2 Dowl. 649. *Re Anon.* 2 B. & Adol. 766); and in the Exchequer, at all events, should be at such a period as will allow the party time to answer it before the end of term. *Anon.* 17 L. J. Ex. 20; 2 Dowl. 227.

Further, the motion to strike an attorney off the roll ought to be made in the court in which he has been admitted an attorney; and, if made in any other, the application should be to prohibit him from practising in such latter court. *Stephens v. Hill*, 10 Mee. & W. 28. See *Simes v. Gibbs*, 6 Dowl. 310. *Re Lord*, 2 Scott, 131. Where a rule was obtained in the Exchequer, calling upon the defendant's attorney, who was not admitted there, to show cause why he should not be struck off the roll, or be prohibited from practising in that court, the latter branch of the rule was made absolute. *Stephens v. Hill*, 10 Mee. & W. 28. But a rule will not be granted in the alternative, calling on an attorney to show cause why he should not be struck off the roll, or answer the matters in the affidavit, as either branch of the rule should be the subject of a distinct application. *Burton v. Earl of Chesterfield*, 9 Jur. 373.

The affidavit in support of the motion for striking an attorney off the roll for misconduct during the proceedings in a cause, should be entitled in the cause, and is properly so entitled even where judgment has been obtained therein, for the cause is not on that account out of court. *Stephens v. Hill*, 10 Mee. & W. 28, 30. *See* also *Simes v. Gibbs*, 6 Dowl. 310. If the misconduct were not connected with proceedings in an action the affidavit should be entitled in the matter of the attorney. *See supra*, 27. It should further be shown that the attorney is an attorney of the court in which the application is made, or practising there; or at all events, that the subject-matter thereof relates to some cause before the court. *Re Lord*, 2 Scott, 131. *Re Becke*, 1 Hurl. & W. 617. See *Evans v. Duncombe*, 1 C. & J. 372. *Re Greaves*, id. 374 n. *Re Paterson*, 1 Dowl. 468. It has, however, been held that the court will, without any such averment, take judicial notice who are enrolled there as attornies. *Ex-parte Hoare*, 1 Hurl. & W. 211, following *Ex-parte King*, 3 Dowl. 41. *Downton v. Styles*, 6 id. 189. The affidavit must make out a case of palpable fraud or misconduct against the attorney; it will not be sufficient for the deponent to state facts from which such misconduct may be inferred, without directly asserting his belief that the party charged has been actually guilty thereof. *Re King*, 3 Nev. & M. 716. *Re Lord*, 2 Scott, 131.

Where, on showing cause against the rule for striking an attorney off the roll, the fact of any malpractice is doubtful, the court will, in their discretion, refer the matter to the master for investigation, and will reserve their decision until his report has been received. Under such circumstances it will be the duty of the master to receive all affidavits tendered to him which may serve to elucidate the facts or explain the conduct of the accused party. *Dicas v. Warne*, 2 Dowl. 812.

An attorney may be struck off the roll at his own request: as, for the purpose of being called to the bar, on motion supported by a proper affidavit. This affidavit need not specify the ground on which the application is made (*Ex-parte Burrell*, 11 Jur. 1062. *Ex-parte Charnock*, 1 W. W. & H. 548), but it must aver that no proceedings are pending or apprehended against the applicant. *Ex-parte Gray*, 9 Dowl. 336. *Anon.* 1 Chit. 557 n. It need not, however, state that he has taken out his certificate. *Ex-parte Partridge*, 4 Jur. 681.

If an attorney, who has been struck off the roll at his own instance, for the purpose of being called to the bar, subsequently desires to be readmitted, he must previously apply to the inn of court by which he was called to be disbarred (*Ex-parte Cole*, 1 Dougl. 114), and he must then move to be re-admitted, which motion will, under ordinary circumstances, be granted as of course upon the usual notices being given. *Moody's case*, Barnes, 42, cited 1 Dougl. 114 n.; 1 Sugd. 16th ed. 90; citing *Ex-parte Sambridge*, Q. B. T. T. 25 Geo. 3.

Form of Affidavit by Attorney to have himself struck off the Roll.

In the Q. B. [*or* C. P. *or* Exch. of P.]

I, A. B., &c., one of the attornies of this honourable court, make oath and say:

1. I was duly admitted an attorney of this honourable court in Term, 18 , and I am now desirous of having my name struck off the roll of attornies of this court [*for the purpose of my being called to the bar by the Honourable Society of or as the case may be.*]

2. I further say, that no application or other proceeding is now pending against me, nor do I expect or apprehend that any application or other proceeding will be made, had, or commenced against me, as such attorney as aforesaid.

Sworn, &c. A. B.

(*a*) *Rule for must be produced to Registrar.*

Rule for striking attorney off the roll must be produced to the registrar before it is acted on.

23 & 24 Vic. c. 127, s. 24. "Where the name of any attorney or solicitor is ordered to be struck off the roll of attornies or solicitors of any court on his own application, or on the application of any other person, the rule or order for that purpose shall forthwith, and before the same is acted upon, be produced to the registrar, and the registrar shall enter a note or minute of such rule or order in connexion with the name of such attorney or solicitor on the roll of attornies and solicitors kept by the registrar, and shall strike such name off such roll, and shall mark such rule or order as having been entered."

(*b*) *On Production of Office Copy of Rule he may be struck off Roll of other Courts.*

On production of office copy of rule for striking an attorney off the roll, he may be struck off the roll of other courts.

By 23 & 24 Vic. c. 127, s. 25, "the name of every person hereafter struck off the roll of attornies of any of the superior courts of law at Westminster, by the rule of any of such courts, or off the roll of solicitors of the Court of Chancery, by the order of any judge of that court, shall, upon production of an office copy of such rule or order, and an affidavit of the identity of the person named therein, to the proper officer of every or any other of the said courts of which such person is an attorney or solicitor, be struck off the roll of such court; and in case any such person be at any time thereafter restored to the roll by the rule of the court, or order of any judges of the court, by the rule of which or the order of a judge of which his name was struck off such roll, he shall, upon production of an office copy of the rule or order so restoring him, with an affidavit of the identity of the person named therein, to the proper officer of every or any such other court, be restored to the roll thereof, without payment of any fee or fine whatsoever."

(*c*) *Readmission of.*

(1) *Notice must be given as on Original Admission, &c.*

Notices must be given as on original admission, and affidavits filed at master's office, &c. before the term on which application is intended to be made.[1]

Reg. Gen. H. T. 1853. "On an application to readmit an attorney who has been struck off the roll the applicant shall, before the commencement of the term next preceding that in which he intends to apply to be readmitted, give notice thereof, as in the case of an original admission; and the affidavits in support of such application shall be filed at the office of the master, and a copy thereof left at the chambers of the Lord Chief Justice of the Court of Queen's Bench, before the term on the last day of which the notice for readmission is intended to be made, and the rule for such readmission shall be drawn up on reading such affidavit, and an affidavit of such copy having been left and notices given in compliance with this rule." See *Ex-parte Mackison*, 18 C. B. 661.

The rule of court thereon in the Queen's Bench is as under:—

Upon reading the affidavit of A. B.

It is ordered, that the said A. B. of be struck off the roll of attornies of this court at his own request, upon payment of all such fees as are due to the masters or any of their clerks.

Upon the motion of Mr. ——.

By the Court.

[1] The readmission of an attorney who has been struck off the roll for misconduct will be sanctioned by the court, provided he can succeed in satisfying the judges that he ought to be restored, as for instance, by proving himself innocent of the alleged misconduct; and it must not, therefore, be supposed that the disability is in every case to be perpetual. *Rex v. Greenwood*, 1 W. Black. 222; 1 Tidd. *Pr.* 9th ed. 89. *Re Barker*, Q. B. M. T. 1858.

Such applications for readmission are accordingly in practice sometimes granted, though an offence, in consequence of which the above punishment has been inflicted, will not necessarily be cleared by a pardon. *Ex-parte Frost*, 1 Chit. 558 n.

A rule for readmission of an attorney is a rule to show cause only. In *Re Gill*, 20 Jur. 1232. *Re Barker*, *supra*.

Being readmitted in one court, he will be entitled to readmission in others, on producing an office copy of the rule accompanied by an affidavit of identity. 23 & 24 Vic. c. 127, s. 25, *supra* in text.

(E) *Responsibility of Attorney to Third Party.*[1]

(*a*) *No Action for Money had and received is maintainable against an Attorney, unless there is some Privity between him and the Plaintiff.*

WAKEFIELD v. NEWBON, 6 Q. B. 276.

An action for money had and received is not in general maintainable against an attorney at the suit of a third person, there being no privity.

This action was brought by a mortgagor against the mortgagee's solicitors to recover a sum of money which the defendants had exacted from the plaintiff, by refusing to re-deliver his title-deeds after a reconveyance to him of the mortgaged property, on payment of principal and interest, unless the plaintiff would also pay the amount of the defendant's bill of costs. A verdict was found for the plaintiff. A rule having been obtained to enter a nonsuit,—

Lord Denman, C. J. "Defence was rested on the case of *Bamford v. Shuttleworth*, 11 Ad. & E. 926, where a purchaser had paid the agreed price of an

[1] According to a general rule of law, where an agent receives money either from or on account of his principal for the benefit of some third person, an action does not lie at suit of such last-mentioned party against the agent, the privity of contract being between the principal and agent on the one hand, and between the principal and the third party on the other. *Stephens v. Badcock*, 3 B. & Adol. 354. *Symonds v. Atkinson*, 1 H. & N. 146; 25 L. J. Ex. 313. *Bamford v. Shuttleworth*, 11 Ad. & E. 926. *Stead v. Thornton*, 3 B. & Adol. 357, n. a. *Sims v. Brittain*, 4 id. 375. *Clark v. Dignam*, 3 Mee. & W. 478. *Sewell v. Raby*, 6 id. 22. *Sadler v. Evans*, 4 Burr. 1984. On this ground an action for money had and received is not, under ordinary circumstances, maintainable against an attorney at suit of a party other than his client, in respect of money which has come to the attorney's hands for the benefit of such third party. Where, for instance, the deposit on the sale of an estate was received by the vendor's attorney, describing himself as an agent merely, it was held that an action for money had and received would not lie against the attorney at suit of the purchaser, on the ground of want of privity between the parties. *Bamford v. Shuttleworth*, 11 Ad. & E. 926. Notwithstanding this rule, however, one who is *primâ facie* an agent only, as an attorney or solicitor, may by his own express act create a privity in law between himself and the other party with whom he has been dealing on behalf of his principal; as in *Wakefield v. Newbon, supra* in text. *See* also *Davies v. Vernon*, 6 Q. B. 443. *Smith v. Sleap*, 12 Mee. & W. 585. *Harper v. Williams*, 4 Q. B. 219. So where the attornies for the plaintiff and defendant, in a case which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner, it was held that the attorney for the plaintiff was liable in *assumpsit* to pay the costs when taxed in the mode specified. *Iveson v. Conington*, 1 B. & C. 160. *Hall v. Ashurst*, 1 C. & M. 714.

The objection of want of privity in general equally applies to prevent an action from being maintained by the client against his attorney's London agent for money retained by the latter party. Hence, where B., the country attorney of A., sent a sum of money to the defendants, who were his London agents, to be paid to C. on account of A., and the defendants promised B. to pay the money according to his directions, but afterwards, being applied to by C., refused to pay it, claiming a balance due to themselves from B. on a general account between them, it was held that an action for money had and received would not lie against the defendants at the suit of A.

"The general rule," observed *Lord Denman, C. J.*, in delivering judgment, "undoubtedly is, that there is no privity between the agent in town and the client in the country, and the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence. In order to render the town agents liable to the clients, it would be necessary to show, either that the money was transmitted directly by the latter to the former, or that the country attorney received instructions to transmit it to them specially, or some fact should be put in evidence warranting the conclusion that the country attorney was a mere conduit-pipe for the transmission of the money to the town agents. *Cobb v. Becke*, 14 L. J. Q. B. 108. See *Moody v. Spencer*, 2 D. & R. 6.

A., who was the London agent of S. & T. attornies in the country, by their directions issued a *fi. fa.* and warrant to levy on the goods of a debtor at the suit of a client of the country attorney, referring the officer to S. and T. for instructions. The officer, not being able to meet with S. and T., paid the amount levied to the under-sheriff, who, without any instructions from S. and T., remitted the money to A., whose name was indorsed on the warrant. A. refused to pay the money to the client, claiming to apply it in reduction of the general balance due from S. and T. for agency business. *Held*, that there was no privity of contract to support an action by the client against A. for money had and received to his use. It appearing, however, on affidavit that A. had in the first instance received the money by mistake, and had retained it against the express directions of S. and T., the court made absolute a rule

estate to the vendor's attorney, but was holden to have no right of action against him for the price when the purchase went off for defect of title. But there the attorney received the money as agent for his client, to whom alone he was responsible for it: here the attornies insisted on withholding the deeds for their own benefit, to secure the payment of their own bill. It is a mistake to say that there is no privity between the plaintiff and defendants. The privity in the original transaction was, indeed, between the defendants and their client; but when the defendants compelled the plaintiff to part with money in order to regain possession of his rights, the law created a privity between them, and implied a promise to repay what the defendants should have improperly obtained."

Rule discharged.

VIII. The Retainer[1]

obtained by the client to compel the town agent to refund the money. *Robbins v. Fennell*, 17 L. J. Q. B. 77. And in a case decided just previously to the preceding in the Court of Exchequer, where S., the London agent of W., the attorney of A., in a suit between A. and B., received the sum sued for from B., and at W.'s request set it off against advances in an account between them, that court compelled S. to pay the money over to A., as there was nothing to show that the latter was indebted to W. at the time that credit was thus given him by S. *Hanley v. Cassan*, 11 Jur. 1088.

[1] The engagement of an attorney to prosecute or defend an action, which is usually called his retainer, may be effected either verbally or in writing. *Lord v. Kellett*, 2 M. & R. 1. In practice, indeed, a verbal authority only to sue or defend is usually given, but *Lord Tenterden, C. J.*, in *Owen v. Ord* (3 C. & P. 349), took occasion to express his opinion strongly in favour of a written retainer. "Every respectable attorney," said his lordship, "ought, before he brings an action, to take a written direction from his client for commencing it, and he ought to do this both for his own sake and for the sake of his client. It is much better for him, because it gets rid of all difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard, and prevent them from being drawn into law-suits without their own express direction."

"Nothing surprises me more," said *Lord Langdale, M. R.*, with reference to the subject of retainer in equity proceedings, "than that solicitors should so frequently take upon themselves to file bills in the name of persons who have not given them authority in writing. The general rule of the court is, that a solicitor should obtain a written authority from his client. I have often had occasion to observe, that the interest of the client does very often induce a solicitor to file a bill before he has had an opportunity of obtaining an authority in writing. I cannot consider a solicitor is to blame in cases of that kind, but, as I have said before, he acts most imprudently if he does not take the very first opportunity to obtain the sanction of the client for what he has done. The law of the court is perfectly clear, that if the authority afterwards comes in question, aye or no, whether there is an authority from the client or not, and there is no writing, it will go against the solicitor, unless he can prove distinct authority, or implied authority by acquiescence, or some other means." *Pinner v. Knights*, 6 Beav. 175; S. P. *Hood v. Phillips*, id. 177. In another case also at the Rolls, the same learned judge remarked that it is the duty of the solicitor to take care that he has sufficient evidence of his authority, and if the authority be not given in writing, and is afterwards denied, there being nothing but assertion against assertion, the solicitor will be treated as if he had no authority at all; though the case would be different if an acquiescence on the part of the client be inferred from his conduct subsequent to the commencement of the proceedings (*Wiggins v. Peppin*, 2 Beav. 404, 405. *Lord v. Kellett*, *supra*. *Wright v. Castle*, 3 Mer. 12. See *Hall v. Laver*, 1 Hare, 371); or if, after the delivery of the attorney's bill, there were proof of a promise to pay it, founded on some new and sufficient consideration. *Hellings v. Gregory*, 1 C. & P. 627.

The retainer, if in writing, may be as under. *See* Tidd, Forms, 8th ed. p. 25.

Form of Retainer by Plaintiff.

I, A. B., of do hereby retain and employ Mr. C. D. of as my attorney, to commence and prosecute an action against E. F. of for the recovery of a debt of £ which I claim to be due and owing to me from the said E. F. [*or as the case may be*].

Dated the day of 18 A. B.

Form of Retainer by Defendant.

Between A. B., plaintiff, and E. F., defendant.

I, E. F., of the above-named defendant, do hereby retain and employ Mr. G. H. of as my attorney, to defend the action commenced against me by the above-named A. B. [*or as the case may be*].

Dated the day of 18

E. F.

The question of retainer is one of fact. Where A. delivered papers to B., an attorney, telling him she was entitled to an estate, and would pay him if she recovered it, B. took the papers, saying that he would see

what he could do for her, and without further communication with her commenced an action of ejectment for the premises in question, which, however, he afterwards abandoned, under the conviction that A. had no title; it was held upon this state of facts that the attorney either undertook the business upon the terms that he should only be paid if the issue were successful, or had acted without authority, and that, upon either of these suppositions, he was incapacitated from suing on his bill. *Tabram v. Horn*, 1 M. & R. 228. *Owen v. Ord*, 3 C. & P. 349. As to what amounts to a contract or agreement establishing the relation of attorney and client, see *Elderton v. Emmens*, 17 L. J. C. P. 307; S. C. 16 id. 209. *Sewell v. Allen*, id. Ex. 246.

Where an attorney, as is frequently the case, conducts parish business without any contract with the parish officers on the faith of being paid out of the parish funds, it is clear that he cannot sue such officers for his bill in respect of such business. *Marsh v. Davies*, 17 L. J. Ex. 94. The general rule is, that whenever in an action on an attorney's bill a question arises upon the contract, *i.e.* whether the work was done for and on the credit of the defendant, or for another person, the question must, as in other cases of a similar nature, be submitted to the jury (*Hayward v. Fiott*, 8 C. & P. 59. *Noel v. Hall*, id. 231. *Scrace v. Whittington*, 2 B. & C. 11. *Turner v. Rookes*, 10 Ad. & E. 47), and the practice of the profession as to the mode of payment will be evidence in support of or an opposition to the plaintiff's case. *Grissell v. Robinson*, 3 Bing. N. C. 10. The retainer may be proved as well by showing the client's acquiescence in the proceedings taken by the attorney, as by direct evidence of the fact. See *Cameron v. Baker*, 1 C. & P. 268. It has, however, been held in equity, that the mere omission by a party after notice of the suit to take any active steps to have his name expunged from the record, will not necessarily be equivalent to a personal retainer even in that suit, and, *à fortiori*, cannot extend to establish the relation of attorney and client in matters unconnected with the suit. *Hall v. Laver*, 1 Hare, 571.

Where there are several actions against separate defendants, conducted on behalf of the defendants by the same attorney, and it is agreed that only one should go on, and that the others should be decided by its result, the separate retainers are determined when the consolidation is agreed on, and the attorney thenceforth acts under the joint retainer of all the persons whose rights are to be determined by the result of the action carried on, and they are equally liable with the actual defendant in the action. In such a case as between the defendants, the consideration for the agreement is the saving of costs in having one trial instead of several, and all would not have this consideration unless the costs of the defendant in the action selected for trial should be shared by the rest. *Anderson v. Boynton*, 19 L. J. Q. B. 42.

[1] The attorney's authority to act may come either from the party himself, or from some one duly authorised expressly or implied by him. See *Turner v. Rookes*, 11 Ad. & E. 47. When, therefore, a debt has been assigned, and the assignee is, according to the usual practice, empowered to sue for its recovery in the assignor's name; in this case, if the attorney be authorised by the assignee, it is sufficient. *Pickford v. Ewington*, 4 Dowl. 453. In an action, however, on a bail-bond, the principal cannot authorise his attorney to appear for the bail as well as himself. *Chivers v. Fenn*, 2 Show. 161. Nor, in ejectment, can an appearance be entered for the tenant without his consent by order of the landlord. *Roe v. Doe*, Barnes, 39. Neither can one partner authorise an attorney to enter an appearance for his co-partner. *Humbridge v. De la Croúe*, 16 L. J. C. P. 85. *See* Partners, *post*.

Where an attorney has been once retained in an action or other proceeding, it is clearly his duty to take the necessary steps during its progress, and he has not the obligation cast upon him of consulting his client or receiving specific directions from him prior to each step. Therefore, where the town-council of a borough, by resolution, authorised and retained an attorney to take proceedings in opposition to a rule *nisi* for a *mandamus*, and subsequently (the rule having been made absolute) ordered the return to be filed, this was held to be a sufficient authority to the attorney to appear for the corporation on the trial of certain issues raised on the return. *Reg. v. Lichfield* (town council), 10 Q. B. 534; 16 L. J. Q. B. 333. So an attorney, who is authorised to appear for a party in a cause, has also authority to refer it. *Smith v. Troup*, 18 L. J. C. P. 209. *Favie v. Eastern Counties Railway Co.* 17 L. J. Ex. 297. *See* vol. i. p. 427.

But an attorney is not justified in entering into a compromise contrary to the instructions of his client. *Fray v. Fowles*, 28 L. J. Q. B. 235; 7 W. R. 446. See *Swinfen v. Ld. Chelmsford*, vol. i. p. 218 n.

It may be laid down as a general rule, that if an attorney has authority to do a particular act, he becomes thereby authorised to do whatever may be incidentally necessary for accomplishing the specific object for which he has been retained by his client. See *Dawson v. Lawley*, 4 Esp. 65. *Richardson v. Daly*, 4 Mee. & W. 384. *Drake v. Lewin*, 4 Tyr. 730. *Dent v. Hallifax*, 1 Taunt. 493. A town agent of a country attorney cannot, under an authority given for a particular purpose, take other proceedings in behalf of his client which are not within the scope of that special authority. *Malins v. Greenway*, 17 L. J. Ch. 26; S. C. affirmed,

(A) *An Attorney must carry the Suit to a Termination, unless there be sufficient Reason for abandoning it.*[1]

HAWKES v. COTTERELL, 3 H. & N. 243.

The attorney may, if the client make default in supplying him with funds to meet the actual expenses of carrying on the action, sue for his bill before its termination.

This was an action on an attorney's bill. *Plea*, Never indebted.

The plaintiff, a solicitor employed by the defendant as *prochein amy*, in a suit in Chancery, sent in his bill before the termination of the suit. The defendant contended that he was not responsible. The solicitor then wrote, offering to go on if a certain sum was paid, and if the defendant would admit that he was personally responsible. The defendant not consenting to this, the plaintiff brought his action, and recovered the amount of his bill. A rule for a new trial was refused.

Per Cur. If the client make default in supplying the attorney with the necessary funds required for carrying on the suit, the attorney may put an end to the retainer and sue before its termination. There is in this case a further ground on which this action may be maintained, namely, that the client denied his liability.

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id. 331. Under a general retainer, an attorney is not ordinarily justified in commencing an action, unless it should appear that an unlimited discretionary power was given to him. *Anderson v. Watson*, 3 C. & P. 214. As observed by *Lord Eldon* (*Wright v. Castle*, 3 Mer. 12; see *Simms v. Henderson*, 17 L. J. Q. B. 209), "there must be a special authority to institute, although a general authority is sufficient to enable the solicitor to defend a suit." This remark seems equally applicable to an action at law. Wherever practicable, however, the attorney should consult his client before appearing to an action.

Where an attorney, who has no general retainer, has authority to do some particular act, his authority will necessarily be confined to doing the particular act, or effecting the particular object specified; and the question will always be, whether the business for which he seeks to recover fell within the scope of the authority with which he was invested. *Dawson v. Lawley*, 4 Esp. 65. For instance, an authority to sue must be confined to the particular action or matter in respect of which it was given (*Edwards v. Cooper*, 3 C. & P. 277); and therefore, if only employed to bring an action, he cannot accept service of process in a cross-action, nor oppose the defendant's discharge in the Insolvent Court (—— *v. Davis*, 3 L. J. Ex. 212. *Drake v. Lewin*, 4 Tyr. 730): but he ought to consult his client before doing so. In like manner, an attorney who has been employed by a party in an application to be discharged out of custody, cannot accept service of a declaration against the prisoner; unless, indeed, the latter expressly assent to his so doing. *Spencer v. Newton*, 6 Ad. & E. 630. See *Dent v. Hallifax*, 1 Taunt. 493. However, a retainer to commence a suit which is afterwards abated by non-joinder, is sufficient evidence of authority to commence another action against the parties named in the plea in abatement. *Crook v. Wright*, R. & M. 278.

Where an attorney has authority to do an act the client will be bound thereby, and therefore, after an order of reference has been made with the consent of counsel and attorney, the court will not set it aside on an affidavit by the party, expressly denying his attorney's authority to refer, although the application be made before any step has been taken by the arbitrator, except the appointment for a meeting on a future day. *Filmer v. Delber*, 3 Taunt. 486. *Latuch v. Pasherante*, 1 Salk. 86. *Rex v. Addington*, Say. 259. See *Thomas v. Hewes*, 2 C. & M. 519. In such a case, therefore, if the attorney had, in fact, no authority to enter into the agreement, the defendant's only remedy is by action against him. *Smith v. Troup*, 18 L. J. C. P. 209. A plaintiff will be liable in trespass for an execution levied on the wrong party by his attorney, although he be not proved to have interfered in any way, except giving instructions to sue the defendant. *Jarmain v. Hooper*, 7 Scott, N. R. 663. So, trespass is maintainable against the client for an arrest under a writ, which is afterwards set aside for irregularity, although the suing out of the writ is the immediate act of the attorney. *Parsons v. Lloyd*, 3 Wils. 341.

And where an attorney, retained to enforce a judgment, issued a *ca. sa.* when the debt was reduced below 20*l.*, it was held that the client was responsible for this unlawful arrest. *Collett v. Foster*, 5 W. R. 790; 29 L. T. 229.

[1] An attorney cannot wantonly throw up his retainer during the progress of a suit, or without due notice refuse to proceed with it. It is necessary, in order to enable an attorney to sue for his bill of costs, that the suit in which he has been retained has been terminated; or if not terminated, that the conduct of it has been abandoned by

(C) *Changing Attorney.*

(*a*) *An Order of a Judge is necessary.*

Reg. Gen. (Pr.) H. T. 1853, r. 4. "No attorney shall be changed without the order of a judge." An order is necessary.[1]

him for reasonable cause. This arises from the nature of the contract between attorney and client: for when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination; and it lies in the attorney, where he claims his costs in a case where it has not been brought to a termination, to show satisfactorily why he did not proceed with it. *Harris v. Osbourn*, 2 C. & M. 629. *Nicholls v. Wilson*, 11 Mee. & W. 106. It is also incumbent on the attorney to give notice to the client of his withdrawal from the suit. *Harris v. Osbourn, supra.* There may be instances, however, where he would be at liberty to do so without notice, because a case might occur so plain as not to require notice. *Nicholls v. Wilson, supra.* In general, the ground upon which the attorney claims to withdraw from the suit and receive payment of his bill before the termination of the action, is the refusal or inability of the client to furnish the funds necessary for its continuance. The rule upon this matter is, that the attorney has the right to call upon the client from time to time, on reasonable notice, to make advances, and for the purpose of taking the cause to trial to supply him with adequate funds, not to pay his costs but the expenses out of pocket. *Wadsworth v. Marshall*, 2 C. & J. 665. *Lawrence v. Potts*, 6 C. & P. 428. In case of the withdrawal of the attorney from the suit on this ground, he must take care beforehand to give timely notice of such his intention (*Hoby v. Built*, 3 B. & Adol. 350), and he will then be entitled to recover his fees up to that time. *Hawkes v. Cotterell*, 3 H. & N. 243. *Rowson v. Earle*, 1 M. & M. 538. *Vansandeau v. Brown*, 9 Bing. 402.

The court will not compel an attorney, even after notice of trial, to carry the cause into court, if, after due notice, the client omits to furnish the funds. *Wadsworth v. Marshall*, 2 C. & J. 666. If, however, in such a case reasonable notice be not given, and a verdict consequently pass against the client, the attorney will clearly be liable for the damages sustained. Accordingly, where the notice was given on the Saturday preceding the commission-day, which was on a Thursday, and the jury found that reasonable notice had not been given, this question having been submitted to them by the judge, the court refused to disturb the verdict on the ground of misdirection. *Hoby v. Built, supra.*

Further, the attorney cannot voluntarily give up his client and act as attorney for the opposite party; and the court will, in exercise of the authority they possess over their own officers, interfere for obvious reasons to prevent an attorney or solicitor who has acted on one side, and has either relinquished his client, or been discharged on the ground of misconduct by him, from subsequently acting for the opposite party. *Davies v. Clough*, 8 Sim. 262. *Cholmondeley v. Clinton*, 19 Ves. 261. *Parratt v. Parratt*, 17 L. J. Ch. 346. But an attorney who has been discharged by his client will not, in general, be restrained from acting for the other party in an action, unless indeed he has been guilty of misconduct amounting virtually to a discharge of himself, or unless the affidavits show that the client has confidentially made communications to him, the disclosure of which would be prejudicial to the suit. *Johnson v. Marriott*, 2 C. & M. 183. See *Grissell v. Peto*, 9 Bing. 1. *Beer v. Ward*, 1 Jacob. 77. *Bricheno v. Thorp*, id. 300.

Attornies or solicitors in partnership, or in whose joint skill the client has confided, cannot, without his acquiescence, dissolve their partnership, and turn him over to one of them; and a dissolution of partnership, resulting from the retirement of one partner, absolves the client from any obligation to the remaining partner: for "the agreement between the two solicitors that the partnership shall be dissolved being made for their own benefit, without any communication with their client, the moment one of them retires he has discharged himself, and the relation of attorney and client is dissolved between them." *Griffiths v. Griffiths*, 8 Hare 587. *Cholmondeley v. Clinton*, 19 Ves. 272.

[1] The above rule applies wherever the attorney acting had authority to do so, and his authority has not expired (*Doe v. Bransom*, 6 Dowl. 490. *May v. Pike*, 4 Mee. & W. 197; 6 Dowl. 667. *Bevens v. Hulme*, 15 Mee. & W. 88; 3 D. & L. 309. *Batchellor v. Ellis*, 7 T. R. 337); and, of course, the rule has no application where the party sued or defended in person, and then appoints an attorney. *Jones v. King*, 5 D. & L. 412. *Kerrison v. Wallingborough*, 5 Dowl. 564. The application is to a judge for a summons. Where the client is a foreigner, there should be an affidavit showing that he understands and requires the change (*Davies v. Lowndes*, 3 C. B. 818), and the order has been obtained after final judgment (Id.) The order is usually made on payment of the attorney's bill to be taxed, and the bill ought therefore to be delivered by the attorney forthwith. *Macpherson v. Rorison*, Dougl. 217. Until the order is

IX. Personal Liability of Attorney for Charges incurred for Client's benefit.[1]

X. Attorney acting without Authority.

(A) *Is Responsible for the Costs he occasions.*

served on all the parties the original attorney's authority remains, and notices, &c. may be served on him, and money paid to him as usual. *Ginders v. Moore*, 1 B. & C. 654. *Lord v. Wardle*, 3 C. B. 295. *Kaye v. De Mattos*, 2 H. Black. 1323. *Phillips v. Berkeley*, 5 Dowl. 279. If before the order is obtained the new attorney make any application, objection may be taken (*Doe v. Bransom*, 6 id. 490); yet the new attorney may, without any order, give notice of justifying bail (*R. v. Sheriff of London*, 2 B. & A. 604. See *Haggett v. Argent*, 7 Taunt. 47. *Keys v. Tavernier*, 1 Chit. 291); or may show cause against a rule. *Lovegrove v. Daymond*, 4 Taunt. 69. And any step taken by the new attorney before the order is an irregularity only. *Farley v. Hebbes*, 3 Dowl. 538. *Hill v. Mills*, 2 id. 696. *Doe v. Bransom*, 6 id. 490. Where the attorney dies, the authority lapses, and no order to change the attorney is necessary; but if the new attorney proceed without giving notice of the fact to the opposite party (*Ryland v. Noakes*, 1 Taunt. 342. *Ashley v. Brown*, 15 Jur. 399), the latter may treat the client as suing or defending in person. *Collins v. Arnold*, 1 Bail C. C. 217. No affidavit, it seems, is necessary to show that an attorney obtaining a rule in a cause is not the attorney on the record. *Pym v. Grazebrook*, 3 Man. & G. 863.

[1] The general principle which applies to other cases of agency is applicable to the contracts of an attorney acting as such, namely, that where a party is professedly acting for another the principal is bound, and not the agent; for an attorney is the agent of his client, and is acting for him. There is, therefore, no implied contract by the attorney to pay the witnesses subpœnaed, or requested by the attorney to attend at the trial, for the attorney is known merely as the agent, and does not bind himself, unless he offer to do so by express words. *Robins v. Bridge*, 3 Mee. & W. 114. *Hartop v. Jukes*, 2 M. & S. 438. It makes no difference that the witness attends without a subpœna, or that, to make his attendance useful, he previously makes a survey, or prepares plans; the client, and not the attorney, will, *primâ facie*, be liable. *Lee v. Everest*, 2 H. & N. 285. Neither is the attorney liable for refreshments supplied to witnesses at the assize town, unless he has expressly authorised the supply, or has so conducted himself as to warrant the inference that credit was given to him. *Fendall v. Nokes*, 7 Scott, 647.

The attorney, however, is liable for those charges which he is bound to pay, and for which he makes a claim against his client. If, therefore, he employ a stationer to do anything for which he makes a charge, he is liable. *Robins v. Bridge*, 3 Mee. & W. 114. *Ex-parte Hartop*, 12 Ves. 353: *per Lord Eldon*.

Further, the attorney, and not the client, is liable for the fees of the officers of the court, for these are ready-money transactions for which the person engaged in the business of the court is liable; and it cannot be presumed that the client would authorise him to pledge his credit where no credit is given. *Robins v. Bridge*, 3 Mee. & W. 104. *Ex-parte Griffiths*, 2 Rose, 342. See *Becke v. Cattell*, 3 Man. & G. 480.

The attorney is also liable for the fees of the sheriff's *officer* employed by him to execute writs, and in general the client is not liable, there being no privity between him and them (*Walbank v. Quartermaine*, 3 C. B. 94. *Marle v. Mann*, 2 Ex. 608. *Newton v. Chambers*, 1 D. & L. 869); and he is so liable, notwithstanding the bailiff be not specially nominated. *Brewer v. Jones*, 10 Ex. 655. There is, however, no presumptive liability on the part of the attorney to the sheriff for his fees of executing writs, but the client, and not the attorney, is liable for these fees, for the sheriff's right depends on the statute, and not upon contract. *Mayberry v. Mansfield*, 16 L. J. Q. B. 102. *Marle v. Mann*, 2 Ex. 608.

The petitioning creditor, and not his solicitor, is liable to the messenger under a *fiat* in bankruptcy for his charges. *Hartop v. Jukes*, 2 M. & S. 438. *Hart v. White*, Holt's N. P. 376. *Ex-parte Hartop*, 12 Ves. 349.

As to the liability of an attorney to his agent, where one attorney is employed by another to do business for him, the attorney who does the business almost universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done. If the attorney in such a case intends not to be responsible, it becomes his duty to give express notice that the business is to be done on the credit of the client. *Scrace v. Whittington*, 2 B. & C. 11.

With the exceptions above alluded to the client, and not the attorney, is answerable for the charges incurred in the course of a suit. The attorney, however, may, by a formal undertaking to be responsible, make himself answerable for costs; and if he enter into an undertaking to pay costs, he is personally responsible, although he be described as "attorney" in the undertaking. *Iveson v. Connington*, 1 B. & C. 160. *Burrell v. Jones*, 3 B. & A. 47.

Bayley v. Buckland, 1 Ex. 1.

This was a rule calling upon the plaintiffs to show cause why the judgment, and all proceedings subsequent to the writ of summons, should not be set aside, and the sum levied on the defendant's goods, and paid by him into court, should not be repaid to him or his attorney, on the ground that an attorney had appeared for him without authority.

An attorney who has brought or defended an action without authority is personally responsible for the costs occasioned to the person for whom he professed to act.[1]

Rolfe, B. "The rule of law hitherto has generally been considered as stated in an anonymous case in Salkeld, 86, that 'where an attorney takes upon himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him;' but they qualify it in Salkeld, 88, stating that the judgment was regular; 'but if the attorney be not responsible or suspicious, they would set aside the judgment, for, otherwise, the defendant has no remedy, and any one may be undone by that means.' It must be admitted that the reasoning is not very clear by which the court arrived at the conclusion that, by so doing, they did justice to the defendant, for the non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant; and by the hypothesis, the defendant is wholly without blame, and may notwithstanding be ruined. It is true that the plaintiff is equally blameless; but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and possible loss of costs. We are disposed to lay down a different rule, and confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against him. Where, therefore, a defendant has been served with process, and the attorney, without authority, appears for him, we think the court must proceed as if the attorney really had authority; for in that case the defendant, having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence upon the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorised attorney for the defendant, he is not wholly free from the imputation of negligence: the law requires him to give notice to the defendant by serving the writ, and he has not done so; and, upon the same principle upon which we before proceeded, we must set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney, by summary proceedings."

(B) *The Attorney whose Name is indorsed on the Writ may be required by the Defendant to disclose whether the Writ is issued by his Authority; and if without his Authority, Proceedings will be stayed.*

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[1] See *Doe d. Davies v. Eyton*, 3 B. & Adol. 785. *Hoskins v. Phillips*, 16 L. J. Q. B. 339. *Westaway v. Frost*, 17 L. J. Q. B. 286. *Cotterill v. Jones*, 11 C. B. 713.

The fact of a party coming to the knowledge that his name has been used by an attorney without authority, and not taking steps to have his name struck out, is no adoption or ratification of the attorney's retainer. *Hall v. Laver*, 1 Hare, 571. In some cases the court will set aside or stay the proceedings. *Hubbart v. Phillips*, 13 Mee. & W. 703; 2 D. & L. 707. *Hanbridge v. De la Crouée*, 3 C. B. 742; 4 D. & L. 466. But where a defendant has been served with process, and afterwards an attorney appears and proceeds without authority, the court will not set aside or stay proceedings if the attorney is solvent; but if he is insolvent, and there is a defence on the merits, will relieve the defendant on terms. (Id.) So if a defendant has been sued in one action without authority, and is sued in a second, the court will not stay the latter. *Souter v. Watts*, 2 Dowl. 263. *See* also *Mudey v. Newman*, id. 695. *Barber v. Wilkins*, 5 id. 305. If the defendant pay the debt to an attorney suing without authority, and the creditor never receive it, the defendant can be sued again by the latter, though he may have recourse against the attorney. *Robson v. Eaton*, 1 T. R. 62. *Worley v.* ——, 12 Mod. 318. *Dupen v. Keeling*, 4 C. & P. 102.

The attorney whose name is indorsed on the writ may be required by the defendant to declare whether the writ was issued by his authority, and if so to disclose the name, &c. of the plaintiff; and if used without authority, proceedings will be stayed.[1]

15 & 16 Vic. c. 76, s. 7. "Every attorney whose name shall be indorsed on any writ by authority of this act shall, on demand in writing, made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or by his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or a judge shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that such writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge." *See* Abode, vol. i. p. 54.

XI. Authority to Attornies and Solicitors to administer Oaths, and Appointments to take the Acknowledgments of Married Women, to be Registered.

Authority to administer oaths, and appointments to take acknowledgments of married women, must be registered.

23 & 24 Vic. c. 127, s. 30. "Every authority granted after the passing of this act to any attorney to administer the oaths and take declarations and affirmations on matters depending in any of the superior courts of law at Westminster, or in the court of the Duchy Chamber of Lancaster at Westminster, or in any of the courts of the counties palatine of Lancaster and Durham, and every authority granted after the passing of this act to any attorney to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and whether any such authority as aforesaid be to act in England or to act out of England; and every appointment made after the passing of this act of any attorney or solicitor, under sect. 81 of the act 3 & 4 Wm. 4, c. 74, 'For the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance,' to be a perpetual commissioner for taking acknowledgments of married women under that act, shall, before any such authority or appointment is acted upon, be brought to the registrar by the person to whom the same is granted, or some person on his behalf, and the registrar shall, in books to be kept for that purpose, enter the particulars of every such authority or appointment; and for the entry of every such authority or appointment the registrar shall be paid, by or on behalf of the person having such authority and appointment, the sum of 1*s.*; and the registrar shall mark such authority or appointment as having been entered, and with the dates of the entry; and such books shall at all times be open to public inspection during office hours without fee or reward." By the 31st section, provision is made for the registration of existing authorities, the proper officer of each court being thereby required to transmit to the registrars the necessary particulars.

XII. The Qualification for Offices of an Attorney who has previously been a Barrister dates from his Call to the Bar.

The qualification of an attorney who has been a barrister dates from his call.

23 & 24 Vict. c. 127, s. 16. "In every case where, by statutory provision or by custom, the qualification of a solicitor or attorney for holding any office is his having been admitted and enrolled an attorney or solicitor a prescribed period, any person, whether before the passing of this act has been, or hereafter

[1] A step taken in a cause, as a plea pleaded, in the name of an attorney, but without his authority, cannot, it seems, be treated as a nullity. *Hill v. Mills*, 2 Dowl. 696. But where a judgment was entered up by an attorney's clerk, who used the name of a regular attorney without his knowledge or consent, the judgment was held to be irregular, and was set aside accordingly. *Hopwood v. Adams*, 5 Burr. 2660. See *Hawkins v. Edwards*, 4 Moore, 603. In order to punish the individual thus wrongfully using the attorney's name, a special application to the court must be made against him. *Norton v. Curtis*, 3 Dowl. 245. *Reg. v. Burgess*, 8 Ad. & E. 275. *Oppenheim v. Harrison*, 1 Burr. 20.

shall be, called to the degree of utter barrister in England, and who, having been subsequently disbarred, has been admitted and enrolled as an attorney or solicitor, shall, in lieu of such qualification as aforesaid, be qualified to hold any such office on the completion of the prescribed period, to be reckoned from the date of such person being called to the degree of an utter barrister in England."

XIII. The Bill of Costs and its Delivery.

(A) *An Attorney is bound and may be compelled to deliver his Bill of Costs.*

An attorney may be required to deliver his bill;

6 & 7 Vic. c. 73, s. 37, enables the courts or judges, in those cases in which they are authorised to refer to taxation a bill which has been delivered as required by the act, "to make such order for the delivery by an attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor of such bill as aforesaid, and for the delivering up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor by such courts or judges respectively, where any such business had been transacted in the court in which such order was made."[1]

(B) *And he is incapacitated from Suing for his Bill until a Month after its Delivery.*

and it must be delivered one month[2] before action.

6 & 7 Vic. c. 73, s. 37. "No attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last-known place of abode, a bill of such fees, charges, and disbursements; and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of partnership, by any of the partners, either with his own name or with the name and style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter, subscribed in like manner, referring to such bill: Provided that it shall not in any case be necessary, in the first instance, for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left; but it shall be sufficient to prove that a bill of fees, charges, and disbursements, subscribed in the manner aforesaid, or inclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid: but, nevertheless, it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bonâ fide* compliance with this act: Provided also, that it shall be lawful for any judge of the superior courts of law or equity to authorise any attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill

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[1] Independently of the statute, the court has power to require an attorney to deliver his bill to his client (*Clarkson v. Parker*, 7 Dowl. 87), and this power is preserved by the section in the text *supra*. In any case, therefore, in which the court or a judge may, under the statute, refer a bill to taxation, they may, under the statute, require the delivery of a bill. The circumstance that an agreement exists between the attorney and his client for a fixed sum for costs, does not preclude the court or a judge from requiring a delivery of the bill; and they will in general compel it, notwithstanding such an agreement. *Tanner v. Lea*, 5 Scott, N. R. 237.

[2] The month is reckoned exclusively of the day of the delivery of the bill and the commencement of the action. *Blunt v. Heslop*, 8 Ad. & E. 677.

as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England."

(C) *Particularity*[1] *of Bill with respect to Name of Court.*

COOK v. GILLARD, 1 E. & B. 33.

An attorney's bill is not vitiated by an omission of the name of the court in which the business was done; but see cases *contra* in note.[2]

Action for an attorney's bill.

Plea, No signed bill delivered a month before action. The bill related to several transactions, all of which were properly described, except that there were items of small amount in two actions for writs of summons and other proceedings, such as would occur in the superior courts, and there was nothing to indicate in what court these actions were brought. The defendants objected that the bill was therefore invalid.

Lord Campbell, C. J., delivering the judgment of the court, said, "After considering the statute, the change that has been made in the taxation of costs, the reason assigned for the rule, and the late cases upon the subject, we have come to the conclusion that the objection ought not to be sustained. Statute 6 & 7 Vic. c. 73, s. 37, forbids an action until a bill of fees, charges, and disbursements shall have been delivered. No requisites for the bill are particularised; there is no requirement that the court should be specified; and the section further declares that the plaintiff is not bound in the first instance, in proving a compliance with the act, to prove the contents of the bill delivered: but it is sufficient, unless the defendants prove that it is not such a bill as constitutes a *boná fide* compliance with this act. The defendant here does not prove that any further information was practically

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[1] Since the principal purpose of requiring the delivery of the bill of costs to the client is to allow him an opportunity of considering whether he ought to refer it to taxation, and to allow him time for having it taxed, the business in respect of which the different items are charged must be specified with sufficient particularity to enable a professional adviser to give an opinion upon the charges.

Under the statute in force before the 6 & 7 Vic. c. 73, namely, the 2 Geo. 2, c. 23, s. 23, the degree of particularity required was much more stringent than under this act. "It seems to us probable," says *Lord Campbell, C. J.*, in *Cook v. Gillard*, *supra* in text, "that the legislature changed the law relating to attorney's bills from having perceived that a clerical error or an accidental oversight often worked the forfeiture of the remuneration due for many years of professional service, and therefore meant, while it secured the client a right to reasonable information respecting the bill before an action should be brought upon it, at the same time to give to the attorney security that the delivery of a bill intended to give and giving all requisite information, should be a compliance with the act, unless he could say that information which was really wanted has been withheld."

The question has been raised in several cases whether, if a bill contain items, some of which are sufficient and others insufficient, the attorney is entitled to recover in an action on the bill in respect of the sufficient part of it, or whether his entire claim is vitiated. On the one hand it is said, that while the client is entitled to have the whole bill taxed, unless the bill be sufficient in every part it is the same as no bill. On the other hand it is denied that the insertion of items insufficiently stated destroys the whole bill, and it is asserted that the attorney is entitled to recover costs so far as a sufficient bill has been delivered for them. The former view was taken by the Court of Exchequer in *Ivimy v. Marks*, 16 Mee. & W. 843; and in the recent case of *Pigot v. Cadman*, 1 H. & N. 837. The latter view is supported by decisions in the Queen's Bench and in the Common Pleas. *Haigh v. Ousley*, 7 E. & B. 578. *Waller v. Lucy*, 1 Man. & G. 68. *Dun v. Clifford*, R. & M. 280. "To decide," said *Erle, J.*, in *Haigh v. Ousley*, *supra*, "that one bad item vitiates the whole bill, is to affirm that the legislature intended that a fraudulent client might lie in ambush with a technical point till the moment of trial."

[2] There is a direct conflict among the cases as to whether it is necessary that the bill of costs should specify the particular court in which any item of business was done, or whether it is not enough if it appear whether it were done in one of the superior courts at common law or in a court of equity. In *Ivimy v. Marks*, 16 Mee. & W. 843; *Engleheart v. Moore*, 15 id. 543; and *Davies v. Wright*, 13 Q. B. 515, the rule was laid down that to charge for an item in an action without specifying in what court the action is brought, renders the bill bad, the reason assigned being that the client ought

wanted for taxation, or suggest that the name of the court in which the two writs of summons were issued would have been of any use to him; nor does he contend that the act has not in this case been *bonâ fide* complied with, unless the arbitrary rule to be deduced from the cases mentioned, that the name of the court as to every item is indispensable, can be maintained. Now this rule, as applied to the existing statute, appears to have originated in a mistake. It was first introduced by judges applying the provisions of stat. 2 Geo. 2, c. 23, s. 23, and then there was a good reason for it, for the jurisdiction to tax under that statute is given to the court in which the greatest part of the business was done; and it was therefore indispensable for the party and for the taxing officer to be able to assign each item to its appropriate court before the taxation could be entered upon. Moreover, at the time, the scale of charges in the different courts was different, so that the name of the court was also wanted in order to estimate the amount of charges. But under the existing statute, if there is any item in any court of law, jurisdiction is given to all the superior courts indifferently; so that, with respect to jurisdiction, the name of the special court is entirely immaterial; and so, likewise, is it for estimating the amount due, as the scale of charges in all the different courts is now uniform. The judges who instituted the rule in relation to the existing statute adopted it from cases under the former statute, without adverting to the important changes in the law which the legislature had made, and thereby, as we think, contravened the intention of the legislature. If this reasoning is correct, it follows that the rule which so originated has been maintained without any useful purpose."

(D) *Particularity with respect to Name of Cause.*

Anderton v. Boynton, 13 Q. B. 308.

The bill ought to specify or describe the cause with sufficient accuracy to enable the client to take advice as to taxation; if it does so,

This was an action on an attorney's bill for business done in defending a suit against a joint-stock company, and proceedings in *scire facias* on the judgment against shareholders. The cause was described in the bill as being against the company instead of the public officers, and the names of the parties to the *scire facias* brought to trial were not given. It was objected by the defendant in the action for the costs, that this defect was fatal to the bill. But the objection was overruled by the court,—

Lord Denman, C. J., saying, that "the result of the cases appears

to be enabled by the bill to obtain advice about taxation, without the need of further question: the Court of Queen's Bench, have, however, in a case in which these authorities were reviewed, arrived at the conclusion that they proceeded upon the unsupported authority of a case under the old act, and that under the new statute no necessity exists for specifying the particular court, and that the bill is not bad for an omission in this respect. *Cook v. Gillard*, *supra* in text.

This doctrine is supported by other authorities. In *Martindale v. Faulkner*, 2 C. B. 706, a bill was decided to be sufficient which showed by reasonable intendment that the business was done in one of the courts in Chancery, although there was nothing to show which of those courts was intended. In *Anderton v. Boynton*, 13 Q. B. 308, it was held sufficient if the name of the cause and the court can be gathered by intendment from the bill, without being expressly mentioned. In *Keane v. Ward*, 13 id. 515, a bill was held good, although it contained items in an action, and did not indicate in what court that action was brought; and in that case the change of the law in respect of the power to tax, and of the uniformity of charge in the different courts, and also the practical result of the supposed rule, was pointed out. And in *Cozens v. Graham*, 16 Jur. 925, a bill was held valid, although the court in which the business was done was not mentioned or described; it being clear that the defendant, knowing the court, did not want the information, and only made the objection to evade payment of costs. "A judgment," said *Lord Campbell*, in *Cook v. Gillard*, *supra*, "which gives effect to the true meaning of the statute. The defendant, who undertakes to prove that the bill is not a *bonâ fide* compliance with the statute, cannot found an objection on want of information in the bill, if it appear that he is already in possession of the information." Finally, in a recent case, the Court of Queen's Bench held that it was no ground of objection to a bill that it contained items for business which may have been done in the superior courts, or in an inferior common-law court, without its being stated in which it was actually done. *Haigh v. Ousley*, 7 E. & B. 578.

it is no objection that it is not described by its technical name.

to be that the court and the cause must be so specified as to enable the client, with the bill alone, to take advice upon taxation, and in this case enough appears to be stated to effect that purpose. The court is named, and the cause is pointed out by a description more intelligible to the client than the technical name, the parties to the first being probably more known by the name of the bank than of the trustees or public officers; and the technical name is given where the copy of the judgment is mentioned. With respect to the proceedings in *scire facias* against the defendant and others, the technical name of the *scire facias* brought to trial would not facilitate advice as to taxation, and we cannot discern any reason for thinking that the particulars which are given are insufficient for the purpose for which the delivery of a bill is required."

(E) *Particularity with respect to Items.*[1]

(F) *Delivery of the Bill.*[2]

MANT v. SMITH AND OTHERS, 28 L. J. Ex. 234.

A delivery to one of several joint-contractors is sufficient.

The defendants were jointly sued on an attorney's bill as the promoters of a joint-stock company. The bill was headed "The Promoters of the Lancashire

[1] The bill ought to contain an intelligible and explanatory statement of the charges. A mere mistake as to the date at which the business was done will not vitiate the bill. *Williams v. Barber*, 4 Taunt. 805. Even where the bill includes costs, which have been taxed as between party and party, but which the attorney of the unsuccessful party has been unable to get from the other side, it will not do to describe the amount so taxed as a lump sum, for a bill must be delivered with items; if for no other purpose, at least to show that the client is not charged for the same items twice over. *Drew v. Clifford*, 2 C. & P. 69. *Waller v. Lacey*, 1 M. & R. 54. *Pigott v. Cadman*, 1 H. & N. 837. The attorney is concluded by the charge made in the bill; as to business for which the charge is discretionary, he puts his own value upon his own labour, and the master will not increase it on taxation. Neither, it would appear, will the master allow anything for matters with respect to the charge for which blanks are left in the bill. *Eyre v. Shelly*, 8 Mee. & W. 154.

It is scarcely necessary to say that a bill claiming merely a gross sum, which the client has agreed to pay, will not be sufficient, such an agreement not precluding taxation, or binding the client. *Philley v. Hayle*, 8 W. R. 611; 36 L. T. 433.

[2] The 37th section provides that the bill shall be delivered to the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-place, or last-known place of abode. *Gridley v. Austin*, 16 Q. B. 504. *Daubney v. Phipps*, id. 517. It has been held, that if the letter accompanying the bill or in which it is enclosed be addressed to the party to be charged, it is a sufficient compliance with the statute, although the bill itself does not specify the name of the client, for both ought to be read together. *Roberts v. Dalas*, 11 Ex. 741. *Taylor v. Hodgson*, 3 D. & L. 115. A delivery to an agent of the client will be sufficient, if from the circumstances it may be inferred that it reached the client, or if it is proved that it did reach him. Thus, in *Phipps v. Daubney* (2 L., M. & P. 180), where the bill was delivered to the solicitor of a provisional committee, one of whom was sued for costs connected with the business of the projected company, and it was proved that upon a copy of the bill being afterwards shown to the defendant he admitted having seen the original, the delivery was held to be sufficient. So where the bill was delivered to the solicitor of a joint-stock company, and was proved to have reached the secretary, and to have been submitted at a meeting of the directors, the delivery was held sufficient. *Eggington v. Cumberland*, 1 Ex. 271. And in *Edwards v. Lawless* (6 C. B. 329), the delivery of the bill to one of several provisional committeemen who were sued was held sufficient. In these cases the question was left in doubt whether a delivery to the attorney of the client *simpliciter* is a good delivery under the 6 & 7 Vic., as it was held to be under the 2 Geo. 2, c. 23, s. 23. *Vincent v. Slaymaker*, 12 East, 372. In *Re Bush*, 8 Beav. 66. "It is open to the plaintiff," said *Parke, B.*, in *Macgregor v. Keily* (3 Ex. 794), "to select any mode of delivery which the statute authorises. He may deliver the bill to the defendant personally, or, according to the construction put on the other act, he may deliver it to an agent authorised to receive such bill; or he may rely on its being sent by post, or left otherwise at the dwelling-house or last place of abode of the defendant. But having selected his mode, he must prove to the satisfaction of the jury a delivery by himself or his agent, or some one authorised by him." In that case a bill was left with a man-servant at the door of the client's residence; it was held that it afforded presumptive evidence that the bill reached the master.

In an action notice should be given to produce the original bill, and the plaintiff be prepared to prove a copy, or otherwise its contents.

Cotton-Mill Company," and was sent by post to one of the defendants. It was objected on the part of the defendants that there had been no sufficient delivery of the bill.

Per Cur. Where there is a joint liability, a delivery to one of the persons jointly liable is sufficient. There was a sufficient delivery in compliance with the statute.

XIV. The Reference of the Bill to Taxation.

(A) *What Bill is Taxable.*

Allen v. Aldridge, 13 L. J. Ch. 155.

In order to be taxable the bill must be for business connected with the attorney's profession.[1]

The question was, whether the charges of a steward of a manor, who happened to be a solicitor but was not employed as a solicitor, and who acted on the occasion in question only as the steward of the manor, were taxable or not under the act.

Lord Langdale held that the bill was not taxable, as it was not a solicitor's bill. "The act," said his lordship, "does not authorise the taxation of every pecuniary demand or bill which may be made or delivered by a person who is an attorney or solicitor for any species of employment in which he may happen to be engaged. The business may happen to be business no portion of which was transacted in any court of law or equity; but it must, in my opinion, be business connected with the profession of an attorney or solicitor, *i. e.* business in which the attorney or solicitor was employed because he happened to be such, or in which he would not have been employed if the relation of attorney or solicitor and client had not subsisted between him and his client."

(B) *Agreement between Attorney and Client as to Costs does not preclude Reference.*[2]

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[1] To give the court jurisdiction to refer the bill of costs to be taxed, the bill must contain taxable items, that is, some charge in respect of an employment of the attorney or solicitor as such. And if it contain one such item the bill is taxable, whatever may be the character of the other items. As tersely expressed by *Parke, J.*, "one taxable item draws into its vortex all others in the same bill." *Smith v. Taylor*, 7 Bing. 263. Thus, where a bill contained a charge of a fee for advising upon the subject of a suit brought against the defendant, it was held that such charge was of a fee for business done in a court of law, and rendered the bill into which it was introduced subject to taxation. (Id. 259.) But if the attorney waive the only charge of a taxable nature he can make against his client, the bill will not be taxed. *Sparrow v. Johns*, 6 Dowl. 554. And if all the items are unconnected with the attorney's professional character, his claim or bill is not taxable. *Allen v. Aldridge, supra* in text. Thus, where the claim was for a sum of money paid by an attorney at the request of A., being the debt and costs in an action in which the attorney and his partners were attornies for the defendant, who was a creditor of A., it was held that an action to recover the money from A. was not for business done as an attorney, and that it was not necessary to deliver any bill. *Prothero v. Thomas*, 6 Taunt. 195. An attorney's bill may be referred to taxation, although it was not signed or delivered under the stat. 6 & 7 Vic. c. 73. *Young v. Walker*, 16 Mee. & W. 446. In *Re Billing*, 16 L. J. Ex. 265.

[2] An agreement between the attorney and his client for the costs the former should receive does not preclude a reference of the bill to taxation, whether such agreement be for the payment by the client of a lump sum, or of an allowance of so much *per diem*, or for the recompensing the attorney the costs out of pocket only. Thus, where upon the settling of an action it was agreed *between the parties* that the plaintiff's attorney should receive 60*l.* the court required the attorney to deliver his bill of costs. *Tanner v. Lea*, 4 Man. & G. 617. And the court referred an attorney's bill to taxation, notwithstanding an agreement between the attorney and his client that the former should be allowed five guineas a-day, besides his expenses of all journeys. *Drax v. Scroupe*, 1 Dowl. 69; S. C. 2 B. & Adol. 581. And in another case, where the attorney agreed with his client to charge costs out of pocket only, the court referred his bill to taxation. *Re Ransom*, 18 Beav. 220. The master in taxing is not bound to proceed in his allowance upon the basis of the agreement. He must regard all the circumstances, and, exercising his discretion upon them, say what he thinks ought to be allowed. In *Drax v. Scroupe, supra*, *Lord Tenterden* said, that "if it was sworn that the master in taxing the bills considered

(C) *To what Court application to refer the Bill to Taxation must be made.*

6 & 7 Vic. c. 73, s. 37, enacts, that upon the application of the party chargeable[1] by the bill within one month of the delivery of it,[2] "it shall be lawful in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other court of equity,[3] or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity[4] for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court,[5] for the Court of Queen's Bench,

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himself bound by the agreement, he should have thought that he ought to have reviewed his taxation."

[1] By the party chargeable, the client, and probably his personal representatives, is meant. *Re Barber*, 14 Mee. & W. 723. But an outlaw cannot make the application unless he be sued on the bill. In *Re Mander*, 6 Q. B. 867. *Re Ford*, 1 Bail C. C. 88.

[2] If the application for taxation be made by the client within the month, the order is an order of course, a simple order for taxation of the bill; but after the expiration of the month the court will impose such terms as seem necessary to do justice between the parties. *Re Pender*, 2 Phil. 77. However, within the twelve months it is not necessary to show any special circumstances.

[3] If the entire business in respect of which the bill is delivered has been done in a court of equity, the application to refer must be made there. See *Jones v. Byewater*, 1 Dowl. 557. This point was considered in *Slater v. Brooks*, 9 id. 349, in which the defendant pleaded a set-off of costs and charges for business done as a solicitor in a chancery suit. The plaintiff moved for a rule to refer the bills to taxation. It was admitted that they contained no item for business done in any court of law, but was composed entirely of charges for business done in courts of equity. "It was not contended," said *Mr. Justice Coleridge*, "that I could have sent the bill for taxation if no action had been brought, for the case is not within the words of the statute, and it is now settled that the courts have not any general common-law jurisdiction to order the taxation of an attorney's bill; but it was said the existence of the action and the attorney's setting the bill off in the action, which was the same as if he was suing upon it, give the court jurisdiction. I am, however, of a contrary opinion. It appears to me that no business having been done in this court, and the bill containing no taxable item at law, it is the same in principle as if the bill had been wholly for conveyancing or wholly for work done before a committee of the House of Commons, or any other untaxable matter. Where a bill contains even a single item for business done in the courts, it has become the inveterate practice, not very reconcilable with the language of the statute, to refer it for taxation throughout to the officers of our courts, though the residue of the work may have been done in other courts of common law or in Chancery, and our officer then procures the assistance of officers of other courts for the taxation, the whole taxation being, however, to be considered as his. But in the present case there is nothing on which the jurisdiction can attach. I agree that there is no distinction in this respect between suing on the bill and setting it off. In both cases, I apprehend, the remedy is by an application to the court of equity in which the business was done."

[4] The statute requires a bill to be delivered, and gives a power of taxing a bill, not merely for fees, charges, and disbursements (at law or in equity), meaning fees, charges, and disbursements for business done in courts of law and equity, but for fees, charges, and disbursements for any business done by such attorney or solicitor. This does not mean for every description of business which a person, being an attorney or solicitor, does for another, but for such professional business as he is employed to do as an attorney or solicitor; that is, by reason of his character as an attorney or solicitor. *Smith v. Dimes*, 4 Ex. 32. *Allen v. Aldridge*, 5 Beav. 401, *ante*, p. 47. For a reference of bills of this description application must be made to the Lord Chancellor, Master of the Rolls, or one of the Vice-Chancellors.

[5] A *court of law* has no power to refer an attorney's bill to taxation under this statute, unless it contain items for business done in a court of law. *Bush v. Sayer*, 7 Man. & G. 1027. But if in a case not within the statute an attorney submits to an order for the taxation of his bill, and it is made unconditionally, and acted upon accordingly, it would appear that if more than a sixth be taxed off he will be liable to pay the costs of the taxation. *Peters v. Sheehan*, 10 Mee. & W. 213.

Where the bill contains any item or items for business done in any court of common law the application may be made, it would seem, to either of the superior courts, although no part of the business may have been done in that particular court. *See* in *Re Barber*, 3 D. & L. 244. And if all the business has been done in an inferior court, it is immaterial to which of the superior courts the application is made. 6 & 7 Vic.

Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham,[1] or any judge of either of them; and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court, and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor[2] whose bill may have been so as aforesaid delivered, sent or left, or upon the application of the parties chargeable by such bill, with such directions and subject to such conditions as the court or judge making such reference shall think proper, and such court or judge may restrain such attorney or solicitor, or the executor, administrator, or the assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: Provided always, that no such reference as aforesaid shall be directed upon any application by the party chargeable upon such bill after a verdict shall have been obtained, or a writ of inquiry executed, in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made; and upon every such reference, if either the attorney or solicitor whose bill shall have been delivered or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill *ex-parte*."

(D) *Reference on Application of Party liable to pay, not being the Party chargeable with the Bill.*

6 & 7 Vic. c. 73, s. 38. "Where any person, not the party chargeable with such bill, within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill, as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon, and the same course pursued, in all respects as if such application was made by the party so charge-

The bill may be referred to taxation on the application of the party liable to pay or who has paid the bill, although he is not the party chargeable with it.[3]

c. 73, s. 42. The application must be made on summons at chambers, and is entitled in the matter of the attorney. In *Re Hair*, 7 Man. & G. 1510. *Gregory v. Duke of Brunswick*, id. 511. *Gellor v. Rider*, 15 C. B. 729. *See* also *Re Johnson*, 19 Jur. 1140.

[1] In *Re Barber*, 14 Mee. & W. 720.

[2] If the client do not within one month after the delivery of the bill apply to have it taxed, the attorney may get it taxed on his own application. But if the client make an application within the month and it is refused, the attorney cannot after it has expired apply, as the court will not allow the matter to be entered into a second time. *Reg. v. Great Western Railway Co.* 5 Q. B. 597. *Joynes v. Collinson*, 13 Mee. & W. 558. *Rialla v. Reg.* 11 Q. B. 789.

[3] By sect. 40, the court or judge may, upon the application of a party other than the party chargeable with the bill, who is liable to pay or who has paid the bill, order the attorney to deliver to him a copy of the bill upon payment of the costs of the copy: Provided that no bill which shall have been previously taxed and settled shall be again referred, unless under special circumstances. A mere volunteer, who spontaneously pays an attorney's bill, for which he is not liable, is not entitled to have it taxed. In *Re Beck & Flower*, 5 Beav. 406. Neither is a person whose liability is only remote, as a person

able with such bill as aforesaid: Provided always, that in case such application is made when under the provisions herein contained a reference is not authorised to be made, except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid, if he was the party making the application."

(E) *An Agency Bill may be referred to Taxation.*

Smith v. Dimes, 4 Ex. 32.

The bill of a town agent against the attorney in the country may be referred to taxation.[1]

In this case the question was raised whether the bill of a town agent against the country attorney was subject to taxation.

Pollock, C. B. "We do not see any reason for holding, that as an attorney in London is clearly employed by an attorney in the country solely because he is an attorney, he may not be bound to deliver his bill for such agency, and liable to have it taxed; such bill is for business done by an attorney in respect of an employment in his professional character as such. The objection that the officer of the court would not know on what scale of allowance the bill ought to be taxed, as it depends on the agreement of the parties, does not appear to us to be of any weight; for in the ordinary relation of attorney and client, an attorney may bargain with his client for less than the established amount of fees and disbursements, and the master must ascertain what the bargain was, and take it into his consideration; and when the bill is for conveyancing and business not done in court, the master or taxing-officer must ascertain the remuneration as well as he can, according to the contract by the parties, express, or implied."

(F) *Reference under Special Circumstances.*

Payment does not preclude the client applying for a reference if the circumstances be special, and the application within twelve months of the payment.[2]

6 & 7 Vic. c. 73, s. 40. "Payment of any such bill as aforesaid shall in no case preclude the court or judge, to whom application shall be made, from referring such bill to taxation, if the special circumstances of the case shall, in the opinion of such court or judge, appear to require the same, upon such conditions and subject to such directions as to such court or judge shall seem right: Provided that application for such reference be made within twelve calendar months after payment."

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liable to be rated in respect of a highway, concerning which charges have been incurred to an attorney payable out of the highway-rates. In *Re Barber*, 14 Mee. & W. 720. But the liability of a mortgagor for costs incurred to the mortgagee is sufficiently intimate to entitle the former to make the application. In *Re Carew*, 14 L. J. Chan. 100. In *Re Bracey*, 8 Beav. 338. And where, upon the settlement of an action, it is agreed that one of the parties should pay the costs on both sides, he is a party chargeable with the bill of his adversary, and, as such, entitled to have it taxed. *Sadler v. Palfreyman*, 3 Nev. & M. 599. The bill will be taxed with reference to the liability of the client, and not of the person at whose instance it is referred. In *Re Tyson*, 9 Beav. 117.

[1] There was some conflict among the cases as to the taxability of a town-agent's bill. *Smith v. Dimes*, *supra*, overruling *Re Gedye*, 2 D. & L. 915, in which it was held that such a bill was not taxable. And, unless the agency bill contain taxable items, it cannot be taxed; for, according to the more recent authorities, the courts of law have no jurisdiction to tax an agent's bill by the common-law authority, even though an action have been brought upon it. *Waymouth v. Knipe*, 3 Bing. N. C. 387. *Cardale v. Bull*, 4 Q. B. 611. And in a case before Mr. Justice Patteson, where an attorney in a cause referred to arbitration, had employed another attorney to attend and conduct the defence before the arbitrator, his lordship refused to refer his bill for such attendance to taxation, saying, that he had mentioned the case to several judges, and they all agreed with him in opinion that such a bill could not be taxed, as it is for business done rather as an advocate than as an attorney. In *Re Simons*, 2 D. & L. 500. *Secus* as to courts of equity. *Jones v. Roberts*, 8 Sim. 397.

[2] Besides this section, the 37th section allows a reference after verdict, or writ of inquiry, or after the expiration of a twelvemonth from the delivery of the bill, "under special circumstances," to be proved to the satisfaction of the court or judge, to whom

(G) *The Order of Reference to Taxation.*[1]

the application for such reference shall be made. *See ante*, p. 49.

"Special circumstances" have been explained to mean "some new matter which has come to the knowledge of the party, who should show that he has used due diligence in applying to the court on learning it." In *Re Whicher*, 16 Mee. & W. 549: *per Parke, B.* Acting upon this principle, the court, where no fact was disclosed of which the party was not fully aware nearly a year before the application to tax was made, refused after so long an acquiescence to interfere. In *Re Whicher*, 16 Mee. & W. 549. After a year's delay in making the application, the simple fact of the bill containing overcharges is not, it would seem, sufficient ground for referring the bill to taxation, unless they are so exorbitant as to be fraudulent. *Re Gedye*, 14 Beav. 64. A still stronger case must be made out to induce the court to refer a bill which has been paid. The *onus probandi* lies on the party who has paid the bill, and afterwards asks for taxation, for, *primâ facie*, the payment of a bill is an admission of its correctness by the party paying it. The special circumstances which are usually successfully relied on are of two kinds; first, where pressure has been exercised, and an immediate payment required by the solicitor at a time when it would be very inconvenient for the party paying the bill that any delay should occur in the completion of the business; and, secondly, error or overcharge in the bill, where the overcharges are so gross as to raise a presumption of fraud, for the mere fact that the bill contains items which would not be allowed on taxation is not sufficient. *Re Neate*, 182. *Re Harding*, 10 Beav. 252. *Re Evans*, 15 L. J. Ch. 115. *Re Stephen*, 2 Phil. 562; 17 L. J. Ch. 219. *Re Harper*, 10 Beav. 284. The rule was thus explained by *Lord Langdale*, in *Re Currie*, 9 Beav. 609:—"A paid bill may be taxed if the special circumstances shall, in the opinion of the court, appear to require it. The special circumstances, as I conceive, such as exist or take place at the time of payment, or such as appear on the face of the bills themselves. Payment may be so extorted as to induce the court to say that the bill containing improper charges, even to a small amount, shall not be protected from taxation, and the bill may contain charges so gross that the insertion of them in the bill is of itself evidence of fraud and oppression, from which the client will be relieved." See *Re Boyle*, 5 De G., M. & G. 540. The circumstance that the bill was paid under protest does not afford a ground for referring the bill to taxation. Of itself it amounts to nothing, unless there are other circumstances which justify a taxation after payment. It is material only as showing that the client was inclined to quarrel with the bill, and would avail himself of every circumstance in the case to enable him afterwards to upset the transaction. *Re Neate*, 10 Beav. 183. Neither is it any ground that the client intimated when he paid that he should tax the bill. *Re Harrison*, 10 id. 59.

In order to constitute payment within the act, so as to preclude taxation without special circumstances, the payment must be either actual payment in money or in that which the parties have agreed to treat as money. The mere giving of a bill or note is not payment within the meaning of the statute, unless it be expressly received as payment. In *Re Harris*, 13 Mee. & W. 3. *Sayer v. Wagstaffe*, 5 Beav. 415. Neither is a retention by a solicitor out of monies in hand of the amount of his bill, unless there has been a settlement of accounts. In *Re Bignold*, 9 id. 269. The twelve months after payment are reckoned in cases where a bill of exchange or promissory note has been given for the amount of the bill, from the date of the payment of the bill or note, and not from that of its delivery, unless the attorney at the time of the receiving the security agreed to receive it as cash, and to take upon himself the risk of its non-payment, or unless from his conduct, or the special circumstances of the case, the fact that the security was so taken must legally be implied. *Re Hawes*, 13 Mee. & W. 3; 1 D. & L. 1078. *Re Peach*, 2 id. 33.

[1] By the ordinary form of the order for taxation, the attorney is required to give credit for all sums received by him, and to refund what, if anything, may appear to have been overpaid. And this latter clause is necessary, and, if omitted, will not afterwards be supplied by the court. *Peace v. Jones*, 8 Dowl. 314. If, moreover, the attorney means to claim interest, he ought to have it made part of the order that the master shall allow interest; for if he omit to do so he cannot afterwards have an assessment of damages for the purpose of recovering interest. *Barrington v. Phillips*, 1 Mee. & W. 48; 4 Dowl. 578. The common order for taxation further restrains the attorney from bringing an action on his bill pending the reference, or stays further proceedings if such action has been already commenced. 1 Broom's Pr. 179. If the attorney's right to recover for any particular bill or class of items is disputed on the ground of negligence, care should be taken to provide by the order that the master may tax that portion of the bill distinct from the rest. Steph. Lush. Pr. 207. After a reference under the common order the court will not direct a distinct taxation of such portion. *Jones v. Roberts*, 2 Dowl. 658.

Form of Judge's Order for Taxation of Attorney's Bill.

In the matter of C. D., Gent., one, &c.

By consent [*or as the case may be*], I do order that Mr. C. D.'s bill of fees, charges, and disbursements, in all causes and matters delivered to Mr. A. B., be referred to the master to be taxed, and that the said Mr. C. D. give credit for all sums of money by

XV. Taxation of the Bill.[1]

(G) *The Master cannot inquire into question of Negligence.*

Heald v. Hall, 2 Dowl. 163.

The master cannot disallow charges on the ground of negligence; but he may on the ground that the proceeding was unnecessary.

An attorney was employed to bring an action on a bill of exchange: the defendant in the action gave a *cognovit* for the payment of the money on a day certain. After that day, and notwithstanding he had been informed that the defendant had duly tendered the money to his client, the attorney signed judgment. The judgment was set aside on the application of the defendant, and the plaintiff's attorney paid to the defendant's attorney the costs of the rule. The attorney brought an action against his client to recover the costs of signing judgment, and the costs paid by him in the former action: the bill was referred

him received from or on account of Mr. A. B.; and that he do refund what (if anything), he may, on such taxation, appear to have been overpaid. And I do further order, that the master do tax the costs of such reference, and certify what shall be found due to or from either party in respect of such bill and demand, and of the costs of such reference, to be paid according to the event of such taxation pursuant to the statute; and that the said Mr. C. D. be restrained from commencing or prosecuting any action or suit touching such demand pending such reference. And I further order, that upon payment by Mr. A. B. of what (if anything) may appear to be due to the said Mr. C. D., the said Mr. C. D. do deliver to the said Mr. A. B., or to his attorney, all deeds, books, papers, and writings in his possession, custody, or power, belonging to the said Mr. A. B.

[*Judge's signature.*]

Dated the day of A. D. 18

[1] One day's notice of taxation must be given to the opposite party. A plaintiff may waive his costs, and proceed to judgment and execution immediately on the expiration of the limited time. In taxing an attorney's bill with a view to ascertain what the client ought to pay, the master allows all such disbursements, costs, and charges which the attorney, by reason of his employment as such, has been put to, and is entitled to make, disallowing prohibited, extravagant, unusual, and unreasonable items, unless the client has desired that they should be incurred, and has been specifically informed by the attorney that they will not be allowed on taxation as between himself and the other party in the suit. *Foy v. Cooper*, 2 Q. B. 397. In *Re Smith*, 2 D. & L. 378. His duty is to moderate the charges of attornies, not to determine the question of negligence; that is a matter for the consideration of a jury, and the master does not possess the necessary powers for entering upon such an inquiry, since he cannot subpœna witnesses or require the production of affidavits. *Matchett v. Parkes*, 9 Mee. & W. 767. He, therefore, cannot disallow any charge on this ground, although it will furnish an answer to an action on the bill. *Hill v. Featherstonehaugh*, 7 Bing. 572. And the court may, after taxation, if satisfied that items claimed in the bill, were occasioned by the *crassa negligentia* of the attorney, order such items to be struck out of the bill; but without prejudice to the right of the attorney to bring an action in respect of them. *Cliffe v. Prosser*, 2 Dowl. 21. See *Jones v. Roberts*, 2 id. 656.

It is difficult to define the distinction between questions of negligence which are beyond the master's jurisdiction, and questions as to the propriety of charges depending on whether the proceeding was useful or necessary, of which he may take cognisance. Perhaps the distinction may be this: if a charge ought never to have been made, because the business ought never to have been done, the master may disallow the charge; but if the business was proper to be done, but was unfruitful and useless only by reason of the alleged negligence of the attorney, that is a question which the master has no power to entertain. Marshall on Costs, 238. Thus it was held in *Matchett v. Parkes*, 9 Mee. & W. 767, that the master could not, on taxation, disallow the attorney's charges on the ground that they had been incurred in respect of indictments which, by the alleged negligence of the attorney, had been wholly useless to the defendant. But in *Morris v. Parkinson*, 3 Dowl. 744, the master was held to have correctly disallowed the costs of an action commenced by the attorney in a wrong form, which he abandoned, and commenced a new action, and that the attorney was liable for the costs of taxation, the bill having been reduced by such disallowance more than a sixth; *Parke, B.*, saying that "the charges were not only improper as against the client, but they were improper as against anybody, as they were occasioned entirely through the fault of the attorney, and no one being liable for them they were, like any other charge, disallowed."

So if counsel has been employed on a writ of trial before the sheriff, in a case where the costs cannot be recovered against the opposite side in any event, it is the duty of the master to inquire whether the client required or assented to the retaining of counsel after being informed that he could not have the costs, and to disallow the costs if he did not assent. *Re Smith*, 2 D. & L. 376.

In *Nicholls v. Williams*, 11 L. J. Q. B. 190; 1 Dowl. N. S. 840; the master, on taxing the costs between attorney and client, disallowed

to taxation, and the master disallowed both. On an application for a review of taxation —

Patterson, J., held that the attorney had a right to have the question as to the costs paid by him tried by a jury; but that the master had a right to disallow the other items. "I do not think," said his lordship, "that the master has a right to inquire generally as to whether the proceedings taken have been beneficial to the client; but in this particular case the tender of the money to the client having been made with the knowledge of the plaintiff before he signed judgment, I think the master might consider the signing of the judgment an unnecessary act, upon which he has a right to adjudicate."

(B) *Nor decide a question of Disputed Retainer.*[1]

(C) *Charges in the Bill are conclusive against the Attorney.*[2]

(D) *Costs of Taxation.*

Costs of taxation are payable by the attorney or the client, according as more or less than one-sixth is taxed off.[4]

6 & 7 Vic. c. 73, s. 37. In case any reference to taxation under this act[3] "shall be made on the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left; then such attorney or solicitor or administrator or assignee of such attorney or

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the whole of certain costs of the day, which had been disallowed to the client upon taxation between party and party, on the ground that as there were some defects in the proceedings the whole was unnecessary, and should not have been incurred. It was objected on a motion to review the taxation, that this was an excess of authority; that on such a taxation the master has nothing to do but to see that the work charged for has been done, and the charges regular; that the undertaking waived all questions of liability as regards the retainer; and as to the propriety of the attorney's conduct or benefit resulting from it to the client, the attorney has the right to have that question submitted to a jury. But these arguments were not allowed to prevail; for, although they were admitted to be to a certain extent true, yet, whether in the course of a case certain steps were necessary or unnecessary to be taken, according to the practice of the court, or whether, according to the direction of the judges, certain expenses are allowed to be incurred, the master might, and alone properly could inquire, and it is the ordinary practice of the master to inquire to that extent, and in the instance then before the court he had not gone beyond that limit.

[1] The function of the master being to moderate the charges of the officer of the court, he cannot under a general reference take upon himself to decide the question of a disputed retainer. *Nelson v. Slack*, 2 M. & Scott, 820. But if by consent he decide upon the question, his decision will be final. In *Re Lowless*, 6 C. B. 123.

[2] The master will not allow anything for items in respect of which blanks have been left in the bill (*Eyre v. Shelly*, 8 Mee. & W. 154; 1 Dowl. N. S. 83); nor will he permit the attorney to claim for business not charged in the bill (Id.); nor will he permit the attorney to claim more in respect of any matter than the sum charged therein. In *Re Walters*, 9 Beav. 299. Even where a second bill had been delivered, in which charges were inserted omitted in the first, and in respect of other matters the charges were increased, the court directed the master that the delivery of the first bill *was conclusive* evidence against an increase of charge on any of the items contained in it, and strong presumptive evidence against any additional items; but if errors or real omissions in the former bill could be proved, they ought to be allowed for. *Loveridge v. Botham*, 1 B. & P. 49. In such a case the court will relieve the attorney against the consequences of mistake by allowing him to deliver a new bill where there have been inadvertent omissions or undercharges. In *Re Walters*, 9 Beav. 299.

[3] In cases where the reference is not made under the statute, the court may, under its general jurisdiction, order the costs of taxation to be paid by one or the other party in its discretion. *Peters v. Shehan*, 1 Dowl. N. S. 943. *See* also *Howard v. Groom*, 4 id. 21. *Gerrard v. Arnold*, 6 id. 944. *Doe d. Goodland v. Franklin*, 2 id. N. S. 975.

[4] Where the order of reference is silent as to the costs of taxation, and it is obtained by the party chargeable, or by his attorney or his personal representative, they abide the result of the taxation, and go to the attorney or the client according to the amount by which the bill is reduced. The above section applies to a case where the application is made pending an action on the bill. In *Re Woollett*, 12 Mee. & W. 504.

solicitor, shall pay such costs; and if such bill, when taxed, shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill making such application, or so attending, shall pay such costs; and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to tax the costs of such reference to be so paid as aforesaid, and to certify what upon such reference shall be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill or demand, and of the costs of such reference, if payable: Provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation: Provided also, that where such reference as aforesaid shall be made when the same is not authorised to be made, except

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And although the order of reference ought to contain a direction that the costs of taxation shall be paid as directed by the statute, if it is silent on the subject the costs of taxation will notwithstanding be so payable. In *Re Shaw*, 20 L. J. Q. B. 280. Where the client reserves to himself a right to dispute liability, either in respect of no retainer or misconduct, if less than a sixth be taxed off, he is, it would appear, liable for the costs of such taxation, notwithstanding such reservation, and whatever may be the result of the question so reserved. *Per Erle, J.*, in *Re Shaw, supra.* But where there has been a compromise between the parties, and they have interposed with an arrangement between themselves, so that the master's adjudication is founded on these arrangements, there should be no costs of taxation. Accordingly, where the master so certified, the court refused to allow the attorney the costs of taxing, although less than a sixth had been struck off. *Laurie v. Bartlett*, 1 D. & L. 731.

As to cases in which the writ may be specially indorsed under the 27th section of the Common-Law Procedure Act, 1852, rule 1 of Reg. Gen. (Pr.) H. T. 1853, specifies the amount which may be indorsed for costs, and empowers the attorney, where he claims more than the sums fixed, to indorse a claim for such costs as shall be allowed on taxation, and provides that " in case the plaintiff shall be found not entitled to more costs than such fixed sums, or in case more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. So if the attorney has indorsed on the writ one of the fixed sums for the costs of judgment, and claims more costs on signing judgment, and on taxation shall be found not entitled to more than such sum, or if more than one-sixth shall be taken off on taxation, the plaintiff's attorney shall in like manner pay the costs of taxation."

A question in some cases arises as to whether, where an entire part of the bill or class of charges is struck out on the ground that they are not chargeable as against the client, the bill should be treated as if it had not contained such branch or class of charges, and the proportion the amount taxed off bears to that which is allowed be computed irrespective of it, or whether it should be regarded as an integral part of the bill, and taken into account as disallowed charges. The distinction which may be traced in the cases appears to be this: If the attorney has made a mistake in charging to one client the costs of a matter which ought to have been charged to another, and the master rejects the charge upon that ground, the residue of the bill ought to be taxed, and the proportion deducted allowed, irrespective of such charge; but if the charge is one which either the party sought to be charged or no one is liable for, then, although it constitutes a distinct branch of the bill, it ought to be treated as part of it, and taken into consideration in computing the proportion disallowed. Thus, where the bill was reduced more than a sixth by the disallowance of a class of charges relating to an action brought in a wrong form, through the negligence of the attorney, and on that account abandoned, it was held that the attorney was liable for the costs of taxation; *Parke, B.*, saying, that " if an attorney puts a disputable item in his bill, he takes the chance whether it will be allowed or not, and must abide by the consequence." *Morris v. Parkinson*, 3 Dowl. 744. But where the reduction below a sixth was occasioned by the introduction into the bill of the costs of defending an action against a third party, under the mistaken belief that the client had undertaken to pay the costs, the court held that the proportion disallowed ought to be found without reckoning those charges which were not objectionable, provided he could have proved that the client was liable to pay them, and the other items not being reduced one-sixth, the attorney was not liable to pay the costs of taxation. *White v. Milner*, 2 H. Black. 357. *Mills v. Revett*, 1 Ad. & E. 856. In such a case the reduction of the bill is not the result of a taxation or scrutiny of the particular items of charge. But in the case of the disallowance for an action improperly brought and abandoned, they were charges not only improper as against the client, but they were improper

under special circumstances as hereinbefore provided, then the said court or judge shall be at liberty, if it shall be thought fit, to give any special directions relating to the costs of such reference."[1]

XVI. Action on the Bill of Costs.

(A) *An Attorney cannot maintain unless admitted and enrolled.*

6 & 7 Vic. c. 73, s. 35. "In case any person shall, in his own name or in the name of any other person, sue out any writ or process, or commence,

Attorney cannot sue for his bill unless admitted and enrolled.[2]

as against any body, as they were occasioned entirely through the fault of the attorney, and no one being liable for them, they were, like any other overcharge, disallowed by the master. *Morris v. Parkinson*, 3 Dowl. 764: *per Parke, B.* For the same reason, where a portion of the bill was disallowed, on the ground that the attorney during the time at which the business to which it referred was done was not an attorney of the court in which it was done, the 7 Wm. 4, and 1 Vic. c. 56, not having then come into operation, and the bill was in consequence of such disallowance reduced by more than a sixth, the court held that the attorney was liable for the costs of taxation. *Newton v. Harland*, 2 Man. & G. 886.

Amongst items in the bill which may be rejected in ascertaining its amount after taxation, with a view to see whether a sixth has been taxed off, are sums received from the client, with a specific direction as to their application, and in which the attorney was merely the medium through which payment was made. Such an item ought not to be introduced into the bill, and the master may therefore treat the bill as if it did not occur. Thus, where the defendant in an action paid the debt and costs to the plaintiff by the hands of his attorney, it was held that the sum was improperly introduced into the attorney's bill, and that the proportion the sum taxed off bore to the amount of the bill as delivered ought to be computed irrespective of it. *Woolison v. Hodgson*, 2 Dowl. 360. But it is to be remarked, that in that case the cause was at an end; and in other cases, charges to meet which money has been paid by the client in the cause of the suit, have been held to be properly introduced. Thus, in *Hurdle v. Shackleton*, 1 Taunt. 536, the plaintiff's attorney inserted in his bill the fees of counsel, although he had received from his client a sum of 65*l.* the day after the briefs were delivered, to be disbursed in fees, and it was held that in calculating the amount of the bill the fees to counsel should nevertheless be included. And where the attorney paid the bill of a proctor for business done in the ecclesiastical courts with reference to the matter in which he was employed, it was held that it might properly be considered a disbursement in the cause, and, as such, inserted in the bill. *Franklin v. Featherstonehaugh*, 1 Ad. & E. 475. See *Mills v. Revett*, id. 856. *Re Beadson*, 9 Beav. 5. The attorney may also insert a bill which has been taxed between party and party, and the amount of which allowed in taxation to his client has been received by him, he giving credit for such amount. *Mills v. Revett*, 1 Ad. & E. 856. Further, if the client's money come generally to the hands of the attorney, without any specific direction as to the mode of applying it, and he uses it for the client's purposes, although the proportions in which he shall use it are not determined by his discretion, such use must constitute a disbursement within the meaning of the act of parliament, and, consequently, be properly introduced into the attorney's bill. *Harrison v. Ward*, 4 Dowl. 39. If, however, the attorney has omitted from his bill a disbursement which he may have introduced, he cannot, after having thus shown that he did not consider the payment a disbursement in the cause, turn it into a disbursement, and claim to have it considered part of the bill, to avoid the operation of the statute as to costs of taxation. *Hays v. Trotter*, 5 B. & Adol. 1106.

If the master should allow items not inserted in the bill, and disallow items contained in the bill, the proportion between the bill as delivered and the sum taxed off will determine who ought to bear the costs of taxation. He ought not to deduct the additional sum allowed from the sum taxed off, the consequence of which might be to reduce the sum disallowed from more than a sixth to less than a sixth of the bill. *Reg. v. Eastwood*, 6 E. & B. 285.

[1] Where a reference is made in a case where it is not authorised except under special circumstances, the court or judge is at liberty to give special directions relative to the costs of such reference. 7 & 8 Vic. c. 73, s. 37, *supra*. If no such direction be given, then the costs abide the event, as in ordinary cases. In *Harbin v. Miles* (9 B. & C. 755), the court, after consideration, laid down that where the attorney has delivered his bill a month before he brings the action, and the client thinks proper to wait until the action be brought, he ought not to have the costs of such taxation made after action brought, although more than a sixth be taken off the bill. And in the subsequent case of *Thomas v. The Mayor of Swansea* (11 Mee. & W. 83), the court held that the costs of taxation, where the reference is after action brought upon the bill, are costs in the cause, the master in such a case being substituted for the jury to ascertain the amount.

[2] The 2d section of 6 & 7 Vic. c. 73, prohibits the acting as an attorney or solicitor

prosecute, or defend any action or suit, or any proceeding in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall be and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly."

(B) *Nor if he is Uncertified.* *See ante*, p. 13.

(C) *And he must Deliver his Bill of Costs a Month before Action.*[1]

LANE v. GLENNY, 7 Ad. & E. 83.

And he cannot sue for his fees unless he deliver his bill a month before action; but the non-delivery must be specially pleaded.[2]

This was an action for work and labour as an attorney. The defendant pleaded the general issue only. At the trial it appeared that the plaintiff had delivered a bill of costs before action, which, however, it was objected, did not comply with the statute. The verdict being entered for the plaintiff, the defendant moved to enter a nonsuit, on the ground that no sufficient bill had been delivered.

Lord Denman, C. J. "It has been decided, and the decision has not been overruled, that the defence arising upon the non-delivery of a proper attorney's bill must be specially pleaded. We need not, therefore, discuss the question whether this was a proper bill."

(D) *Defence of Negligence.*

HILL v. FEATHERSTONE, 7 Bing. 57.

It is a good answer to an action upon the

This was an action by an attorney for the recovery of the amount of his bill

in any court of civil or criminal jurisdiction of any person not duly admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor.

[1] *See* 6 & 7 Vic. c. 73, s. 37, *ante*, p. 53.

[2] *Robinson v. Roland*, 6 Dowl. 271. It is a good plea that no signed bill has been delivered before suit; but the want of delivery of the bill is no ground for staying proceedings in the action. *Harper v. Leach*, Barnes, 123. If the plaintiff claims as well money in respect of matters in no way connected with his character of attorney, he will not be precluded from recovering for them by the circumstance that no bill has been delivered as to another part of his claim, which constitutes a taxable matter. The distinction is this: if it appears by the particulars of demand that all the items are in respect of business done, or money advanced by the plaintiff in his character of attorney, all will be taxable, and the whole bill must be delivered; but if there is any item for business done or money advanced by the plaintiff not in that character (as if the plaintiff was a banker as well as an attorney, and had advanced money to the defendant in his former character only), that not being a taxable item may be sued for, although no bill has been delivered. *Wardle v. Nicholson*, 4 B. & Adol. 469. *Mowbray v. Fleming*, 11 East, 285.

If a bill has been delivered containing an insufficient description as to some of the charges, the authorities conflict as to whether the plaintiff must be non-suited, or whether he is entitled to recover as to those items in the bill, the description of which is sufficient. *See ante*, p. 44 n.

The want of delivery of a bill cannot be supplied by evidence under a count on an account stated, otherwise the slightest admission by the client would defeat the salutary provisions of the statute, and dispense with taxation. *Brooks v. Bockett*, 9 Q. B. 847. But if the defendant in support of a plea of set-off put in evidence an account furnished by him to the plaintiff, in which he is credited with certain items for goods sold, and debited with the costs, he cannot object to the want of delivery of a signed bill, for by so doing he puts in evidence both sides of the account, and the neglect to deliver a bill merely prevents the attorney from recovering the amount by action, but does not bar the debt. *Harrison v. Turner*, 10 Q. B. 482. And it is no defence to an action on a promissory note given by the client for the bill of costs that no signed bill was delivered, although the court might perhaps, in such a case, stay the proceedings in the action until the bill should be taxed. *Jeffreys v. Evans*, 14 Mee. & W. 210. Notice should be given to produce the original bill, so as to let in *secondary* evidence of its contents.

of costs; *Tindal, C. J.*, left the question to the jury, whether the business that had been done was necessary for the purpose of the client, or useless and unnecessary. The jury having found for the defendant, the court discharged a rule for a new trial on the ground of misdirection.

bill that the work has been *wholly* useless by the ignorance, negligence, or inadvertence of the attorney.[1]

Tindal, C. J. "The question was left to the jury in the ordinary way in all actions for work and labour, namely, whether the labour has been of any service to the party charged. I have always thought that if an attorney, through inadvertence or inexperience, for I impute no improper motive to the plaintiff, incurs trouble, which is useless to his client, he cannot make it the subject of remuneration, the meaning of which is, a reward for useful labour. If a surgeon were to make his patient undergo an unnecessary operation, or a course of medicine which plainly could be of no service, he could not make it a subject of charge. If we pass from professions to trades, could a bricklayer, who had placed a wall in such a position as to be liable to fall, charge his employer for such an erection? In order to apportion payment, we must examine how the work was done."

XVII. Lien of Attorney for his Costs.[2]

[1] Although not taxed, yet if the bill of costs has been duly delivered before action, the defendant will not be allowed to question the reasonableness of the items before the jury, because it was his own fault that it was not taxed. *Williams v. Frith*, 1 Dougl. 198. *Anderson v. May*, 2 B. & P. 237.

The defendant, however, in the action on the bill of costs, may show that he is not liable either in respect of the whole or a part of the bill (*Shaw v. Arden*, 9 Bing. 287), on the ground that the proceedings were grossly misconducted, or were in some other way entirely nugatory and useless through the ignorance, negligence, or inadvertence of the plaintiff. *Templer v. M'Lachlan*, 2 N. R. 136. This may be shown under the general issue. *Jones v. Nanney*, 1 Mee. & W. 333. And there is no distinction in this respect between *disbursements* and charges for professional service; neither can be recovered if the service, by reason of negligence, has been productive of no benefit to the client. *Lewis v. Samuel*, 8 Q. B. 685. On this principle, it has been held, that where through inadvertence and carelessness the attorney has brought an action on an erroneous ground he is not entitled to charge for the useless proceedings: as, where a deed under seal, the subject-matter of the action, was in his office, and he laid the action on promises, and afterwards on the discovery of the deed abandoned that action, and issued a new writ in covenant, the court held that he ought not to be allowed the costs of the proceedings in the abortive action in *assumpsit*. *Cliffe v. Prosser*, 2 Dowl. 21. Upon the same principle, where an attorney being instructed to sue the acceptors of a bill drawn, accepted, and indorsed in France, commenced an action in the name of an indorsee in blank, which was afterwards abandoned, and a new action commenced in the names of the special indorsees, they being the proper parties to sue according to the French law, it was held that there was such negligence in omitting to examine the bill previously to issuing the writ as disentitled him to recover his costs. *Long v. Orsi*, 18 C. B. 610. So where he has proceeded in a court which has no jurisdiction to afford the relief required, as where he commenced an action against foreign defendants in the Lord Mayor's Court, in a case where the evidence of the defendants was essential to the plaintiff's case, and was afterwards obliged (that court having no power to issue a commission for the examination of witnesses abroad) to abandon the proceedings, it was held that he ought not to recover against his client his charges for the steps in that abortive action; for if an attorney, with or without express direction from his client, takes out a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery by which the practice of that court is regulated, and to see that it is adequate to carry out the objects of the suit. *Cox v. Leech*, 1 C. B. (N. S.) 617. So where the plaintiff was retained to conduct a prosecution for perjury, which miscarried by reason of the name of the commissioner before whom the alleged perjury was committed being mis-stated in the indictment, and having afterwards sued for his bill, the jury were of opinion that there had been gross negligence, all the charges for the prosecution were disallowed, although they consisted entirely of disbursements. *Lewis v. Samuel*, 8 Q. B. 685.

It has been said, however, that although the jury are at liberty to disallow an entire part of the bill or distinct item, on the ground that the work was wholly useless, yet if an entire item be for work *partly* useful, the jury would be precluded from reducing that item in an action to recover the amount of the bill, and the client must in such a case resort to a cross-action. *Shaw v. Arden*, 9 Bing. 291: *per Alderson, B.* And it would seem, that if the client has made advances in such fruitless litigation he cannot recover the money back. *Lewis v. Samuel*, 8 Q. B. 688.

[2] An attorney or solicitor has a general lien for his costs on the papers of his client

(A) *The Lien extends to his general Claim for Costs.*

In Re Bloomfield, 5 D. & L. 52.

The lien extends to the general claim of the attorney for costs.[1]

The question was whether the client was entitled to receive back the papers in a particular suit upon satisfying his attorney's bill in that suit, notwithstanding charges in respect of other business were unsatisfied.

Wightman, J. "The question really simply is, whether this court will deprive an attorney of his lien over the papers of his client by substituting some other security in its place. I confess it seems to me this cannot be done. It is said the court will act differently in a case of lien between attorney and client, than between ordinary parties. The attorney, it is said, received the papers in

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in his hands. This lien differs from that which is ordinarily acquired by the expenditure of labour on the property of another, in this respect, that the attorney's lien extends to all the papers of the client in his hands at the time it is asserted, whether they relate to the business in respect of which the costs are claimed, or other business done as an attorney. Thus, if a deed is delivered to a person having a right to dispose of it to another, that he may do anything upon it by the general law of the land, he has a lien upon it, whether he is an attorney or not; if it were another than that on which the operation is to be performed, it would be necessary for him to be an attorney to have the benefit of the custom, and to enable him to retain other papers than those on which the work is to be done. *Hollis v. Claridge*, 4 Taunt. 806.

A valuable printed book, the property of the client, delivered to the attorney for the purpose of being submitted to witnesses at the trial, has been held to be a matter upon which the attorney's lien might attach. *Treswell v. King*, 15 Sim. 191.

The lien of the attorney attaches only to documents which have come into his possession by reason of his employment as attorney. Thus, if a document of his client comes into his hands, not as his solicitor but as the mortgagee of part of his estate, he does not acquire any general lien upon it for his costs. *Polly v. Wathen*, 7 Hare, 351. So an attorney, town-clerk to a corporation, and also their attorney, has a lien on papers of the corporation for costs due to him by reason of his employment as attorney, provided such papers came into his hands in the course of that employment; but he can claim no lien on documents in his custody as town-clerk. *Rex v. Williams*, 2 H. & W. 275. It has been held that a lease of the client, given up to the attorney by an execution-creditor upon payment of the debt by the attorney with the client's money, was subject to his general lien, since the lease was acquired by him in his professional business. For it was incident to his duty to do that for his client which the client, if well advised, would have done for himself. It became his duty, therefore, in discharging the debt, to receive back the lease which was pledged as a security for the debt; on the receipt of it for his client, under these circumstances, it became not only the subject of particular lien, but also as one of the papers of his client, subject to the general lien. *Stevenson v. Blakelock*, 1 M. & S. 535. Lastly, in order that the lien may attach, the document must come into the hands of the attorney who did the business. Therefore, if an attorney has an unsettled bill for costs at the time he enters into partnership with another, he acquires no lien on papers given to the new firm in respect of such old business. In *Re Forshaw*, 16 Sim. 121.

An attorney, however, has the same lien against the assignees under the client's bankruptcy which he had against the client. He is, therefore, entitled to a lien on papers in his hands at the time of the bankruptcy, and that not only for the costs of business previously done, but also for the costs of an action brought against the bankrupt subsequently to the issuing of the commission to recover the amount of his bill. *Lambert v. Buckmaster*, 2 B. & C. 616.

[1] When the lien has attached upon any document of the client, it applies not only to the costs of the suit in reference to which it came into his possession, but to the entire claim of the attorney for costs, whether due at the time it came into his hands, or which have subsequently arisen while the document was in his custody. "If," said *Lord Eldon*, "in the general course of dealing, the client from time to time hands papers to his attorney, and does not get them again when the occasion which required them is at an end, the conclusion is, that they are left with the attorney upon the general account. If the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement, otherwise they are subject to the general lien which the attorney has upon all papers in his hands." If, therefore, the papers came into his hands in the character of attorney or solicitor for the purpose of business, though they did not come into his hands in the particular cause in which he makes his demand of costs, he has his lien. The lien being once established, the attorney trusts to it; and in the faith of it makes larger advances to his client in other causes. *Ex-parte Nisbit*, 2 Sch. & Lefroy, 278.

his official capacity; but one of the main incidents to his so receiving them, it must be borne in mind, is, that he may detain them till his costs are paid."

(B) *But is subject to Existing Rights of Third Parties.*

Pelly v. Watkins, 7 Hare, 361.

The lien of an attorney on his client's papers is subject to the existing rights of third parties.[1]

In this case there was a contest as to priority between mortgagees and the attorney of the mortgagor, who claimed a lien on the title-deeds.

Vice-Chancellor Wigram. "The law simply enables the solicitor to work out satisfaction of his claim against his own client by the inconvenience to which he can subject the latter by detaining his deeds; upon this the conclusion is founded that the right of the solicitor is good only against his own client. His client may give the solicitor a lien upon the deeds to the extent of his own interest in them, but not so as to affect the rights of third parties. This reasoning applies as strongly to the case of an equitable interest in the estate as to a legal interest."

Blunden v. Desart, 2 D. & W. 405.

And if a judgment binding the lands is obtained against the client while the title-deeds are in the hands of the attorney, his lien for costs subsequently incurred will be subject to the superior claim of the judgment-creditor.[2]

A judgment was obtained against the client subsequently to the deposit of his deeds with his solicitor. Costs had become due for professional services, both before and after the date of the entry of the judgment.

Lord St. Leonard's held that the lien of the solicitor could not prevail against the judgment-creditor for any portion of the costs which became due *after* the date of the rendition of the judgment, saying, "This right is to withhold the deeds, to lock them up in his box, to put the key in his pocket, until his client satisfies the amount of his demand. But if there be a superior claim, while he may say he will lock the box as against his client, he cannot do so as against the *prior* incumbrancer. He must open his box and take the deeds out; and then, is not the benefit of the lien gone? Let us suppose this to be the dealing between the solicitor and his client: the client deposits his title-deeds

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[1] The general lien of an attorney attaching to the papers of his client in his hands, being subject to the rights of third parties, it follows, that if other parties have a joint-interest with the client in papers in the hands of the attorney, the lien enures only to the extent to which the client is interested. Further, an attorney has not any lien on the *private* papers of a partner for business done for the *firm*, because the lien does not extend beyond the property of the person employing the attorney. *Turner v. Deane*, 3 Ex. 836.

An attorney acquires no lien on the deed of a third party, which has been handed to him by his client in respect of the business of his client. Thus, if the client, having been requested by one to advance him money on mortgage security, gives the deeds to his attorney with a view to advise him whether he should accept the security, the attorney, in case the negotiation goes off, cannot claim any lien on the deeds against the proposed mortgagor. *Pratt v. Vizard*, 5 B. & Adol. 808. And if the client possess the deeds, subject to an incumbrance, the attorney must take them subject to the same liabilities. It follows that, as a mortgagee is entitled to the possession of the title-deeds of the mortgaged estate, the mortgagor cannot, by depositing the deeds with his solicitor, with a view of creating a lien, thereby defeat the right of the mortgagee. *Smith v. Chichester*, 2 D. & W. 393. Neither can the mortgagee, having the title-deeds in his possession, by handing them over to his attorney, create a lien as against the mortgagor. Thus it has been held that the attorney of the mortgagee, who received the title-deeds from the mortgagee, had no right to retain them against the mortgagor after he had paid the principal and interest, and received a re-conveyance of the land, under claim of a lien for his bill against the mortgagee for the costs of this transaction. *Wakefield v. Newbon*, 6 Q. B. 276. For it is the known practice that a mortgagee cannot, by handing over deeds to his attorney, create a new lien against the mortgagor in respect of a debt of his own. *Ogle v. Story*, 4 B. & Adol. 735. *Lawson v. Dickenson*, 8 Mod. 307. And a party who has no interest in the papers, nor any authority from the true owner to hand them to the attorney, cannot, by so doing, give the attorney a lien against the true owner, even although he should expend labour upon them. *Hollis v. Claridge*, 4 Taunt. 807.

[2] If, in order to obtain possession of the deeds from the attorney of the mortgagee, the mortgagor, after having received a re-conveyance of the mortgaged estate, is under

with his solicitor, and the latter has his lien upon them for all the costs due to him; but then the client divests himself of his ownership over the estate by a conveyance in fee, while the purchaser, for some reason or other, neglects to procure the title-deeds, but leaves them in the solicitor's hands. There is no fraud. What, then, are the rights of the parties? I apprehend the true state of the law, upon examination, will be found to be this; that where there is a transfer of right or legal charge upon any property, that charge will rank according to its priority, and to that extent the lien will not prevail."

(C) *The Set-off of Damages or Costs in different Actions subject to Lien.*

The set-off of damages or costs between the parties to a suit is subject to the attorney's lien.[1]

Reg. Gen[l] (Pr.) H. T. 1853, r. 63. "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: Provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted."

(D) *Lien on Judgment.*

Wilkins v. Carmichael, Dougl. 104.

An attorney has a claim to the equitable interference of the court to have the judgment held as a security for his debt.[2]

"*Baldwin* had instanced the case of attornies who cannot be compelled to deliver up their deeds and papers until they are paid, upon which *Lord Mansfield* said that the practice in that respect was not very ancient, but that it was established on general principles of justice, and that courts, both of law and equity, have now carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him till his bill is paid."

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the necessity of satisfying a lien claimed by the attorney in respect of costs due from the mortgagee, the amount may be recovered in an action for money had and received. *Wakefield v. Newbon*, 6 Q. B. 276. And it is a general rule, that a refusal to deliver up deeds without the performance of a condition which the attorney has no right to impose amounts to a conversion, and will support an action of trover. *Davies v. Vernon*, id. 451.

[1] The above rule preserves the lien only in cases where the set-off is of costs in an action different from that in respect of which the lien is claimed. It allows the set-off on taxation of interlocutory costs against final, without consideration of the attorney's lien. *Holliday v. Lawes*, 5 Dowl. 636. "Interlocutory costs" have been defined to be all the costs, the right to which has accrued to either party before the final conclusion of the last stage of the suit; that is, before the ultimate judgment of the court upon the whole record. *Scott v. De Richebourg*, 11 C. B. 447. (*See* 15 & 16 Vic. c. 75, s. 145.) Accordingly, issues of fact found for the plaintiff, and issues of law in the same suit found for the defendant, may be set off against each other without regard to the attorney's lien. Id. 11 C. B. 447. So if the plaintiff discontinue after he has obtained judgment on demurrer, the costs of the demurrer may be set off against the costs of the discontinuance, unless the defendant insist on having the judgment of discontinuance entered on the record with a view to bring error on the judgment on demurrer, in which case the taxation would be separate. *Mayor of Macclesfield v. Gee*, 13 Mee. & W. 470. And where the defendant was entitled to the costs of a rule for judgment as in case of a nonsuit, which had been discharged on the plaintiff's giving a peremptory undertaking to try, and the plaintiff had the verdict upon the trial, the costs of the rule were held to be properly set off against the costs in the cause. *Paxton v. Wyllie*, 10 L. J. C. P. 292.

[2] See *Ex-parte Nisbit*, 2 Sch. & Lefroy, 278. The attorney, however, is not the *dominus litis*, so as to marshal the proceedings on the judgment or the execution as he may think fit. He cannot, therefore, carry a writ of execution into effect against the instructions of his client with a view to obtain his costs, even though the parties should collude to deprive him of his lien. *Barker v. St. Quintin*, 12 Mee. & W. 451. Neither has he authority, by virtue of his lien on the judgment, to prevent the discharge of a defendant taken in execution. *Camp v. Pote*, 7 D. & L. 289. But where the attorney for the plaintiff not only had a lien on the judgment for the costs of the cause, but had advanced money to the plaintiff, and the plaintiff had authorised him to pay himself out of the money recovered in the action. *Coleridge, J.*, refused to discharge a defendant in custody under the judgment after the death of the plaintiff. *Cox v. Pritchard*, 20 L. J. Q. B. 353. And his lien on the proceeds, when recovered, does not enable him to require the defendant to pay the money to him, and not to his client. *Lloyd v. Mansell*, 22 L. J. Q. B. 110.

(E) *Lien of Town Agent.*

Ex-parte Steele, 16 Ves. 164.

A town agent has a lien as against the solicitor in the country to the extent of his entire bill.[1]

Per Lord Eldon. "The agent in town has a right to intervene with his claim of lien, not against the client directly, but as against the solicitor employed by him, giving to the agent a right in equity to the money due before the papers are taken from him; and therefore, that money shall be paid to him, *to the extent of his lien against the solicitor.*"

(F) *How the Lien may be determined.*[2]

Stevenson v. Blakelock, 1 M. & S. 535.

The attorney is entitled to claim his lien

Trover for an indenture of lease. The defendant relied upon his lien as an attorney; but it was said on the other side that the lien was gone, by the receipt by the defendant of bills of exchange for his costs. The acceptances were dishonoured before the commencement of the action.

Further, the parties are at liberty to settle the action without consulting the attorney; but if they *collude* to deprive him of his lien by a *fraudulent* settlement made behind his back, the court will not recognise such settlement, and will not allow the release to be set up as a defence in the action. *Wright v. Burrows*, 3 C. B. 344. *Francis v. Webb*, 7 id. 731. *Jones v. Bonner*, 5 D. & L. 718. *Moore v. Angell*, 11 Jur. 455. *Swaine v. Senate*, 2 N. R. 91. *Nelson v. Wilson*, 6 Bing. 568.

The attorney's lien attaches upon money received by way of compromise, though the verdict and judgment be against his client. *Davies v. Lowndestin*, 3 C. B. 823; but see *Shelton v. London and North-Western Railway Co.* 15 id. 40. But the lien on the money does not extend beyond the amount in which the client is indebted to him. *Miller v. Atlee*, 3 Ex. 799. However, if money recovered by an executor is paid into the hands of the attorney employed by him, he may claim out of it the amount of his bill of costs for business done for the testator in his lifetime, as well as of that due to him on account of business transacted for the executor subsequent to the testator's decease. *Bishop v. Huggins*, Barnes, 38.

The attorney is entitled to assert his lien on the fruits of a judgment; notwithstanding six years may have elapsed from the time at which the lien attached, since the Statute of Limitations, although it bars the remedy, does not extinguish the debt. *Higgins v. Scott*, 2 B. & Adol. 413.

If, upon a change of attornies under a rule of court, the new attorney undertakes to hold the record and papers in the cause, subject to the lien of the former attorney, he may, upon the cause being brought to a successful termination, compel his successor to proceed with the taxation, issue execution, and pay him the amount of his lien out of the proceeds, subject only to the costs incurred in such taxation. *Newton v. Harland*, 4 Scott, N. R. 769.

[1] *Ward v. Hepple*, 15 Ves. 297. *Taunton v. Goforth*, 6 D. & R. 384, *contra*. *Dicas v. Stockley*, 7 C. & P. 589. In *Bray v. Hine*, 6 Price, 203 (*see* 1 Bing. 20; 2 D. & R. 6), a question was raised as to the extent of the town agents' lien in a case where the attorney had become bankrupt, the town agents having a claim against him in respect of business beyond that to which the papers in their hands related. The court expressed an opinion that, as between them, the town agents had a lien for all that was due from him to them; and that he could not have compelled them to give up the papers without first paying them the whole which he owed them; and they held that, in equity, the town agents stood in the solicitor's place as against the client, to the extent of the solicitor's demand against him on account of business done in the cause, and were entitled to assert a lien to that extent against the client.

But as against the client, the town agent's lien is co-extensive only with the amount of his agency-bill in the cause to which the papers relate. *Ward v. Hepple*, 15 Ves. 296 a. *Moody v. Spencer*, 2 D. & R. 6. It is confined to this amount, notwithstanding the agent may have a large bill against the attorney in respect of other agency business, and the attorney's bill against the client is larger than the agency charges in that cause, and still remains unpaid. *White v. Royal Exchange Assurance Co.* 1 Bing. 20. And if the client has paid his attorney's bill he is entitled to have the papers, notwithstanding they may be in the hands of the agent, who claims a lien on them for his unsatisfied agency charges, and that circumstance will afford no answer to an action of trover against the attorney. *Anderson v. Passman*, 7 C. & P. 193.

[2] The lien of an attorney prevails until the satisfaction of his entire bill, and is not determined by payment of his charges in the particular business to which the papers relate, if he has other claims as an attorney. *See ante*, p. 58. Neither is the lien determined by the bankruptcy of the client, nor by the expiration of six years from the accrual of the debt (*Higgins v. Scott*, 2 B. & Adol. 413); but if he proves his debt under a commission in bankruptcy, and acts under it, the lien will be gone. *Ex-parte Solomon*, 1 Glyn & J. 25.

after the dishonour of a bill of exchange given as a security by his client.[1]

Lord Ellenborough, C. J. "I take the general rule of the law to be, that where there is an express antecedent contract between the parties a lien, which grows out of an implied contract, does not arise. But in the absence of any express contract, there may be a lien and a right of action on an implied contract. In this case the attorney had a right of action on a *quantum meruit* and a lien, which was not affected by his forbearing to sue. The right of suit and right of lien are distinct rights, both arising out of implied contracts, and both subsisting at the same time. It is unnecessary to canvass the doctrine in *Couell v. Simpson*, 16 Ves. 275, inasmuch as there is a material distinction between that case and the present, for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case the bills have been refused payment. Assuming, then, the position of the Lord Chancellor to be correct, here there is the further circumstance of the bills being dishonoured, which places the defendant in his original position as to lien."

ATTORNEY-GENERAL.[2] See *Certiorari*; Information; Jury; *Nolle Prosequi.*

(A) *His Precedence.*[3]

(B) *His Rights and Duties.*[4]

ATTORNEY, Warrant of. *See* Warrant of Attorney.

[1] The taking of security for the debt from his client is not, in general, so inconsistent with the lien as to raise a presumption that the intention of the parties was that it should be given up. Where bills are given by the client, the remedy by action is suspended during their currency, and it has also been said that the lien is likewise suspended; but if the bills are dishonoured the lien revives, provided the attorney still retains the papers. The suspension of the lien, however, may be doubted, since from its very nature it would appear to be aright incapable of suspension, as that implies the title of the client to take the papers, and having taken them, the lien would be gone for ever. Perhaps it would be more correct to say, that the lien is not affected by the giving of bills or promissory notes by the client until the debt is satisfied by their payment. This doctrine of the revivor of the lien arose out of a decision of *Lord Eldon* in *Cowell v. Simpson* (16 Ves. 275), in which he held that the giving of bills by the client to his attorney for his costs, which were payable with interest three years after date, was so inconsistent with the lien that it must be inferred he had given it up; as the proposition that the lien could exist after such a special contract necessarily involved a contradiction to that contract. "Unless," said his lordship, "from the fact that he has taken this security, you are to imply that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary that he is to deliver them up, and rely on the other contract." But it was subsequently held, in the case in the text of *Stevenson v. Blakelock*, and also *Davies v. Lowndestin*, 3 C. B. 822, that where the bills had been dishonoured the attorney was entitled to assert his lien.

[2] He is appointed by letters patent. He is the only legal representative of the Crown in the courts, and his duties are to exhibit informations to prosecute for the Crown in criminal matters, to conduct proceedings in the Exchequer in revenue causes, and generally to appear and act in all legal proceedings, and in all courts, where the interests of the Crown are in question. 3 Bl. Com. 27; 4 Burr. 2570. The title of "attorney-general" was first mentioned in England in the eleventh year of Edw. 4. 4 Reeve's *Hist. Eng. Law*, 122.

[3] By the king's mandate, 14th Dec. 1814, the attorney and solicitor-general are to have place and audience before the king's premier serjeant. *See* 6 Taunt. 424. Previously they took rank after him, and also after the king's ancient serjeant. Before the Court of Common Pleas was opened to the whole bar, the attorney-general, although not a serjeant, had a right of audience in a cause in which the Crown was concerned (*Paddock v. Forester*, 1 Man. & G. 583; 8 Dowl. P. C. 834), and in the Exchequer pre-audience over the postman and tubman. *R. v. Bishop of Exeter*, 7 Mee. & W. 189.

The English attorney-general, by an order of the House of Lords, has pre-audience over the lord-advocate, and the English solicitor-general over the Scotch solicitor-general. The dean of faculty's right to pre-audience is uncertain, nor does it seem to be settled which of the law officers of Ireland and Scotland respectively would be entitled to pre-audience.

[4] On the trial of public prosecutions, whether for felony or misdemeanour, or proceedings under the revenue laws, instituted by the Crown, the law officers of the Crown, and those who represent them, are in strictness entitled to reply, although no evidence is adduced on the part of the defendant. *Resolutions of the Judges*, 7 C. & P. 676. *R. v. Horne*, 20. How, *St. Tr.* 664. *R. v.*

ATTORNMENT.[1] *See* Distress; Landlord and Tenant.

AUCTION, Sale by.[2] *See* also Auctioneer, p. 65; Abstract of Title, vol. i. p. 63; Horses; Vendor and Purchaser; Warranty.

(A) *Particulars of Sale and Effect of Misrepresentation therein.*[3]

Marsden, M. & M. 439. *See* Best on the Right to Begin. Id. on Principles of Evidence, 763, 3d ed.

But where a question affecting the Crown is discussed on motion, the attorney-general, having shown cause against the rule, has no right to reply. *Reg. v. Lords of Treasury*, 16 Q. B. 357; 20 L. J. Q. B. 305; 15 Jur. 767. In peerage cases, he attends as assistant to the committee of privileges. 1 H. L. C. 511 n. The courts exercise over the attorney-general the same authority which they exercise over any other suitor. *Reg. v. Prosser*, 11 Beav. 306; 18 L. J. Ch. 35; Hence, where an information filed by him was dismissed, it was dismissed with costs (*Attorney-General v. Hanmer*, 27 L. J. Ch. 837); though it appears that this could not be done before the 18 & 19 Vic. c. 90, giving a successful defendant against the Crown his costs. Id. 5 Jur. N. S. 693.

Where there has been an excess of the statutory powers granted to a company, but no injury has been occasioned to any individual, and there is none which is imminent or of irreparable consequence, the attorney-general alone can obtain an injunction to restrain the exorbitance. *Ware v. Regent's Canal Co.* 3 De G. & J. 212. The right of the attorney-general to sue a railway company for breach of their powers is not taken away by the provisions of the 7 & 8 Vic. c. 85. *Attorney-General v. Great Northern Railway Co.* 28 L. J. Ch. 794, V. C. K.

Where, upon an indictment in a colonial court, proceeding by course of common law, a party has been convicted of a criminal offence, and is in execution of the sentence, the Court of Queen's Bench will not grant a writ of error to bring up the record of the conviction unless the attorney-general has issued his *fiat* for a writ of error. *Lees Ex-parte*, 1 Chit. *Crim. Law*, 828.

And the court will not, without such *fiat*, direct a *certiorari* to issue, for the purpose of bringing up the record, and bringing a writ of error upon it. Id.

The plaintiff was outlawed pending the suit:—*Held* that it was irregular to make the attorney-general a party in respect of the outlawry, unless a question was raised with regard to its validity or enforcement. *Bromley v. Smith*, 26 Beav. 644.

[1] At the common law, on the grant of a seignory rent, remainder, or reversion, an attornment or consent to the grant was necessary on the part of the tenant of the particular estate in tail for life or for years. But attornment is rendered unnecessary by the stat. 4 & 5 Anne, c. 16, s. 9. This stat. by sect. 10, provides that no tenant shall be prejudiced or damaged by payment of the rent to the grantor, or by breach of any condition for non-payment of rent before notice of the grant shall be given to him by the grantee. And by the 11 Geo. 2, c. 19, s. 11, any attornment which shall be made by tenants without their landlord's consent to strangers claiming title to the estate of their landlords is rendered null and void. Nothing, therefore, is now necessary for the valid conveyance of any rent-service but a grant by deed of the reversion to which such rent is incident. *See* Wms. *Real Pro.* 212; 1 Steph. Com. 448; 3 Jarm. & Byth, by Sweet, 36. 2 Prest. Shep. T. 297; Burton, s. 41; Watk. Conv. 171.

[2] Is within the Statute of Frauds. (*See* that stat.) The sale is not complete till the hammer of the auctioneer is down, and the bidder may retract. *Payne v. Care*, 3 T. R. 148. By the 8 Vic. c. 18, the duty on sales by auction is repealed, and a duty on auctioneers' licenses is substituted.

[3] It is generally provided in conditionsof sale, that any error or misstatement in the particulars shall not vitiate the sale, but that such error shall be made the subject of compensation to the vendor or purchaser, as the case may be. This condition, however, will not extend to any case in which the error was wilful or fraudulent. Thus, where an estate, sold under such a condition, was described as being "about one mile from Horsham," a borough town, and the purchaser brought an action to recover the deposit, the estate being between three and four miles from Horsham, *Lord Ellenborough* said, that he conceived that the above clause in the conditions was meant to guard unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled; and his lordship left it to the jury to say whether this was merely an erroneous misstatement, or misdescription wilfully introduced to make the land appear more valuable. And the plaintiff had a verdict. *Duke of Norfolk v. Wirthy*, 1 Camp. 337. This doctrine has been recognised in subsequent cases. *Robinson v. Musgrove*, 2 M. & Rob. 92.; and see *Leach v. Mullett*, 3 C. & P. 115. So it is held that even an unintentional error will abate the sale, notwithstanding the clause in question, where no calculation can be made as to the amount of compensation which should be allowed or paid to the purchaser. *White v. Cuddon*, in *Dom. Proc.* 8 Clark & Fin. 766, 792. *Sherwood v. Robins*, 3 C. & P. 339. And so when the misdescription, although it does not proceed from fraud, is in a material and substantial point, and so far affects the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser would never have entered into the contract at all, the contract is avoided altogether, and the purchaser is not bound to resort to

(B) *Nature of Contract where one Purchaser purchases several separate Lots.*[1]

(C) *What Title must be shown where Estate sold in one Lot.*[2]

(D) *Employment of Puffers at.*[3]

(E) *Forfeiture of Deposit.*[4]

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his claim for compensation. *Flight v. Booth*, 1 Scott, 190, 202; and see *Dykes v. Blake*, 6 id. 320, 346. *Dobell v. Hutchinson*, 3 Ad. & E. 355. And it would appear to make no difference in such a case, that the misdescription would be obvious on an inspection of the premises. *Dykes v. Blake*, *supra*; but see *Knight v. Wilson*, 1 M. & Rob. 207.

But where the agreement was to sell an unexpired term of eight years, and it appeared that at the date of the agreement the unexpired term was only seven years and seven months, *Lord Ellenborough* said, "The parties cannot be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must, therefore, receive a reasonable construction, and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day, when the rent was payable, and including, therefore, the current half-year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might have had substantially what he agreed to purchase." *Belworth v. Hassell*, 4 Camp. 140.

[1] It seems to have been a *vexata quæstio* whether, when an estate was sold by auction in separate lots, and the same person became the purchaser of several lots, a distinct contract arose as to each, or whether there was but one contract as to the whole; but the better opinion appears to be, at least at law, that a distinct contract is created as to each lot. 1 Sugd. *V. & P.* 68. *Emerson v. Heelis*, 3 Taunt. 38. *Johnson v. Johnson*, 3 B. & P. 169. *James v. Shore*, 1 Stark. 430. *Roots v. Lord Dormer*, 4 B. & Adol. 77. *Lewin v. Guest*, 1 Russ. 330. *Poole v. Shergold*, 2 Bro. C. C. 118. *Sed vide Chambers v. Griffiths*, 1 Esp. 149. *Gibson v. Spunier*, Peake's *Add. Cas.* 49. *Boyce v. Blackwell*, 3 Anst. 657.

[2] If an estate be sold in one lot, either by public auction or by private contract, the vendor cannot enforce the contract at law unless he has a title to the whole estate. 1 Sugd. *V. & P.* 506. *Tomkins v. White*, 3 Smith, 435. A court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award compensation accordingly, but at law a vendee cannot, in an entire contract, recover any part of the purchase-money where he cannot make a title to the whole estate; nor is a purchaser entitled to retain that part, the title to which is good, and to vacate the contract as to the rest. *Johnson v. Johnson*, 3 B. & P. 162, 170. When, however, an estate is sold, either in one lot or in several, and the vendee cannot make a title to one lot or part, which is complicated with and necessary to, the enjoyment of the rest, the purchaser is at liberty, both at law and in equity, to rescind the contract. *Dykes v. Blake*, 6 Scott, 320, 345; 1 Sugd. *V. & P.* 514. *Peers v. Lambert*, 7 Beav. 546.

[3] The private employment by the vendor of puffers at a sale by auction is a fraud upon the purchaser, and will abate the sale. *Howard v. Castle*, 6 T. R. 644. *Bexwell v. Christie*, Cowp. 396. *Blanford v. Preston*, 8 T. R. 93. *Crowder v. Austin*, 3 Bing. 361; S. C. 11 Moore, 283; and S. C. 2 C. & P. 208. *Fuller v. Abrahams*, 6 Moore, 318. *Rex v. Marsh*, 3 Y. & J. 332. It is said, indeed, that in equity the employment by the vendor of one person to bid at a sale in order to protect the property from being sold at an under-value is not fraud, although not notified, but in law it is otherwise (*Per Parke, B.: Thornett v. Harries*, 15 Mee. & W. 367, 372); so that, if a person be employed to bid, even with a view to save the auction-duty, the sale is void, unless it be announced that there is a person bidding for the owner. *Wheeler v. Collier*, M. & M. 126. *Crowder v. Austin*, 3 Bing. 368; S. C. 2 C. & P. 208; *see* also *per Alexander. C. B.* in *Rex v. Marsh*, 3 Y. & J. 332. So if the advertisements or particulars state that the property will be sold without reserve, and there be any interference by the vendor or by those coming in under him to keep up the price; even a court of equity will not enforce the contract against a purchaser. *Per Lord Cottenham, C.: Robinson v. Watt*, 11 Jur. 577, 578. *See* also *Thornett v. Harries*, *supra*. *Middons v. Tanner*, 5 Mod. 37.

And in a recent case it was laid down, that an advertisement of a sale without reserve means, that neither the vendor nor any one on his behalf shall bid, and that the property shall be sold to the highest bidder. *Warlow v. Harrison*, 29 L. J. Q. B. 14; 24 Jur. 66.

And it has been decided, that if a purchaser by unfair conduct deter other persons from bidding at a sale, and cause the goods to be knocked down to himself, he does not acquire any property therein. *Fuller v. Abrahams*, 6 Moore, 318.

[4] One of the conditions of a sale by auction was, "If the purchaser shall fail to comply with the conditions, the deposit shall be actually forfeited to the vendor, who shall be at liberty to re-sell; and any deficiency upon the re-sale, together with the expenses, shall be made good by the defaulter, and on non-payment shall be recoverable as liquidated damages: but any increase of price at the second sale shall belong to the vendor." Default having been

AUCTIONEER.[1] *See* Abstract of Title, vol. i. p. 63; License; Principal and Agent; Sale; Stamp; Statute of Frauds; Vendor and Purchaser.

(A) *Is the Agent of both Parties*, p. 65.

(B) *May Sue the Purchaser in his own Name*, p. 65.

(C) *Is liable to be Sued for the Deposit if the Sale goes off for Defect of Title*, p. 66.

(A) *Is the Agent of both Parties.*[2]

(B) *May Sue for the Purchase-Money.*

ROBINSON v. RUTTER, 24 L. J. Q. B. 250; 3 W. R. 405.

The auctioneer may sue for the price of the goods, and it is no answer that the purchaser paid the money to his principal.[3]

The declaration was for the price of a horse sold and delivered by the plaintiff to the defendant. The defendant pleaded that the plaintiff sold the horse as an auctioneer, agent, and trustee for one W. Kersey, and that the defendant had paid him the price. On demurrer to the plea,—

Lord Campbell, C. J. "The plea is bad. As auctioneer, the plaintiff must be supposed to have had the possession of the horse before and at the time of the sale, to have had a lien upon the horse for the price, and to have had a right of lien on the price when paid for his commission and charges. It must

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made by a purchaser at the auction, and the property re-sold at a reduced price, it was held that the vendor could recover from the defaulter, in addition to the deposit, only so much of the difference between the two prices and the expenses of re-sale as the deposit did not cover. *Ockenden v. Henley*, 27 L. J. Q. B. 361.

[1] He must use reasonable care and skill, and if guilty of gross negligence, so that a sale is nugatory, he cannot recover for his services (*Denew v. Daverell*, 3 Camp. 451); nor can the conditions or descriptions in catalogue be barred by his verbal statements. 2 C. & J. 411; 1 H. Black. 289; 13 Mee. & W. 614.

[2] Though an auctioneer suing in his own name on the contract of sale cannot avail himself of his character of agent for the defendant, yet in other cases he is looked on as the lawfully-authorised agent of both parties (see *Bird v. Boulter*, 4 B. & Adol. 443. *Hinde v. Whitehouse*, 7 East, 558. *Emerson v. Heelis*, 2 Taunt. 38. *Shelton v. Livius*, 2 Tyr. 436; 2 C. & J. 411. *Simon v. Motiros*, Black. 599; 29 L. J. Q. B. 14), the seller communicating his authority by giving him directions to sell, and the buyer, to whom the conditions of sale posted on the auctioneer's box are sufficient notice of the terms of dealing (*Mesnard v. Aldridge*, 3 Esp. 271), by bidding aloud. 28 L. J. Q. B. 18. And if the auctioneer, or the auctioneer's clerk (*Bird v. Boulter, supra. Gosbell v. Archer*, 2 Ad. & E. 506), write down the purchaser's name in the sale-book opposite the lot for which he is the highest bidder, that is a sufficient signature within the Statute of Frauds, and binds the purchaser (*Emerson v. Heelis, supra. Hinde v. Whitehouse, supra. Shelton v. Livius, supra*), who, perhaps may at any time before such entry retract his authority, as he certainly may before the fall of the hammer. *Payne v. Cave*, 3 T. R. 148. But if the signature be on a mere catalogue of the articles, neither connected with nor referring to the conditions of the sale, it will not be a memorandum of a sale on those conditions, unless it can be connected with them by some other written document. *Phillimore v. Barry*, 1 Camp. 513.

Though, *primâ facie*, the auctioneer is the agent of both parties, yet he is not so necessarily and *ex vi termini:* thus, where P. bought goods at an auction, having previously agreed with their owner that he was not to pay cash, but to set off a debt due to himself against the price, he was held to have a right to do so, though the conditions of sale required payment in cash; for the previous agreement between himself and the seller rebutted the presumption of the auctioneer's authority to bind him to those conditions. *Bartlett v. Pennell*, 4 Ad. & E. 792. And when the sale by auction is at an end the auctioneer's agency ceases, and his signature to a contract afterwards entered into will not be sufficient to satisfy the Statute of Frauds. *Mews v. Carr*, 26 L. J. Ex. 39. As to sales without reserve, *see* 29 L. J. Q. B. 14.

[3] See *Coppin v. Craig*, 7 Taunt. 243. *Williams v. Millington*, 1 H. Black. 81. *Coppin v. Walker*, Cowp. 251.

Where by the conditions the only authority given to the auctioneer is to receive the deposit-money, and no agent is named for the purpose of receiving the remainder of the purchase-money, the payment of such *remainder* ought to be made to the *vendor* or his general agent, which the auctioneer is not; at all events, the auctioneer has no authority to receive the purchase-money by a bill of exchange. *Sykes v. Giles*, 5 Mee. & W. 645.

An auctioneer who receives an I O U in lieu of a deposit is entitled to sue upon it. *Cleave v. Moors*, 21 Jur. 48; 5 W. R. 234.

be presumed that the plaintiff had a debt due from him to Kersey in respect of the sale, to be satisfied from the proceeds of the sale. The plea does not allege that this debt was paid, nor show how the plaintiff had no longer a right to sue, nor even that he had notice of payment being made to Kersey. . . . For this purpose the auctioneer seems to be in the same position as a factor who sells goods having advanced money upon them; and to an action for goods sold and delivered by a factor, it surely could be no answer merely to say that the plaintiff sold them as factor, and that the defendant had paid the principal before action brought."

(C) *Is liable to be Sued for the Deposit if the Sale goes off for Defect of Title.*

Burrough v. Skinner, 5 Bur. 2639.

Is liable to be sued for the deposit by the purchaser, if the sale goes off for defect of title, notwithstanding he may have paid over the money to the vendor, if he had previous notice of the objection.[1]

The defendant was an auctioneer, and had in that character sold to the plaintiff an interest in land. The plaintiff had made a deposit in respect of the purchase, but afterwards, upon discovering a *valid* objection to the title, and other circumstances which ought to have been disclosed at the time of the sale, had declined proceeding further with the contract, and brought the present action to recover back from the auctioneer the sum deposited, and of which he had made a previous demand. The jury found a verdict for the plaintiff; and on a motion for a new trial the court were clearly of opinion that the action might be sustained against the auctioneer, the money not appearing to have been paid over to the principal; and they observed, that even if it had been so, yet as the objection appeared to have been made before it either was or ought to have been paid over, he was equally liable, the auctioneer being a mere stakeholder or depositary, who ought in no case to part with a deposit till such time as the sale is finished and completed, and to whom it properly belongs is ascertained. Rule discharged. See *Wray v. Gutteridge*, 3 C. & P. 40. *Spittle v. Lavender*, 5 Moore, 270.

AUDIT of Assignees' Accounts. *See* Bankrupt.

AUDITÂ Querelâ.[2]

[1] Where an estate is sold by auction, if a good title is not made out according to the conditions of sale, an action may be maintained against the vendor or auctioneer for the recovery of the deposit An auctioneer is personally liable on the contract where he does not name his principal. *Hanson v. Roberdean*, Peake's N. P. C. 120. *Franklyn v. Law*, 4 C. B. 644. And where he acted also as attorney for the sellers he was held liable, notwithstanding he had paid over the deposit to the sellers before demand, on the ground that he was not authorised to part with the deposit, when he must, from his employment as attorney for the sellers, have known long before he paid it over that the title was disputable, and consequently that he had paid the money over in his own wrong. *Edwards v. Hodding*, 5 Taunt. 815. Indeed, where an auctioneer who sells an estate by public auction receives the deposit, it is his duty, as the agent of both vendor and purchaser, to retain the deposit until the sale is complete and he knows to whom the money belongs; and if he pays it over to the vendor without authority, and a defect of title be afterwards discovered, the purchaser may recover it from him. *Wray v. Gutteridge*, 1 M. & R. 614; 3 C. & P. 40.

An auctioneer, however, pending the time which elapses between the payment of the deposit and the making of title, is a mere stakeholder, and not liable to interest to the vendor, although the vendor, without the concurrence of the vendee, give the auctioneer notice to invest the money in government securities, and although interest may have been made. *Harrington v. Hoggart*, 1 B. & Adol. 577. See *Curling v. Shuttleworth*, 6 Bing. 124. *Lee v. Mann*, 8 Taunt. 45.

But where the purchaser, upon failure of the vendor to adduce a title, had recovered back the deposit in an action against the auctioneer, it was held that he might recover interest on the deposit in an action against the vendor for not completing his contract, under an averment of special damages. *Farquhar v. Farley*, 7 Taunt. 592. *Camfield v. Gilbert*, 4 Esp. 221. *See* 3 & 4 Wm. 4, c. 42, s. 28, Interest. A buyer failing to complete is only liable for loss on re-sale and expenses. 27 L. J. Q. B. 361.

[2] A writ of *auditâ querelâ* is an equitable defence, which lies for a person who either is in execution or in danger of being so, upon a judgment or recognisance, when he has matter to show that such execution ought not to have issued, or should not

17 & 18 Vic. c. 125 (C. L. P. Act, 1854), s. 84. "Any such matter" (*i.e.* of equitable defence), "which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *auditâ querelâ*."

Matter of equitable defence arising after it could be pleaded may be set up by way of *auditâ querelâ*.

Reg. Gen. (Pr.) H. T. 1853, r. 79. "No writ of *auditâ querelâ* shall be allowed, unless by rule of court or order of a judge."[1]

A rule of court or order of a judge must be obtained.

AUTERFOIS Attaint,[2] Plea of.

AUTERFOIS Acquit.

(A) *When Pleadable*, p. 67.

(B) *Form of Plea*, p. 68.

(C) *Trial of Issue on Plea of*, p. 68.

(*a*) *Certificate of Acquittal sufficient Evidence of Acquittal*, p. 68.

(D) *Entry up of Judgment*, p. 69.

(A) *When Pleadable.*[3]

issue against him. 2 Wms. S. 147. The proceeding is seldom resorted to, being superseded by motion to the court. The writ is addressed in the name of the Crown to the court, and it sets out the record down to judgment, and then proceeds to state the subsequent matter. *See* a Form, 2 Wms. S. 137 n. *Lord Porchester v. Petrie*, 3 Dougl. 261. The defendant then declares in the usual way, and the plaintiff then pleads, and he may plead several matters thereto. *Humphreys v. Knight*, 6 Bing. 572. *Sutton v. Bishop*, 4 Burr. 2287. *Plevin v. Henshall*, 10 Bing. 24. *Barrow v. Pepte*, 1 B. & Adol. 629. *Ouchterlony v. Gibson*, 6 Scott, N. R. 577. *Turner v. Pulman*, 2 Ex. 508.

Costs may be awarded in an *auditâ querelâ*. In a recent case, the court stayed the proceedings until the plaintiff, who was abroad, should give security for costs. *Holmes v. Pemberton*, 28 L. J. Q. B. 172; 7 W. R. 160.

[1] The application must be made on affidavit. See *Dearie v. Ker*, 4 Ex. 82. *Giles v. Hutt*, 1 id. 59. The rule or order must be personally served. *Williams v. Roberts*, 1 L., M. & P. 381.

[2] The plea of *auterfois attaint* is, since the 7 & 8 Geo. 4, c. 28, s. 4, practically at an end. Before that statute, if a man were attainted for treason or felony, whilst the attainder remained in force he could not be indicted for another felony; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for any other offence was considered useless. *See* Attainder, p. 1. And since the statute attainder is no bar, unless for the same offence as that charged in the indictment.

[3] When a man is indicted for an offence and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *auterfois acquit*, and it will be a good bar to the indictment. The true test by which the question, whether such a plea is a sufficient bar in any particular case, is by inquiry whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *R. v. Clark*, 1 B. & B. 473. *See* also *R. v. Emden*, 9 East, 437. *R. v. Sheen*, 2 C. & P. 634.

Thus, an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods, because upon the former indictment the defendant might have been convicted of the larceny. But, if the first indictment were for a burglary with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny (2 Hale, 245. *R. v. Vandercomb*, 2 Leach, 716); because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter (Fost. 392; 2 Hale, 246); because the defendant might be convicted of the manslaughter on the first indictment. On an indictment for robbery, the defendant may be convicted of an assault with intent to rob, and no person so tried is liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried. 14 & 15 Vic. c. 100, s. 11. See *Ex-parte Thompson*, 30 L. J. Ex. 90. *Reg. v. Gould*, 9 C. & P. 364. So, formerly *auterfois acquit* of petit treason was a good bar to another indictment for murder, and *è converso* for the same treason. Fost. 325, 329; 2 Hawk. c. 35, s. 5. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder. Fost. 229; 3 Co. 466. *Holcraft's case*, 2 Hale, 246; 1 Stark. 305. And this rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone, for upon the second indictment he may be convicted of an offence committed by him

(B) *Form of Plea.*[1]

Sufficient if it state that defendant has been lawfully acquitted.

14 & 15 Vic. c. 100, s. 28. "In any plea of *auterfois convict* or *auterfois acquit* it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be), of the said offence charged in the indictment."

(C) *Trial of Issue.*

(*a*) *Certificate of Acquittal is sufficient Evidence of Acquittal.*

Certificate of acquittal is sufficient evidence of acquittal.[2]

14 & 15 Vic. c. 99, s. 13. "Whenever in any proceeding whatever it be necessary to prove the trial and conviction or acquittal of any person

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separately or jointly with others; and the plea avers the identity of the offence charged in both the indictments. *R. v. Dunn*, 1 Mood. C. C. 424. An acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence before any other tribunal. *R. v. Hutchinson*, 1 Leach, 135; Bull. N. P. 245. But in this case the defendant should produce an exemplification of the record of his acquittal, under the public seal of that state or kingdom where he has been tried and acquitted. *Hutchinson's case*, 3 Keb. 785; and see *Beak v. Thyrwhit*, 3 Mod. 194; 1 Show. 6; Bull. N. P. 245. *R. v. Roche*, 1 Leach, 134. Even an erroneous acquittal still unreversed is a sufficient foundation for this plea. 9 Hen. 5, c. 2; 2 Inst. 318, 319; 2 Hale, 247.

But an acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county. *Vaux's case*, 4 Co. 45 a, 466. Com. Dig. Indictment, L. So, an acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanour, and *è converso*. 2 Hawk. c. 35, s. 5. An acquittal on an indictment for larceny is no bar to an indictment for the same offence charged as a false pretence, notwithstanding the proviso in the stat. 7 & 8 Geo. 4, c. 29, s. 53. *Reg. v. Henderson*, 1 Car. & M. 329. An acquittal as accessory is no bar to an indictment as principal, and *è converso*. 2 Hale, 244; Fost. 361; 2 Hawk. c. 35, s. 11. *R. v. Parry*, 7 C. & P. 836. Where, therefore, to an indictment charging the defendant as accessory before the fact to child-murder, he pleaded *auterfois acquit* upon an indictment charging him with having been present, aiding and abetting in the said murder, the judges held that the plea was no bar, and had been properly overruled at the trial. *R. v. Birchenough*, 1 Mood. C. C. 477; 7 C. & P. 575. So, an acquittal, or judgment for the defendant on demurrer (*Reg. v. Richmond*, 1 C. & Kir. 240), upon an insufficient indictment, is no bar to another indictment for the same offence. 4 Co. 45 a. See *R. v. Coogan*, 1 Leach, 448. *R. v. Taylor*, 3 B. & C. 502. An insolvent debtor, who had been indicted for omitting goods out of his schedule, and acquitted, afterwards pleaded *auterfois acquit* to another indictment for omitting *other* goods out of the same schedule; and *Patteson, J.*, held that the plea was no bar to the second indictment, but said that such a course ought not to be adopted, except under very peculiar circumstances. *R. v. Champneys*, 2 M. & Rob. 25.

[1] *Form of Plea of* Auterfois acquit.

—— And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment read, saith that our Lady the Queen ought not further to prosecute the said indictment against him, the said J. S., because he saith that heretofore, to wit, on the day of at the sessions of our Lady the Queen of oyer and terminer, holden at York Castle, in and for the county of York, before Sir Samuel Martin, Knight, one of the barons of the Exchequer of our said Lady the Queen, he was lawfully acquitted of the said offence charged in the said indictment. And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

[*Counsel's Signature.*]

The plea ought properly to be on parchment, signed by counsel. Before the above statute, it was necessary that the plea should recite the record of the former indictment and acquittal, identifying the offence with that to which the plea applied. The courts did not, however, reject the plea because it was informal, but assigned counsel to prepare it in a proper form for the defendant. *R. v. Chamberlain*, 6 C. & P. 93.

If the indictment be for felony or treason, the defendant, besides this plea of *auterfois acquit*, should also plead over to the felony, &c. *R. v. Vandercomb*, 2 Leach, 712. In such a case, therefore, continue the plea thus: "*And as to the felony and larceny for which the said J. S. now stands indicted, he the said J. S. saith that he is not guilty thereof, and of this he the said J. S. puts himself upon the country.*" If, however, the defendant plead *auterfois acquit*, without pleading over to the felony, after his special plea is found against him he may still plead over to the felony. 2 Hawk. c. 23, s. 128. *R. v. Sheen*, 2 C. & P. 634.

[2] In the case of a plea of *auterfois acquit* a jury are sworn instanter to try the issue. (*R. v. Scott*, 1 Leach, 404), and therefore there is no replication actually pleaded upon the part of the Crown. But *see* 2 C. & P. 635.

charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof."

(D) *Entry up of Judgment.*[1]

AUTERFOIS Convict.[2]

AUTHORITY. *See* Distress; Master and Servant; Power of Attorney; Principal and Agent; Warrant of Attorney; Work and Labour.

AUTHORS.

See Copyright; Lectures; Libel; Newspaper; Printer; Theatre.

(A) *Action by, for Literary Labour.*[3]

But a replication and *similiter* must be entered upon the record when afterwards made up. The form may be thus: "And hereupon A. B. [*the clerk of the peace or clerk of arraigns*], who prosecutes for our said Lady the Queen in this behalf, says, that by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S., because he says that the said J. S. was not lawfully acquitted of the said offence charged in the said indictment in manner and form as the said J. S. hath above in his said plea alleged; and this he, the said A. B., prays may be inquired of by the country. And the said J. S. doth the like. Therefore let a jury come," &c. The replication concludes to the country, and no day is given to bring in the record, as in civil actions, because in criminal cases there can be no trial by the record; it must be by jury only.

The proof of the issue lies upon the defendant. *See* 2 Russ. 837, n. i. He may prove it by production of a certified copy of the record (14 & 15 Vic. c. 99, *supra*), or by the record itself; and by proving his identity with the person so formerly tried and acquitted.

[1] The judgment against the defendant in felony is *respondeat ouster*, or rather, as the defendant generally pleads over to the felony, at the same time with the issue in the plea of *auterfois acquit*, the jury are charged again to inquire of the second issue, and the trial proceeds as if no special plea in bar had been pleaded. *R. v. Vandercomb*, 2 Leach. 708. *R. v. Cogan*, 1 id. 440. *R. v. Sheen*, 2 C. & H. 635. In misdemeanours the judgment is final. *R. v. Goddard*, 2 Ld. Raym. 922; 2 Hale, 256. When the plea is allowed, the judgment is, that the defendant shall go without day, and he is altogether discharged from the prosecution. 2 Hale, 391. *See* 1 Deac. 90. The verdict for the prisoner on the issue on the plea cannot be set aside, and a new trial had, although without evidence and against the opinion of the judge. *R. v. Lea*, 1 Mood. C. C. 9.

[2] Formerly a man convicted of a clergyable felony, and who had prayed the benefit of clergy, might plead such conviction and prayer of clergy in bar of any subsequent indictment, either for the felony of which he was convicted, or for any other clergyable felony committed by him previously to this conviction. *See* stat. 25 Edw. 3, c. 5; 8 Eliz. c. 4; 18 Eliz. c. 7; 2 Hurst, c. 36; *R. v. Jennings*, R. & R. 388; 1 Stark. 311. *See* 7 & 8 Geo. 4, c. 28, s. 6. By stat. 6 Geo. 4, c. 25, s. 4, the benefit of the allowance of clergy was restricted to the individual claim upon which it was allowed, and such previous conviction can only be pleaded in bar of any subsequent indictment for the felony of which the defendant has previously been convicted. *See* 4 Bl. Com. 336; 2 Hale, 251. *Vaux's case*, 4 Co. 45 a. As to the form of plea, the trial and judgment thereon, see *ante*, *Auterfois acquit*, p. 67.

[3] An author cannot recover for composing for the press a work of an immoral or libellous description; but it is said, that although it would be a good defence to an action for not supplying manuscript to complete such a work according to agreement, that the subject-matter thereof was of an illegal nature, yet, if the work be not produced, the presumption shall be that the publication was lawful. *Gale v. Leckie*, 2 Stark. 107. In *Poplett v. Stockdale*, R. & M. 337, *Best, C. J.*, held that the plaintiff, a printer, could not recover for printing such an immoral and libellous work. See *Coates v. Hatton*, 3 Stark. 61. If an author undertakes to compose a book and dies before completing it, his executors are discharged from the contract; for the undertaking is merely personal in its nature, and by the intervention of the contractor's death has become impossible to be performed. *Marshall v. Broadhurst*, Tyr. 349. The employer of an author is entitled to copyright without assignment. 27 L. J. C. P. 129; 29 id. 20.

PLANCHÉ v. COLBURN, 8 Bing. 14; 5 C. & P. 58.

An author engaged to write a treatise for a periodical publication which is afterwards, and after his work is commenced, abandoned, is entitled to a *quantum meruit*, without tendering or delivering the treatise.[1]

The plaintiff had agreed to write for the *Juvenile Library* a volume upon costume and ancient armour. After the plaintiff had commenced, and before he had completed the work, the defendant abandoned the periodical publication. The plaintiff, without tendering or delivering the treatise, brought an action for compensation.

Tindal, C. J., upon motion to set aside a verdict for the plaintiff, observed: "The considerations by which an author is generally actuated in undertaking to write a work are, pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author who is engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The defendants, by putting an end to the *Juvenile Library*, broke their contract with the plaintiff." See *Clarke v. Price*, 2 Wils. Ch. R. 157. *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

AVERAGE. *See* Insurance; Salvage; Ship and Shipping.

I. GENERAL OR GROSS AVERAGE, p. 70.

(A) *What is*, p. 70.

(*a*) *Subjects of: what are*, p. 71.

(*b*) „ *what not*, p. 71.

(*c*) *Sacrifice must be for the joint Benefit of Ship and Cargo*, p. 72.

(*d*) *Must be Necessary and Voluntary*, p. 73.

(*e*) *Must conduce to the Saving of the Ship and Cargo*, p. 73.

(*f*) *What shall Contribute to it*, p. 73.

(*g*) *Captain's Duty respecting*, p. 73.

II. AVERAGE, PETTY: WHAT, p. 73.

III. „ PARTICULAR: WHAT, p. 74.

AVERAGE OF CORNFIELDS, p. 74.

I. GENERAL OR GROSS AVERAGE.

(A) *What is.*[2]

[1] A covenant not to write for any other than a named theatre is legal. 2 Eden's Rep. 329.

[2] General average signifies a contribution by the owners of the ship, of the freight and goods on board, in proportion to their respective interests, towards any damage or loss of any particular part of the ship or cargo, voluntarily incurred for the preservation of the rest. When taken in the above sense, it is called general or gross average, because it falls generally upon the whole or gross amount of the ship, freight, and cargo. This principle is derived from the ancient law of Rhodes, and is adopted into the *Digest* of Justinian. It has also been recognised, with considerable variations in practice, by all commercial nations, and is, no doubt, founded on equity and good sense. *Emerigon*, c. 12, ss. 39–42. Lord Tenterden, in his work on Shipping, says, "The rule of the Rhodian law is this: if goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all." The property must be *thrown* overboard; the mind and agency of the man must be employed: if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard to *lighten* the ship: if they are cast overboard by the wanton caprice of the crew or the passengers, they, or the masters or owners for them, must make good the loss. The goods must be thrown overboard for the sake of all; not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped, or received the goods, but because, at a moment of distress and danger, their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the

(*a*) *Subjects of General Average: what are.*[1]
(*b*) *Subjects of General Average: what not.*[2]

wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake; no measure that may facilitate the motion and passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure may be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship for the sake of all. *Mouse's case*, 12 Co. 63. *Bird v. Astock*, 2 Bulst. 280. But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss." *See* Shee's *Abbott on Shipping*, p. 55, 3d ed. In *Job v. Langton*, 6 E. & B. 779, 26 L. J. Q. B. 99, the court, in a considered judgment, adopted the definition of general average as given by *Lawrence, J.* (*Birkley v. Presgrove*, 1 East, 220), "A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested."

[1] The subjects of general average are jettison, which is where the goods of a particular merchant are thrown overboard in a storm, which may be lawfully done to save the ship from sinking (12 Co. 64); or where the masts, cables, anchors, or other furniture of the ship are cut away or destroyed, for the preservation of the whole (Molloy, b. 2, c. 2, s. 6); or where salvage is paid to recaptors, or money or goods are given as a composition to pirates to save the rest; or where a ransom (when that was legal) was agreed to be paid to an enemy or pirate for liberating the ship; or an expense is incurred in reclaiming her, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention. In these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and *bonâ fide* incurred, to prevent a total loss, or some great disaster, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally on all, according to the equitable maxim of the civil law, *Nemo debet locupletari aliena jacturâ*. *See* Marshall on Marine Insurance, by Shee, 4th ed. 424.

So, if a ship on her arrival at the mouth of a harbour or river be found too deeply laden to get over a bar, or to sail up, and the captain put part of her cargo into lighters, which are lost, the owner of the ship and the remaining goods shall contribute to this loss; because the removal of part of the cargo from the ship into the lighters was for the general benefit. But should the ship be lost and the lighters be saved, the owners of the goods preserved in the lighters shall not contribute to this loss; because the ship cannot be said to have been lost for the preservation of the goods in the lighters, and because it is a general rule that a contribution is only due when the ship and remaining cargo have been saved from the peril to which they were exposed. *Vide* ff. *De Leg. Rhod.* lib. 14, tit. 2, 6; Le Guid. c. 5, 28; 1 Mag. 56; Malyne, 109, 110. Marsh. Ins. by Shee, 426. And it is said, that if a ship be unjustly captured and carried into a foreign port, that not only the charges of reclaiming her, but also the wages and expenses of the ship's company during the detention, shall be brought into general average. Beawes, 166; 1 Mag. 67. Vide *Ord. of Louis XIV.*, Avasies, art. 7. So where a ship is obliged to put into a port to repair, and this is necessary for the safety of the whole concern, the charges of loading and unloading and taking care of the cargo, and the wages and provisions of the workmen hired for the repairs, become a general average. 1 Robin. 494. But see *Plummer v. Wildman*, 3 M. & S. 482. *Power v. Whitmore*, 4 id. 141. And any injury done to the ship voluntarily by cutting her decks or sides to facilitate a necessary jettison, or by running her ashore to avoid an enemy or the danger of a storm, must be made good by general average. *Marsham v. Datrey*, Select Ca. 58. So, expenses of unloading and reloading the ship in order to repair her are the subject of general average (*Mason v. Jones*, 7 E. & B. 523; 25 L. J. Q. B. 187); and so where the captain cut the cable and made other sacrifices of her tackle and furniture to prevent her being cast away in a storm, and also employed and paid a number of men to keep the vessel, which had been damaged in the storm, free from water, in order that the cargo of corn should not be damaged, it was held that this was general average (*Birkley v. Presgrove*, 1 East, 220); and in the case of a jettison, it makes no difference that at the time the ship was in the hands of a captain, provided it was done for the preservation of the whole; and therefore, in case of a recapture, the owner is entitled to a general average. See *Price v. Noble*, 4 Taunt. 123.

[2] Expenses in order to save or repair the ship incurred after the cargo is safe, are not the subject of general average (*Job v. Langton*, 6 E. & B. 779; 26 L. J. Q. B. 99. *Moran v. Jones*, 7 E. & B.; 26 L. J. Q. B. 187); nor a leak sprung in a storm, by which part of the cargo is injured. *Consolato del Mare*, c. 63, 193, 194; Le Guidon,

(c) *The Sacrifice must be for the joint Benefit of Ship and Cargo.*

JOB AND ANOTHER v. LANGTON, 6 E. & B. 779; 26 L. J. Q. B. 97.

Expenses incurred by the misadventure till all the cargo is discharged is the subject of general average, but expenses incurred after the cargo is safe is subject of particular average on the ship only.[1]

This was a special case for the opinion of the court. On the 15th March, 1855, the plaintiffs, who were owners of the bark "Snowdon," effected a policy thereon with the defendant, an underwriter, for the sum of 100*l.* On March 20th, 1855, the vessel sailed from Liverpool on her contemplated voyage, with a general cargo; but, by some non-adjustment of her compasses, ran aground the same night in Malahide Bay, on the coast of Ireland. It became necessary to discharge the whole of her cargo and her ballast before she could be got off. After the cargo was discharged, the vessel was got off at considerable cost. She was then towed to Liverpool to be repaired. The cargo was forwarded to its destination by another vessel: but it was agreed that this circumstance was not to affect the question. The question was, whether the expenses incurred in getting off the ship, and taking her to Liverpool for repairs, after the whole of the cargo had been discharged, were chargeable to general average, or to particular average on the ship alone.

Per Cur. "We begin with the definition of general average by *Lawrence, J.*, in *Birkley v. Presgrove*, 1 East, 220. 'A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the preservation of the ship and cargo 'Menning,' for the joint benefit of the ship and cargo.' Here it cannot be said there was any *sacrifice*. The expenses, to constitute general average, must, therefore, be brought under the second category, 'extraordinary expenses incurred for the joint benefit of ship and cargo.' All expenses incurred from the misadventure till all the cargo had been discharged confessedly constitute general average. But after the cargo was discharged, the owner appears to have done nothing but for the exclusive benefit of the ship. Notwithstanding some expressions of *Lord Ellenborough*, in *Plummer v.*

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c. 5, art. 20; Marshall on Ins. 4th ed. 430. Nor, in general, any damage done by stress of weather, or by wear and tear (ff. lib. 14, t. 2, *De Leg. Rhod. de jactu.* s. 1; Roccus, not. 60. *Laws of Oleron*, 9; *of Wisb.* 12. *Jackson v. Chorrock*, 8 T. R. 509). So, repairs, other than those rendered necessary by some sacrifice for the general benefit, are not the subject of general average. *Plummer v. Wildman*, 3 M. & S. 482. *Power v. Whitmore*, 4 id. 141. And if a ship, after having been captured by a privateer, escape by using a press of sail, but in so doing suffers material damage, by straining and otherwise, this is only a common sea risk, and is not the subject of general average. *Covington v. Roberts*, 2 N. R. 378. Neither is the damage sustained by a ship in defending herself against an enemy; nor the expense of curing the wounded men; nor the ammunition expended in the engagement (*Taylor v. Curtis*, 6 Taunt. 608; 2 Marsh. Rep. 309); though the policy and good sense of this last decision may at least be doubted. There is also no claim to general average where there has been a jettison of goods stowed upon deck, unless so carried according to the common usage and course of the trade on the voyage for which they were shipped (Park, 8th ed. 23. *Da Costa v. Edmonds*, 4 Camp. 142. *Gould v. Oliver*, 4 Bing. N. C. 135. *Milward v. Hibbert*, 3 Q. B. 120); although they contribute, if saved. And the same principle obtains in the case of goods for which there is no bill of lading, or which are taken on board by the captain contrary to the charter-party. *Code de Commerce*, art. 420.

[1] But the expenses of unloading and loading the ship, in order that she may be repaired, give a claim to general average, as they are incurred deliberately for the joint benefit of those interested in the ship, freight, and cargo. *Case of the "Copenhagen,"* 1 Rob. 298. *Plummer v. Wildman*, 3 M. & S. 487. *Hall v. Janson*, 4 E. & B, 500; 24 L. J. Q. B. 97. And where a ship, being chartered out and in for a homeward cargo, but having some goods on board outwards, became stranded soon after sailing, the goods, together with material of the ship, were put on board lighters by the master, and sent back to port and warehoused there. The ship, after some days, was got off, and returned to port; and when she had been repaired the goods were reshipped, and carried forward to their destination, without any interference of the owner of them. It was held, that the landing of the goods was part of the continuous operation for getting the ship off and sending her back to port, there to be repaired, with a view to prosecute the original adventure, and that the goods and chartered freight must both contribute, in general average with the ship, to the expenses necessarily incurred in getting her off after the goods were landed. *Moran v. Jones*, 7 E. & B. 523; 26 L. J. Q. B. 187.

Wildman (3 M. & S. 482), we consider it quite settled by the law of this country, that the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average."

(*d*) *The Sacrifices must be Necessary and Voluntary.*[1]

(*e*) *And must conduce to the Saving of the Ship and Cargo.*[2]

(*f*) *What shall Contribute to General Average.*[3]

(*g*) *Captain's Duty respecting.*[4]

II. AVERAGE, PETTY: WHAT.[5]

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[1] Contribution upon a general average can only be claimed where, upon as much deliberation and consultation between the captain and his officers as the occasion will admit of, it appears that the sacrifice was *absolutely requisite* for the preservation of the ship and cargo. Marshall on Ins. 4th ed. p. 425. Abbott on Shipping, p. 108, 3d ed. So, also, it must be incurred *voluntarily*, for masts and sails destroyed in consequence of the necessity of carrying an unusual press of canvas, or by stress of weather, are not the subject of general average (*Covington v. Roberts*, 2 N. R. 378. *Power v. Whitmore*, 4 M. & S. 141); though they are so if cut away, and abandoned for the preservation of the ship. *Birkley v. Presgrove*, 1 East, 220.

[2] A loss, which does not evidently conduce to the preservation of the ship and cargo, is not the ground of general average. Thus, if a pirate take from a ship only the goods of a particular person (Mal. *Lex Merc.* 109); or if, from apprehension of an enemy, some of the cargo be landed and secured on shore, and the rest taken, the goods taken are, in neither case, the subject of general average (*see* Show. *Ca. Parl.* 20); nor are goods damaged in a storm (*see* Mo. 297); as neither the taking nor the damage conduced to the safety of the rest. But if the ship be preserved by a jettison, and continue her course, and be afterwards lost by a second misadventure, the goods, if any, saved from the second misadventure shall contribute to the loss sustained by the jettison, since to that their preservation was once owing. 2 Mag. 98, 240; *Ord. Louis XIV.;* Cont. art. 15, 16. But *see* Cont. 1 Mag. 56. *Vide* Show, *Ca. Parl.* 20; Mo. 297. From the above authorities it would also appear that the ship must, in fact, be saved; for, if goods be thrown overboard in a storm, and the ship afterwards perish in the same storm, there shall be no contribution of the goods saved, as the object of the jettison was not attained. The American law, however, would seem to be otherwise. *See* Phillips on Ins. vol. ii. p. 101. Kent's Com. vol. iii. p. 238; Marshall on Ins. 4th ed. p. 426.

[3] All objects of value properly called merchandise, conveyed in the ship for the purposes of traffic, whether belonging to merchants, passengers, the owners, or to the master, of whatever kind or weight, contribute according to their value (1 Mag. pp. 62, 63. *Emerigon*, tom. 1, p. 639); for this contribution is made, not on account of incumbrance to the ship, but of safety obtained. Therefore, bullion, plate, money, jewels, &c., contribute according to their full value. 1 Mag. 62, 63.

The owners also contribute according to the clear value of the ship and freight at the end of the voyage, after deducting the expense thereof (Smith, *Merc. Law*, 6th ed. p. 332); but mariners do not contribute for their wages (*Emerigon*, tom. 1, p. 642; 1 Mag. 71); neither do the persons on board their wearing apparel, nor the jewels or ornaments belonging to their persons. *Vide* Molloy, l. 2, c. 6; *Laws of Oler.* art. 8; *Ord. of Wisb.* art. 20.

[4] On the arrival of the ship at the port of destination, it is the duty of the captain to make his protests, with some of his crew, or, according to Malyne (*Lex Merc.* 113), "with most part of his company," swear that the goods were thrown overboard, money paid, or other loss sustained for the safety of the ship and cargo, and for the preservation of the lives on board, and for no other cause. Beawes, 148; Molloy, l. 2, c. 6, s. 2. The captain has a lien on the goods saved till the contribution be made (*Scaife v. Tobin*, 3 B. & A. 523); he may therefore detain them till the amount to be contributed is paid. But in the case of a general ship, where there are many consignees, it is usual, before he delivers the goods, to take a bond, or other security, from the different merchants for payment of their portions of the average when it shall be adjusted. Marshall on Ins. 4th ed. p. 433. It follows, that if the captain part with the goods without sufficient security, the sufferer would have his remedy against him.

[5] Petty, or accustomed averages, are certain small charges—such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, signals, instructions, castle-money, pier-money, digging the ship out of the ice, &c. When these are incurred in the usual course of the voyage they are not considered as a loss, but only a necessary and ordinary expense. If, however, they are incurred for any extraordinary purpose in the voyage (as to provide against any impending danger, or in consequence of the ship being driven out of her course by stress of weather), they will

III. Average, Particular:[1] what.

AVERAGE of Cornfields is the stubble, or remainder of the straw or grass, left in the cornfields after the harvest is carried away. In Kent it is called the *grattin;* in other parts, the *roughings*, &c.

AVERMENTS. *See* Evidence; Issues; Pleading; Right to Begin.

AVOWRY. *See* Replevin.

AWARD. *See* Arbitration, vol. i. p. 427.

AWAY-GOING Crop.[2] *See* also Landlord and Tenant.

B.

BACHELOR of Arts or Laws, Service of Articles by. *See* vol. i. p. 547.

BAIL Below, or to the Sheriff. *See* Affidavit to hold to Bail, vol. i. p. 250; Arrest on Mesne Process, id. 525.

I. Giving Bail to the Sheriff, p. 75.

(A) *Form of Bail-Bond*, p. 75.

II. Deposit in Lieu of Bail, p. 76.

III. Action on the Bail-Bond, p. 77.

(A) *The Sheriff is bound to Assign the Bond to the Plaintiff*, p. 77.

(*a*) *Form of Assignment*, p. 77.

(B) *The Plaintiff, after Assignment, may Sue on the Bond in his own Name*, p. 78.

(C) *The Sheriff may Sue on the Bail-Bond*, p. 78.

IV. Rule to return Writ or bring up the Body, p. 78.

(A) *Is a Four-day Rule in London and Middlesex, and an Eight-day Rule elsewhere*, p. 79.

(B) *Where Rule for returning Writ expires in Vacation*, p. 79.

(C) *Sheriff may be ruled to Return after he has gone out of Office*, p. 79.

(D) *The Defendant may put in Bail at any Time before the Expiration of the Rule*, p. 79.

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then be deemed general or gross average. 1 Mag. 72; 2 id. 278; Potier, L. t. n. 67. Some of the foreign ordinances specify the particulars which fall under this head, and the mode of distributing the charges. French *Ord.* liv. 3, tit. 7; 2 Mag. 277; *Ord. of Wisb.* art. 44, 56, 59, 60; Guidon, c. 5, art. 12–19; *Code de Commerce*, art. 406.

[1] By "particular average" is meant a particular or partial loss, which may be claimed in respect of certain perishable commodities, but it has no affinity to "average," properly so called. *See post*, Insurance; Policy; Memorandum; Ship and Shipping; and Marsh. Ins. App. 603, where the English and American cases are reviewed and commented upon.

[2] An away-going crop may be defined to be the crop sown during the last year of a tenancy, but not ripe until after its expiration. The right to this is usually vested in the out-going tenant, either by the express terms of the lease or contract, or by the usage or custom of the country. Woodf. L. & T. 505, 5th ed. But in the absence of any contract or custom, and provided the law of emblements does not apply, the landlord is entitled to crops unsevered at the determination of the tenancy, as being a portion of the realty. Broom's *Max.* 306. Cooke on Agricultural Contracts. *See post*, Crops; Emblements; Landlord and Tenant.

V. Attachment against the Sheriff for not Obeying, p. 80.
VI. Setting Aside and Staying Proceedings, p. 80.
(A) *Affidavit in Support of Application*, p. 81.

I. Giving Bail to the Sheriff.[1]

1 & 2 Vic. c. 110, s. 4. The defendant, when arrested, "shall remain in custody until he shall have given a bail-bond to the sheriff."

(A) *Form of Bail-Bond.*[2]

[1] Where a defendant has been arrested on mesne process, the sheriff, on being furnished with the names of sufficient securities, and satisfying himself of their competency, prepares a bail-bond to be executed by them and the defendant; and on its execution he is bound to discharge the defendant, if not liable to be detained on other grounds. The sheriff is entitled to be paid by the defendant the expenses of preparing the bail-bond. *Milne v. Wood*, 5 C. & P. 587. If the sheriff refuse, without cause, to accept a bail-bond, he is liable to an action. 2 Saund. 611 c. Each surety must be worth the sum in the penalty (*Matson v. Booth*, 5 M. & S. 223), his property being within the county (*Lovell v. Plumer*, 15 East, 320). The sheriff may take a bail-bond without arresting the defendant. *Taylor v. Clow*, 1 B. & A. 223. The bail-bond must be executed on or before the eight days limited for putting in bail. (Id. *Pullien v. Benson*, 1 Ld. Raym. 352. *Thompson v. Rock*, 4 M. & S. 338); and before the bond is executed, the condition must have been filled up (*Powell v. Duff*, 3 Camp. 181); otherwise the bond will be void. The number of sureties is immaterial (*Beaufoye's case*, 10 Co. 101 a; 2 Saund. 61 c. *Peppin v. Cooper*, 2 B. & A. 440. *Matson v. Booth*, 5 M. & S. 223); though more than one are generally taken for safety. *Lazarus v. Farmer*, 9 Moore, 422; 2 Bing. 227. *Lane v. Griffiths*, 7 Dowl. 313. If the sureties be insufficient, the sheriff is not liable to the plaintiff on that ground; for the plaintiff need not accept the assignment of the bond. 2 Saund. 61 a. The sheriff, in practice, takes the bail for double the amount indorsed on the writ. *See* 12 Geo. 1, c. 23, s. 2; Watson's *Sheriff*, 154. *Cook v. Cooper*, 7 Ad. & E. 605. If the bond be given for a greater sum than that endorsed on the writ, the court will set it aside. *Cook v. Cooper*, 7 Ad. & E. 605; 2 Nev. & P. 607. The bail must satisfy the whole debt due to the plaintiff, though exceeding the sum sworn to and costs. 2 Saund. 61 a. *Stevenson v. Cameron*, 8 T. R. 29. The bond must be given, not to the bailiff but to the sheriff himself, and designating him by the addition of his name of office, otherwise it is void. *Beaufoye's case*, 10 Co. 101. *Louis v. Knight*, 8 Bing. 271; 1 M. & Scott, 353; 1 Dowl. 261. *Rogers v. Reeves*, 1 T. R. 418. It requires no stamp. 5 Geo. 4, c. 41. The condition is for the defendant putting in special bail. 1 & 2 Vic. c. 110, s. 3, and sched. If the defendant has been arrested by a wrong name, he should execute the bond in his right name, stating that he was arrested in a wrong name, otherwise he may be held to waive the irregularity. *Mursay v. Hulbert*, 1 B. & P. 645. *Lake v. Silk*, 3 Bing. 296. *Ogden v. Barker*, 1 Dowl. 125.

[2] Know all men by these presents, that we, C. D., of E. F. of and G. H. of are held and firmly bound to S. S. Esquire, sheriff of the county of in the sum of [*double the sum indorsed on writ*] of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made we bind ourselves, and each of us for himself, in the whole, our and every of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals.

Dated the day of in the year of our Lord, 186

Whereas the above-bounden C. D. was, on the day of taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the Queen's writ of *capias*, issued out of her Majesty's court of bearing date at Westminster the day of to the said sheriff directed and delivered against the said C. D., in an action at the suit of A. B.: And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon, was, on the execution thereof, delivered to the said C. D.: And whereas he is, by the said writ, required to cause special bail to be put in for him in the said court to the said action within eight days after the execution thereof on him, inclusive of the day of such execution: Now the condition of this obligation is such that, if the said C. D. do cause special bail to be put in for him in the said action in her Majesty's said court, as required by the said writ, then this obligation to be void and of no force; otherwise to stand and remain in full force, vigour, and effect.

Sealed and delivered in the presence of—

C. D. (L. S.)
E. F. (L. S.)
G. H. (L. S.)

II. Deposit in Lieu of Bail.

1 and 2 Vic. c. 110, s. 4, enacts, that the defendant shall remain in custody until he has given bail (*see supra*), "or shall have made deposit of the sum endorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said superior courts."[1]

[1] Instead of giving a bail-bond, the defendant may be discharged if he deposit with the sheriff the sum endorsed on the writ of *capias*, together with 10*l.* costs; and money paid on an arrest will be presumed to be paid for this purpose, unless the defendant has got an acknowledgment for the same. *Wain v. Bradbury*, 1 Smith, 127. The sheriff is bound to pay these monies into court; and if the defendant, within the eight days required by the *capias*, put in and perfect bail, he is entitled to be repaid such sum on motion (43 Geo. 3, c. 46, s. 2). To entitle the defendant to get back the money, he need not have entered an appearance to the writ of summons (*Brook v. Gunning*, 8 Dowl. 11; and Scott, 343); nor even have put in bail if he render himself (*Harford v. Harris*, 4 Taunt. 669. *Chadwick v. Battye*, 3 M. & S. 283); nor have put in bail in due time, if in his affidavit he deny the debt and allege merits. *Brook v. Brook*, 1 Bail C. C. 120. Where the deposit has been made by a third person, the latter will be entitled in like manner to have it returned. *Nunn v. Powell*, 1 Smith, R. 13. See *Douglas v. Stanbrough*, 3 Ad. & E. 316. Where, after depositing, the defendant obtained a summons for better particulars, with a stay of proceedings, which was unobeyed for a year, the court refused to return the money. *Hardin v. Harbourn*, 7 Dowl. 546. The sheriff is entitled to a fee of 6*s.* 8*d.* or 10*s.* (according as the arrest is in London or Middlesex, or in any other county) for receiving and paying the money into court. (*See* table of Sheriffs' Fees, *post*, Sheriff.) The application must be made to the court, and not to a judge at chambers (*Geach v. Coppin*, 3 Dowl. 74); and should be for a rule to show cause why the defendant should not be at liberty to take out of court the sum of £ deposited by him with the sheriff in lieu of bail, bail above having since been duly perfected (or the defendant having since been duly rendered in discharge of his bail in this action). There must be an affidavit, which may be as follows:—

Form of Affidavit on Application to take Money deposited in lieu of Bail out of Court.

[Title of Court and Cause.]

I, D. A., of attorney in this cause for the above-named defendant, make oath and say:

1. That the said defendant was arrested on or about the by an officer of the sheriff of at the suit of the above-named plaintiff, by virtue of a writ of *capias*, dated the issuing out of this honourable court, and which writ was endorsed for £ by order of the Honourable Mr. dated and that the said defendant thereupon, in lieu of giving bail to the said sheriff, deposited with the sheriff's officer aforesaid the sum of £ being the sum endorsed on the said writ, together with the sum of 10*l.* to answer costs.

2. That the said several sums have been paid into the hands of the proper officer of this honourable court.

3. That bail above has since been duly put in in this action for the said defendant, and duly perfected [*or*, that the said defendant has been duly rendered in discharge of his bail in this action at the suit of the above-named plaintiff]. D. A.

Sworn, &c.

If the defendant fail to put in and perfect bail in due time, the plaintiff may apply to the court (not to a judge) for the money to be paid over to him, such payment being subject to such deductions, if any, from the sum of 10*l.* deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the court in that behalf, may be found reasonable (43 Geo. 3, c. 46, s. 2). The application cannot be made till the time for perfecting special bail has expired (*Rowe v. Softly*, 6 Bing. 634; 4 M. & P. 464. *Stamford v. M'Cann*, 2 C., M. & R. 632. *Straford v. Love*, 3 Dowl. 593); but where the defendant does not perfect bail in time, and makes no affidavit of merits, the plaintiff may apply, notwithstanding the defendant afterwards render (*Newman v. Hodgson*, 2 B. & Adol. 422); though, if bail has been perfected, not in due time but before the money is paid out, the court will put the plaintiff to elect which security he will have. *Geach v. Coppin*, 3 Dowl. 74. The court will, on affidavit of merits, extend the time for perfecting bail. *Parker v. Turner*, 2 Chit. R. 71. *Geach v. Coppin*, 3 Dowl. 74. Where, after the time for perfecting bail, the defendant paid an additional 10*l.* into court, under 7 and 8 Geo. 4, c. 71, s. 2, before the plaintiff applied, the court refused to pay it out (*Scherwinski v. Peronnet*, 8 Dowl. 229; 6 Mee. & W. 90); but, where the plaintiff has got out the money before the additional 10*l.* in lieu of special bail has been put in, the court will not order him to refund, on the ground that, owing to the sheriff's default, the 10*l.* could not be paid sooner. *Hannah v. Willis*, 6 Dowl. 417; 4 Bing. N. C. 311. Where the defendant, having been arrested in a wrong name, paid the debt and 10*l.* costs, without prejudice, but omitted to perfect bail, the court refused to pay out. *Gadley v. Parsons*,

III. Action on the Bail-Bond.[1]

(A) *The Sheriff is bound to Assign the Bond to the Plaintiff, for the purpose of Suing.*

4 Anne, c. 16, s. 20. "If any person or persons shall be arrested by any writ, bill, or process issuing out of any of her Majesty's courts of record at Westminster, at the suit of any common person, and the sheriff or other officer taketh bail from such person, against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and cost of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by endorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses,[2] which may be done without any stamp."[3]

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5 Taunt. 623.

The application must be made on an affidavit, which is the same as that made on the defendant's application, *ante*, p. 76, down to the third paragraph, for which substitute —

3. "And I further say, that bail above has not been put in in this action for the said defendant" [*or*, that bail above has been put in in this action for the said defendant, but has not been perfected, nor has a sum of 10*l.*, in addition to the said sums of £ and £ been paid into the hands of the proper officer of this honourable court under the statute in that case made and provided].

The rule must be served on the defendant, and a motion is afterwards made, on affidavit of service, to make the rule absolute. If the residence of the defendant is unknown, or he has gone abroad, the rule may be stuck up in the master's office by leave of the court or a judge. Rule (Pr.) 162, H. T. 1853. See *Hunt v. M'Lachlan*, 7 Dowl. 731. *Shackel v. Johnson*, 7 C. B. 865.

[1] If the defendant do not give bail, nor obtain his discharge in any of the ways mentioned, he remains in prison until final judgment. If he has been discharged by the sheriff without giving a bail-bond or deposit, and bail is not put in or perfected, or the defendant rendered, the plaintiff may either bring an action for the escape against the sheriff, or apply for an attachment against him, after ruling him to return the writ and bring in the body. But if, as is generally the case, he gives a bail-bond to the sheriff, which contains the usual condition to put in special bail in eight days, and this is not done, the bond is forfeited, and the plaintiff has his option of proceeding either against the sheriff or against the bail. If the bail given to the sheriff be substantial and sufficient, the plaintiff may obtain an assignment of the bail-bond, and bring an action thereupon against such bail for the amount sought to be recovered. But if he prefer proceeding against the sheriff, then he must rule the sheriff to return the writ, and to put in and perfect special bail, or to put in bail and render the defendant; and if this is not done, the plaintiff may apply for an attachment against the sheriff. The plaintiff, however, cannot take both these courses, but must elect one or other, for, after serving the sheriff with a rule of allowance of bail, or suing out an attachment, the plaintiff cannot take an assignment of the bond and sue thereon.

[2] *Form of Assignment of Bail-bond.*

I, the within-named sheriff of have, at the request of A. B., the within-named plaintiff, assigned to him, the said A. B., the bail-bond within written, and all benefit and advantage arising therefrom, pursuant to the statute in that case made and provided. In witness whereof I have hereunto set my hand and seal of office, this day of 18

S. L. sheriff. (L. S.)

Signed, sealed, and delivered by the within-named sheriff, in the presence of

W. A.
W. B.

The plaintiff must not be a witness (*White v. Barrack*, 1 Mee. & W. 424; 1 Tyr. & Gr. 764), and the witnesses need not both sign their names at the time of the execution. *Phillips v. Barber*, 6 C. & P. 781; 1 Scott, 322; 1 Bing. N. C. 433.

[3] The assignment need not be stamped. 5 Geo. 4, c. 41. If the sheriff refuse to assign, an action on the case lies against him. *Stamper v. Melbourne*, 7 T. R. 122. Where two bail-bonds have been taken, two writs having been sued out into separate counties, the plaintiff may proceed upon the first. *Bullock v. Morris*, 2 Taunt. 67; *Powell v. Henderson*, 1 Chit. Rep. 392. The plaintiff cannot compel an assignment after service of the rule of allowance of bail (*Murray v. Durand*, 1 Esp. 87. *How v. Lacy*, 1 Taunt. 119); or after suing out an attachment against the sheriff (Tidd, 300), though the plaintiff may abandon the attachment and take the assignment (*Pople v. Wyatt*, 15 East, 215); nor can the plaintiff compel an assignment, after ruling the sheriff to bring in the body, until that rule has expired (*Whittle v. Oldaker*, 7 B. & C. 400); nor after giving time to the defendant, without the consent of the bail (*Farmer v. Thirley*, 4 B. & A. 91); but he is entitled to the assignment though the defendant has rendered, provided he has not duly put in special bail, for a surrender does not

(B) *The Plaintiff, after Assignment, may Sue on the Bond in his own Name.*[1]

4 Anne, c. 16, s. 20. "If the bail-bond or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment, may bring an action and suit thereupon in his own name."

(C) *The Sheriff may Sue on the Bail-Bond.*

Reg. Gen. (Pr.) H. T. 1853, r. 83. "An action may be brought upon a bail-bond by the sheriff himself in any court."

IV. Rule to return Writ or bring up the Body.[2]

vacate the bond. *Rodgson v. Mee*, 3 Ad. & E. 765; 5 Nev. & M. 302. The assignment must be made before the plaintiff is out of court for not declaring (*Sparrow v. Naylor*, 2 W. Black, 876); though he may sue on the bond after that time. *Pigott v. Trust*, 3 B. & P. 221. The assignment may be made before forfeiture (*Paradise v. Holiday*, Barnes, 77. *Alsten v. Underhill*, 1 C. & M. 492. See *Dent v. Weston*, 8 T. R. 4); though the action on the bond must be afterwards. *Gregson v. Heather*, 2 Lord Raym. 1455; 2 Stra. 727.

The assignment is obtained by application at the Sheriff's Office, Red Lion Square, for Middlesex; at the Secondary's Office, Basinghall Street, for London; or at the office of the town agent of the sheriff, for other counties respectively. The under-sheriff is presumed to have authority to make the assignment (*Wright v. Barrack*, 1 Tyr. & G. 764); or even his clerk, in the name of the sheriff. *Doe d. James v. Brown*, 5 B. & A. 245; Tidd, 164. The assignment of the bail-bond discharges the sheriff, but does not prevent the plaintiff going on with the original action (*Ede v. Collingridge*, 11 Mee. & W. 61; 2 Dowl. N. S. 764. *Betts v. Smith*, 2 Q. B. 113; 1 Gale & D. 284); nor does it prevent him excepting to the bail when the bail to the sheriff become bail to the action. Rule (Pr.) 86, H. T. 1853.

If the plaintiff resolve not to take an assignment of the bail-bond, but to proceed against the sheriff, he should do so promptly, for the court will not, in general, interfere if the delay has put the sheriff in a worse situation (*R. v. Sheriff of Surrey*, 9 East, 467. *Hobhouse v. Middledibet*, 2 Chit. R. 58); and yet inconveniences may ensue from proceeding too quickly; as where the time for putting in and perfecting bail has not expired. *Hutchins v. Hird*, 5 T. R. 479; Tidd, 310.

[1] See *Barnes v. Keene*, 15 Q. B. 75. He cannot bring the action until the bail-bond is forfeited; *i. e.* where the bail has not been put in within eight days after the *capias* has been executed (*Hillary v. Rowles*, 5 B. & Adol. 460. *Hodgson v. Mee*, 3 Ad. & E. 765); or not being duly justified after exception taken to the bail. *Bond v. Evans*, 4 B. & C. 864. *Evans v. Bates*, 2 C. & M. 143. The action may be brought after justification of bail, if the rule for allowance has not been served in time (*Ellis v. Bates*, 2 C. & M. 143. *Bignold v. Lee*, 1 B. & C. 285); and even after a surrender, and after the expiration of eight days from the arrest, if special bail be not put in (*Hodgson v. Mee*, 3 Ad. & E. 765); but not after bail has been put in who are not competent, for this cannot be treated as a nullity (*R. v. Sheriff of Surrey*, 2 East, 181). Nor will the action be allowed after gross delay in resorting to this remedy (*Surman v. Bruce*, 10 Bing. 434; 4 M. & Sc. 184); nor pending a rule to bring in the body of the defendant (Rule (Pr.) 87, H. T. 1853); nor after giving time to the defendant, as by taking a *cognovit*, unless the bail have consented to remain liable (*Clift v. Gye*, 9 B. & C. 422. *Surman v. Bruce*, 10 Bing. 434; 4 M. & Sc. 184; 2 Dowl. 777); but in such a case, notice that the *cognovit* is unsatisfied must be first given. (Id.) But time given to the defendant, without the consent of bail, will not discharge the latter, where the assignment has been taken after the forfeiture of the bond. *Woosman v. Price*, 1 C. & M. 352.

The action should be against all the bail jointly, or it may be against any of them severally. *Knowles v. Johnson*, 2 Dowl. 653.

The action is commenced by writ of summons, in the usual manner, against the bail, either jointly or severally, according to circumstances. The writ should not be issued before forfeiture has occurred. The action must be brought in the same court as that out of which the original writ issued. The venue may be laid in any county. *Gregson v. Hether*, 2 Stra. 727; 2 Lord Raym. 1455.

The defendant cannot be held to bail in an action on a bail-bond (*Brandon v. Robson*, 6 T. R. 336); though he may in an action upon the judgment, when obtained (*Prendergast v. Davis*, 8 id. 86; *see* also 450). Though the writ is not specially endorsed, if judgment go by default, final judgment may at once be entered up, without any writ of inquiry (*Moody v. Pheasant*, 2 B. & P. 446), and execution levied for the debt and costs in the original action, if not exceeding the penalty; also for the costs of the action on the bond and four per cent interest.

[2] The first step, if bail has not been put in, or not put in in time, is to rule the sheriff to return the writ; or if bail has been put in, but not justified, then the course is to except to the bail, and serve a notice of the

(A) *Is a Four-day Rule in London and Middlesex, and an Eight-day Rule elsewhere.*

Is a four-day rule in London and Middlesex, and an eight-day rule elsewhere.

Reg. Gen. (Pr.) H. T. 1853, r. 130. "All rules upon the sheriffs of London or Middlesex to return writs, or to bring in the bodies of defendants, shall be four-day rules, and upon other sheriffs eight-day rules."

Is a side-bar rule.

Ib. r. 132. "No judge's order shall issue for the return of any writ, or to bring in the body of a defendant, but a side-bar rule shall issue for that purpose in vacation as in term, which shall be of the same force and effect as side-bar rules made for that purpose in term."

(B) *Where Rule for returning Writ expires in Vacation.*

Reg. Gen. (Pr.) H. T. 1853, r. 90. "In case a rule for returning a writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ, shall return *cepi corpus* thereon, a rule may thereupon issue requiring the sheriff or other officer within the like number of days after the service of such rule as, by the practice of the court, is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such rule, an attachment shall issue in the following term for disobedience of such rule, whether the bail shall or shall not have been put in and perfected in the meantime."

(C) *Sheriff may be ruled to Return after he has gone out of Office.*

Reg. Gen. (Pr.) H. T. 1853, r. 134. "Where any sheriff, before his going out of office, shall arrest any defendant, and take a bail-bond and make a return of *cepi corpus*, he shall and may, within the time allowed by law, be called upon to bring in the body by rule for that purpose, notwithstanding he may be out of office before such rule shall be granted."

(D) *The Defendant may put in Bail at any Time before the Expiration of the Rule.*[1]

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exception before ruling the sheriff to return the writ. The rule may be obtained immediately after the execution of the writ of *capias*, or if not executed at the expiration of a calendar month from its date, or sooner if the court or a judge so order. The rule cannot, however, be made after the plaintiff has obtained an assignment of the bail-bond (*Hepworth v. Sanderson*, 1 M. & S. 64. *Ladd v. Arnabaldi*, 1 C. & J. 97); unless such assignment is invalid (*Brooke v. Stone*, 1 Wils, 223); nor after accepting a *cognovit* or other security from the defendant, without the sanction, express or implied, of the sheriff. *R. v. Sheriff of Surrey*, 1 Taunt. 159. *Rustin v. Hatfield*, 3 B. & A. 204.

After the return of *cepi corpus*, if bail has not been put in or perfected in proper time, or the defendant has not surrendered, the next step is to rule the sheriff to bring in the body; or if bail have been put in, but not justified, notice of exception should be served, in order to compel a justification. The rule to bring in the body should be issued promptly, otherwise an attachment for disobeying it will be refused (*R. v. Sheriff of Middlesex*, 1 Dowl. 53); but it cannot issue earlier than the day on which the writ is returned, nor before the time has expired for putting in bail. *Pouchée v. Levien*, 4 M. & S. 427. *Potter v. Marsden*, 7 East, 525. *Hutchins v. Hird*, 5 T. R. 479. Nor can the rule issue after judgment recovered in an action against the sheriff for an escape (*Borwick v. Walton*, 2 B. & A. 623; 1 Chit. R. 393); nor after the defendant has been discharged by order of the plaintiff. *Hookham v. Monkton*, 6 Moore, 497. The rule must be served within a reasonable time. *R. v. Sheriff of Middlesex*, 1 Dowl. 53.

[1] The sheriff must, within the time limited by the rule, bring the defendant into court, or put in and perfect special bail; and it is not enough to render the defendant or put in and perfect special bail afterwards, though before an attachment is moved for (Rule (Pr.) 90, H. T. 1853, *supra*); nor is it any excuse that the plaintiff's proceedings are stayed by an injunction obtained by the defendant. *R. v. Sheriff of Middlesex*, 1 Dowl. 454. The sheriff obeys the writ, not by bringing the defendant in person into court, but merely by showing

Reg. Gen. (Pr.) H. T. 1853, r. 89. "Whenever the plaintiff shall rule the sheriff, on a return of *cepi corpus*, to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and a plaintiff having so ruled the sheriff shall not proceed on any assignment of the bail-bond until the time has expired to bring in the body as aforesaid."

V. Attachment against the Sheriff for not Obeying.[1]

VI. Setting Aside and Staying Proceedings.[2]

Proceedings stayed on payment of costs of one action.

Reg. Gen. (Pr.) H. T. 1853, r. 85. "Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more."

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that the defendant is in custody (*Macleod v. Marsden*, Barnes, 32), or that bail had been put in and he has rendered. *R. v. Sheriff of Middlesex*, 8 T. R. 464. If the sheriff's officer has put in bail for the defendant, these may immediately take him, and render him in their discharge (*R. v. Butcher*, Peake, 169), without justifying. *R. v. Sheriff of Middlesex*, 7 T. R. 527; id. 4 Dowl. 673.

[1] An attachment lies against the sheriff for disobedience, even though he has gone out of office before the rule to bring in the body is granted. Rule (Pr.) 134, H. T. 1853, *ante*, p. 79. If the rule to bring in the body expire on a day in term, the attachment may be moved for next day (*R. v. Sheriff of Middlesex*, 8 T. R. 464; 1 Burr. 651 n.; 2 Saund. 61 a); or if on the last day of term, then on that day at the rising of the court. *R. v. Sheriff of Surrey*, 11 East, 591. *R. v. Sheriff of Middlesex*, 1 Dowl. 53. If the rule expire in vacation, the attachment may be moved for on the first day of the ensuing term; and it is immaterial whether before that time the sheriff may have put in and perfected bail. Rule (Pr.) 90, H. T. 1853, *ante*, p. 79. The attachment should be moved for promptly, and four months' and even three months' delay has been held too great (*R. v. Perring*, 3 B. & P. 151. *R. v. Sheriff of Surrey*, 9 East, 467); but if the plaintiff delay at the instance of the sheriff's officer, the sheriff is not discharged. *Pople v. Wyatt*, 15 East, 215. *R. v. Sheriff of London*, 1 D. & R. 163.

The attachment is moved for by counsel on an affidavit setting forth that the rule was served by giving a copy or the original (*Leaf v. Jones*, 3 Dowl. 315); or that the original was shown at the time, and that no bail has been put in; or, if put in, not justified. If the affidavit is defective, the application may be renewed on an amended affidavit. *R. v. Smythies*, 3 T. R. 351.

Form of Affidavit of Service of Rule.

[Title of court and cause.]

I., J. M., of clerk to P. A., gentleman, attorney for the above-named plaintiff in this cause, make oath and say:—

1. That I did, on the day of instant, serve, &c.

2. That no bail above has been put in for the defendant in this cause [*or*, that bail above has been in for the defendant in this cause, but that the same has not been perfected]; [*If in C. P.*, and that I have this day searched with the proper officer of the court for that purpose].

The rule for an attachment is absolute in the first instance. Rule (Pr.) 168, H. T. 1853.

[2] The proceedings will be set aside for irregularity, as where the action on the bail-bond is commenced too soon. *Alston v. Underhill*, 1 C. & M. 492. *Anon.* 2 Chit. R. 103. Where the rule to bring in the body is sued out before the time for putting in bail has expired. *Rolfe v. Steel*, 2 H. Black. 276. So where an action has been brought on the bail-bond contrary to good faith. *Sweeting v. Weaver*, 11 Price, 734. So if the plaintiff proceed against the sheriff or on the bail-bond, knowing that the defendant had died before the eight days for putting in bail had expired. See *R. v. Sheriff of Middlesex*, 3 T. R. 133. *R. v. Sheriff of Essex*, 8 Scott, 363. So, in some cases, where the defendant and both bail have become bankrupts. *Streeter v. Scott*, 2 Dowl. 362. *Coulson v. Hammond*, 2 B. & C. 626.

The application to set aside must, as in ordinary cases, be made promptly. It is not necessary before applying to put in bail to the original action. *Heath v. Gurley*, 4 Moore, 149.

The court may stay proceedings on bail-bonds where the proceedings are perfectly regular, and may afford by rule such relief to the plaintiff or defendant in the original action, and to the bail, as is agreeable to justice and reason, and such rule shall have the effect of a defeasance to the bail-bond. 4 & 5 Anne, c. 16, s. 20. The court will also, on similar grounds, relieve the sheriff, unless he has been guilty of some breach of duty. *R. v. Sheriff of Surrey*, 7 T. R. 329. *Todd v. Jacob*, 2 B. & A. 354. *R. v. Sheriff of Kent*, 2 Mee. & W. 316. In all cases of bailable proceedings under the act 1 & 2 Vic. c. 110, the proceedings will be stayed on putting in or perfecting bail, or payment into court in lieu of bail, or render and payment of costs. *Ede v. Collingridge*, 11 Mee. & W. 61; 2 Dowl. N. S. 764. *R. v. Sheriff of Middlesex*, 15 Mee. & W. 146.

The application to stay proceedings on

(A) *The Application must be supported by an Affidavit.*[1]

The application must be grounded by affidavit.

Ibid. r. 88. "The rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced, on the assignment of any bail-bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded on an affidavit of merits; or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded on an affidavit showing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff (as the case may be), at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant."

BAIL Above, or Special Bail.

I. General Nature of, p. 83.

II. Waiver of Right to, p. 83.

III. Number of Bail, p. 83.

(A) *Must consist of Two at least*, p. 84.

(B) *But not of more than Two, without leave*, p. 84.

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payment of the costs in an action should be made before verdict. *Johnson v. Macdonald*, 2 Dowl. 44. The application to stay cannot be made until either bail has been perfected (*Heath v. Ginley*, 4 Moore, 149), or put in, or the party rendered, or money paid into court in lieu of bail. But the application may be made on the same day the bail justifies (*Shawe v. Johnstone*, 2 Chit R. 108), and it has been made even after execution sued out and execution issued against the bail. *Lelpine v. Barrett*, 8 T. R. 223. When the motion to stay proceedings is made by the bail, the court cannot impose terms on the original defendant. *Call v. Thelwell*, 3 Dowl. 443; 1 C., M. & R. 780. *Gale v. Hayworth*, 6 Dowl. 323.

[1] The affidavit for setting aside an attachment must be entitled, "The Queen against the Sheriff of ———, in a cause of A. B. *v.* C. D;" on setting aside proceedings on the bail-bond, it must be entitled in the original action, or in the action on the bond. *Leyles v. Chetwood*, 1 Dowl. 321; 2 C. & J. 332. *Kelly v. Wrother*, 2 Chit. R. 109. In the Common Pleas it is entitled in the action on the bond. *Hand v. Philcox*, 7 Moore, 52; id. 600. If it be an affidavit of merits, it must be positively stated that there is a good defence on the merits. *Grottick v. Bailey*, 5 B. & A. 703. *Lane v. Isaacs*, 3 Dowl. 652. *Crosby v. Innes*, 5 id. 566. If the attorney of the defendant make the affidavit, he must so describe himself (*Bouneford v. Russell*, 5 id. 546); but if it is made on behalf of the bail this need not be stated, provided it is stated there is a good defence on the merits. *Bell v. Taylor*, 1 Chit. R. 572.

It seems, all the bail must join in the application. *Magnay v. Porter*, 3 Dowl. 443. *Dowson v. Cull*, 2 C. & J. 671. It is not sufficient to say the application is for their own indemnity, or for their protection. *Call v. Thelwell*, 3 Dowl. 443. *R. v. Sheriff of Cheshire*, 6 id. 709; 3 Mee. & W. 605; *R. v. Sheriff of* ———, 8 Ad. & E. 938. The court will sometimes give time to produce and amend the affidavit. *R. v. Sheriff of Cheshire*, 3 Mee. & W. 695. *Merryman v. Quibble*, 1 Chit. R. 127; but see *R. v. Sheriff of Middlesex*, *supra*.

When the rule is made absolute an appointment should be obtained from the master to tax costs, which should be forthwith paid, otherwise the rule will not be a stay of proceedings.

Where the proceedings have been stayed the defendant may plead his bankruptcy in bar to the original action (*Sainsbury v. Gandon*, 3 M. & R. 16); but not in abatement. *Anon.* 2 Salk. 519. *See post*, p. 91.

When the defendant pays the debt and costs in the action against him, the proceedings against the bail will be stayed on payment of the costs in the action against them. *Betts v. Smyth*, 2 Q. B. 113.

"In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it." Rule (Pr.) 84, H. T. 1853.

If the sheriff fail to set the attachment aside he must pay the whole debt and costs in the original action, and the costs of the attachment (*R. v. Sheriff of Devon*, 1 B. & Adol. 159; *R. v. Sheriff of Middlesex*, 15 Mee. & W. 146; 5 D. & L. 472); though he in general be reimbursed by his bailiff, he can maintain no action against the defendant for money paid (*Pitcher v. Bailey*, 8 East, 171); nor detain the defendant in custody. *Rimmer v. Turner*, 3 Dowl. 601.

If the bail-bond be not set aside or stayed, the bail must pay the debt and costs of the original action, together with the costs of the action against the bail. *Stevenson v. Cameron*, 8 T. R. 29. *Mitchell v. Gibbons*, 1 H. Black. 76.

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I. General Nature of.[1]
II. Waiver of Right to.[2]
III. Number of Bail.

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[1] If the defendant duly appear according to the condition of the bail-bond, the bail to the sheriff are exonerated. This is accomplished by putting in special bail to the action, or bail above, as they are in general denominated, in contradistinction to bail below, or bail to the sheriff. Bail above, or special bail, may be defined to be persons who undertake generally, or in a sum certain, that the defendant, if convicted, shall satisfy the plaintiff, or render himself to proper custody, according to the established practice of the court in which the recognisance (the security required) shall be taken and recorded. *See* Peters. on Bail, 266, and 3 Peters. Ab. 97.

[2] There are some acts of the plaintiff which, in contemplation of law, amount to a waiver upon his part of special bail. But where the defendant has been arrested on a bill which had been indorsed over by the plaintiff to persons as trustees, and who were ready to give it up for the purposes of suit, the court held it no waiver of bail. *Stones v. Butt*, 2 C. & M. 416; 2 Dowl. P. C. 335. And demanding or accepting a plea is no waiver. *Law v. Stephens*, 1 Dowl. 425; Barnes, 92; *R. v. Sheriff of Montgomeryshire*, 1 Dowl. N. S. 388.

(A) *Must consist of Two at least.*[1]

(B) *But not of more than Two, without leave.*

IV. Who may be Bail.[2]

(A) *Must not be Attorney, his Clerk, or Bailiff.*[3]

(B) *Nor Persons indemnified by Attorney or Bailiff.*[4]

(C) *Must be a Householder or Freeholder.*[5]

(D) *Generally, what Disqualifies.*[6]

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[1] The bail must consist of two at least (*Stewart v. Bishop*, Barnes, 60; 1 Chit. R. 602); and a defendant cannot justify *one* bail, who appears alone, without the consent of the plaintiff (*White's case*, 5 Dowl. 133); and more than two bail is irregular, without leave of the court. By R. 91, H. T. 1853, "notice of more bail than *two* shall be deemed irregular, unless by order of the court or a judge." But where the debt is large, the court or a judge will allow a greater number to become bail in different sums, amounting altogether to the requisite amount. *Anon.* 13 Price, 448; *Easter v. Edwards*, 1 Dowl. 39; For. 138; 2 Black. R. 1122; 1 Chit. R. 601.

[2] They must be persons residing within the jurisdiction of the court, and prepared to prove on oath they are worth the amount required. *See post*, p. 85.

[3] By R. 94, H. T. 1853, if any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

[4] By R. 93, H. T. 1853, "no person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants, if such person or persons shall have been indemnified for so doing by the attorney or attornies concerned for any such defendant or defendants." But such indemnified bail cannot be treated as a nullity. And it is no objection if they are indemnified by any other person, or even by the principal. *Neat v. Allen*, 1 B. & P. 21. Of course, if they are indemnified by a sheriff's officer or bailiff they will not be allowed (*Bolland v. Pritchard*, 2 W. Black. 799); and this extends to all officers having the execution of the process.

The court will take official notice of unfitness of bail, although unopposed, as where they have, in a former case, acknowledged their insufficiency. *Laporte's Bail*, 3 Dowl. P. C. 110. But mere infamy of character is not a ground of rejection: hence, keeping a brothel is no objection. *Gouge's Bail*, id. 320. A party told by an attorney that he shall come to no harm is disqualified from becoming bail. *Capon v. Dallimore*, 8 Moore, 516; S. C. 1 Bing. 428; S. C. *Anon.* 1 Dowl. P. C. 1. But assenting to be bail at request of defendant's attorney does not disqualify. *Hunt v. Blaquire*, 4 Bing. 588.

[5] The bail must be a housekeeper within the jurisdiction of the court. *Hughes v. Stirling*, 11 Price, 158. And a person letting out lodgings, though not resident in the house, is deemed a housekeeper, and eligible. *Cohen v. Waterhouse*, 8 Moore, 365. A leaseholder, as such, cannot justify. *Smith's Bail*, 1 Dowl. P. C. 1. If a party be described in the notice as a housekeeper, and he is only a lodger, though a freeholder, he cannot justify. *Wilson's Bail*, 2 Dowl. P. C. 431. Nor a party a housekeeper at time of signing bail-piece, but not so at time of justification. *Weale v. Wild*, 12 Price, 770.

The bail must be in actual possession of the whole or some main part of the house. 1 Chit. R. 288; id. 6; id. 316; id. 502. But if the bail be likely to become a householder in two or three days, time to justify may be allowed (id. 288); and where a person had taken a house occupied by several tenants or lodgers, from one of whom he had received rent, he was held to be qualified, although he had not himself occupied the house. *Cohen v. Waterhouse*, 8 Moore, 365. So, a person may justify in respect of a house kept by him and his partner, who carried on business therein, where the rent and taxes were paid by them jointly, and his partner resided in the house, though he himself lodged at a considerable distance therefrom. *Hemming v. Plenty*, 1 Moore, 529. *Savage v. Hall*, 1 Bing. 420; 8 Moore, 525.

And it is now settled that no bail shall be allowed to justify unless he is a housekeeper or freeholder. *Smith's Bail*, 1 Dowl. 1; and *per Cur.* M. T. 10 Geo. 4, C. P., after conference with all the judges. *Anon.* 1 Dowl. 127. If the plaintiff consent, however, a person who is not a householder or freeholder may justify.

[6] A person paid for becoming bail is inadmissible. *Foxall's Bail*, 7 D. & R. 783. A defendant brought up to be charged in execution cannot be allowed on the same day to justify as bail. *Bischam v. Chambers*, 11 Moore, 343. It is no objection to bail in an action against the acceptor, that he is the drawer of the bill on which his principal is sued (*Prime v. Beesley*, 3 Bing. N. S. 391; 4 Scott, 37; and 5 Dowl. P. C. 477); but a party being the acceptor of a dishonoured bill is not allowed to become bail in an action against the drawer (*Anon.* 1 Dowl. P. C. 183); and it is an objection that he remains liable

(E) *Must not be Foreigners, unless Property here.*[1]

(F) *Nor Privileged Persons.*[2]

(G) *Nor have previously been Rejected.*[3]

V. Of Putting in Bail in Town.

(A) *By whom put in.*[4]

(B) *When put in.*[5]

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on dishonoured bills. *Barnesdell v. Stretton*, 2 Chit. R. 79; 1 Tyr. 531). Where it was sworn, and not contradicted, that the bail were gambling-house-keepers, held to be no objection, they swearing to sufficient property. *Anon.* id. 160.

But where the qualifying property consisted of money placed in his hands to indemnify him, it was deemed insufficient. *Nicholl's Bail*, 1 Hodges, 77). Where the bail had suffered his children (2 Chit. R. 77), or his father (*Holm v. Booth*, id. 78), to receive parochial relief, he was rejected. So where he did not know whether or not he had been arrested within two years (*Newman's Bail*, id. 95); they should also be worth double the amount endorsed on the writ, or if that sum exceed 1000*l.*, then 1000*l.* in addition to it, after payment of their just debts; and they must not be uncertificated bankrupts, nor persons who have been insolvent debtors, not having paid 20*s.* in the pound on the debts inserted in their schedule. *Smith v. Roberts*, 1 Chit. R. 9.

[1] That bail are foreigners, and have no property in England, is an objection (*Boddy v. Leyland*, 4 Burr. 2526. *Levy's Bail*, 1 Chit. R. 285; 2 W. Black. 444); but a native of England has been allowed to justify in respect of property partly in England and partly abroad. *Beardmore v. Phillips*, 4 M. & S. 173. *Graham v. Anderson*, id. 371. *Tomsey v. Napier*, 8 Taunt. 148.

[2] No person having privilege of parliament will be allowed to justify (*Duncan v. Hill*, 1 D. & R. 126; 2 B. & P. 682. *Graham v. Stuart*, 4 Taunt. 249); nor a servant in ordinary of the Queen (*Anon.* 1 D. & R. 127); or of a foreign ambassador. *Lock's Bail*, 1 Dowl. 124. *See* also *Glend v. Mackay*, 2 W. Black. 956.

[3] If they have previously been rejected, they will not be allowed, even if not opposed (*Laporte's Bail*, 3 Dowl. 110); and even where it was not discovered until after bail had been opposed and allowed, the court set aside the rule for allowance, although it appeared that the person, since his rejection, had become a person of considerable property (*Pickard v. Dobson*, 3 D. & R. 5; *Gould v. Berry*, 1 Chit. R. 143; id. 307; but *see* 1 D. & R. 488); also if they have been bail before, and cannot say for how much or how often; or if it appear that their property is not sufficient for both actions, they will be rejected. Lofft, 72, 194. *Varden v. Wilson*, 1 Chit. R. 287.

[4] Bail may be put in by the defendant or his attorney, or by an attorney in pursuance of his undertaking, or by the sheriff or his officer. 2 Bing. 271; 5 Price, 558. The sheriff may put in bail for his own protection, and such bail may render without justifying (*Hamilton v. Jones*, 6 Bing. 628; S. C. 4 M. & P. 454); but bail put in by the sheriff's officer before the time allowed for that purpose, and without the consent of the defendant, will be set aside. *Taylor v. Evans*, 1 Bing. 367. The attorney employed by the sheriff may describe himself as attorney for defendant (*Gilmour v. Brindley*, 7 D. &. R. 259); and if two sets of bail are put in, the plaintiff must except to both, if he wishes to prevent their allowance.

[5] Bail must be put in within eight days after the arrest of the defendant, inclusive of the day of such arrest, whether the arrest take place in town or country (2 Wm. 4, c. 39, s. 10; 1 & 2 Vic. c. 110, s. 4; *Grant v. Gibbs*, 1 Hodges, 56); but by R. 89, H. T. 1833, "whenever a plaintiff shall rule the sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and a plaintiff having so ruled, the sheriff shall not proceed on any assignment of the bail-bond until the time has expired to bring in the body as aforesaid." Where the last of the eight days is a Sunday, or a day appointed for public fast or thanksgiving, or is a holiday, the defendant has the whole of the following day (*Studly v. Sturt*, 2 Stra. 782; R. 174, H. T. 1853. *Alston v Underhill*, 1 C. & M. 492); but the proviso in 2 Wm. 4, c. 39, s. 11, as to vacation, is only applicable to declarations and subsequent pleadings, and does not affect the time for putting in bail, although the arrest is between the 10th August and the 24th October. *Rex v. Sheriff of Middlesex*, 2 C. & M. 333; S. C. 2 Dowl. P. C. 286. Bail may be put in on a *dies non juridicus* other than Sunday. *Baddely v. Adams*, 5 T. R. 170; *Bennett v. Potter*, 2 C. & J. 622. When the defendant is a prisoner, bail may be put in at any time before defendant is charged in execution, but not afterwards. *Dyott v. Dunn*, 2 Chit. R. 72. *Stanton's Bail*, id. 73. *Davis v. Towler*, id. 74. *Todd v. Etherington*, 2 Marsh. 375. If the defendant have obtained a *rule to stay the proceedings*, and it be discharged, he has only the whole of the day on which the rule is disposed to put in and perfect bail. *St. Hanlaire v. Byam*, 4 B. & C. 970. *Glover v. Watmore*, 6 id. 769; 8 D. & R. 607. An extension of time for putting in bail may gene-

(C) *Where put in.*[1]

VI. Bail-Piece, Requisites of.

(A) *Must state the County where Arrest was.*[2]

(B) *Must Correspond with the Writ.*[3]

VII. Notice of Bail.

(A) *Must specify Residence of Bail.*[4]

(B) *And whether Housekeeper or Freeholder.*[5]

(C) *What sufficient Description of.*[6]

(D) *Must be given in all Cases.*[7]

(E) *When to be given.*[8]

(F) *By and to whom to be given.*[9]

VIII. Affidavit of Justification.

rally be obtained by taking out a summons before the expiration of the time allowed, on consenting that the plaintiff shall not be damnified by the delay. *Joyce v. Pratt*, 6 Bing. 377.

[1] Bail may be put in before a judge in town, or in vacation before a commissioner, under 1 & 2 Vic. c. 45, s. 4, or a commissioner in the country, or a judge on circuit. It may be put in *absolutely* or *de bene esse*, subject to the plaintiff afterwards approving or excepting to them. Chit. Arch. Pr. 10th ed. 788.

[2] The bail-piece (that is the document signed by the bail), must state the county where the arrest took place. *Smith v. Miller*, 7 T. R. 96; 3 M. & S. 532. It must be entitled in the court. 1 Chit. R. 79.

[3] It should correspond with the writ in the names of the parties and the sum endorsed on it. 1 Moore, 126; 1 M. & S. 199. The names of the parties should be stated correctly. 1 M. & S. 199; 1 B. & P. 356. If the defendant has been arrested by a *wrong* name, the bail-piece should set out his *right*, and state how he was sued. 2 Wils. 393; Willes, 462; Barnes, 94; 4 Taunt. 818; but *see* also *Boswell v. Atkins*, 2 Chit. R. 56; id. 81. The court have refused to amend the bail-piece without the consent of the bail. 1 Barn. 214. *Bingham v. Dickie*, 5 Taunt. 814; 1 B. & P. 31; 3 id. 321. The conditions of the recognisance entered into cannot be varied. *Bottomley v. Medhurst*, 1 M'Clel. 311.

[4] By R. 97 (Pr.) 1853, "Every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any) where each of the bail resides, and all the streets or places, and numbers (if any) in which each of them has been resident at any time within the last six months; and."

[5] "Whether he is a housekeeper or freeholder." And this rule applies to both town and country bail. *Anon.* 1 Dowl. 259.

[6] The word "gentleman" is sufficient description for a schoolmaster, clerk in the Post Office, or clerk in the Custom House. —— *v. Pasman*, 5 Taunt. 759. *Wood v. Ray*, 2 Dowl. 692; 1 Chit. R. 494 n. A place well known as a village is a sufficient description, without mentioning a street in it. *Smith's Bail*, 1 Dowl. P. C. 499. An agent cannot be described in the notice as a gentleman (*Fleming's Bail*, 1 Dowl. P. C. 641; S. C. 1 C. & M. 111); nor a clerk as jeweller (*Hamlet's Bail*, 1 Dowl. P. C. 501); or as a gentleman (*Moss v. Heaviside*, 7 D. & R. 772); or a builder as a gentleman. *Anon.* C. P. MSS. Notice of bail need not state where the bail-piece is filed. *Wigley v. Edwards*, 2 Dowl. P. C. 282. The names and descriptions of original or added bail must be inserted in the notice. 6 Bing. 57. A defective notice of bail is not such a nullity as will enable the plaintiff to obtain an attachment. *Rex v. The Sheriff of Middlesex*, 2 Dowl. P. C. 5; S. C. 1 C. & M. 482; S. P. *Lowe v. Galloway*, 5 Taunt. 663; and *see* 8 Bing. 334; S. C. 1 M. & S. 518. A notice describing the party as housekeeper when only a lodger is insufficient, although it should turn out that he is a freeholder. *Wilson's Bail*, 2 Dowl. P. C. 432. S. P. *Rex v. The Sheriff of Middlesex*, id. 433.

If the defendant be a prisoner, the notice in the Exchequer should state the fact. *Fuller's Bail*, 5 Tyr. 491. And notice of bail as put in before one judge, when, in fact, they were put in before another, is bad. *Kelly v. Wrother*, 2 Chit. R. 109. *Crawford v. Oxley*, 3 Smith, 515. Notice of more bail than two is also irregular. *See ante*, p. 84 n.

[7] Notice of bail must be given in all cases; and it is no bail until such notice has been served. 1 Taunt. 616; 1 Hodges, 56.

[8] It *may* be given before bail are put in; but this is not usual, unless it is intended to justify at the time of putting in. If, however, it is desired to justify on putting in, four days' notice for that purpose must be given before eleven in the morning, and exclusive of Sunday. R. 96 (Pr.) H. T. 1853, *See post*, p. 87 n.

[9] The notice is usually given by the attorney for the party who puts in the bail, and is served either on the attorney for the plaintiff, or on the plaintiff himself if he sues in person. But it may also be given by the attorney appointed by the bail to the sheriff. *Plomer v. Houghton*, 2 B. & A. 604.

(A) *Form of.*[1]

(B) *What Amount must state Bail to be worth.*[2]

(C) *Should describe Property with Certainty.*[3]

(D) *Consequences of Defective Affidavit.*[4]

IX. Accepting of and excepting to Bail.

(A) *Affidavit is sufficient, if no Notice of Exception.*[5]

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[1] By R. 98 (Pr.) 1853. "If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court, or a judge thereof, shall otherwise order."

Form of Affidavit of Justification of Bail.

In the Q. B. [*or* C. P. *or* Exch. of P., *as the case may be*].

Between A. B., plaintiff, and C. D., defendant.

B. B., one of the bail for the above-named defendant, maketh oath and saith that he is a housekeeper [*or* freeholder, *as the case may be*], residing at [*describing particularly the street or place, and number, if any*]; that he is worth property to the amount of £ [*the amount required by the practice of the courts*] over and above what will pay all his just debts [*if bail in any other action, add,* and every other sum for which he is now bail]; that he is not bail for any defendant except in this action [*or if bail in any other action or actions, add,* except for C. D., at the suit of E. F., in the Court of in the sum of £ for G. H., at the suit of J. K., in the Court of in the sum of £ [*specifying the several actions, with the courts in which they are brought, and the sum in which the deponent is bail*]; that the deponent's property, to the amount of the said sum of £ [*if bail in any other action or actions, here add,* and of all other sums for which he is now bail as aforesaid], consists of [*here specify the nature and value of the property in respect of which the bail purposes to justify, as follows:*] stock in trade in his business of carried on by him at of the value of £ of good book-debts owing to him to the amount of £ of furniture in his house at of the value of £ of a freehold or leasehold farm of the value of £ situated at occupied by [*or of other property, particularising each description of property, with the value thereof*]; and that the deponent hath, for the last six months, resided at [*describing the place or places of such residence*].

Sworn, &c. [*as usual*].

This form should be substantially complied with. 1 Dowl. 606. *Bell v. Foster*, 1 M. & Scott, 518. *Hunt's Bail*, 4 Dowl. 272. *Henshaw v. Woolrych*, 1 C. & J. 150. *Okill's Bail*, 2 Dowl. P. C. 19. *Penson's Bail*, 4 id. 627. *Weller's Bail*, 6 Dowl. 312. Though the form is several, it may, however, be made jointly by the bail. 1 Dowl. 115. It would seem requisite to give the bail some addition, though it is not so stated in the form. *Benbow's case*, 5 Dowl. 714; 2 id. 670. *Stone's Bail*, 1 Gale, 15.

[2] By R. 101 (Pr.) 1853, affidavits of justification shall be deemed insufficient, unless they state each person justifying is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds 1000*l.*, when it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to.

[3] The property should be described with sufficient certainty to enable the plaintiff to make inquiries respecting it. 1 Dowl. 159. "Household furniture and effects," without saying where, is not sufficient. *Cooper's Bail*, 3 Dowl. P. C. 692. But an affidavit swearing to good debts owing to the bail, omitting the word "book," has been deemed sufficient. *Lanyon's Bail*, 3 Dowl. P. C. 85. See *Okill's Bail*, 2 id. 19. So, "possessed of money in the funds" is not sufficient, without saying what funds. 1 Dowl. 159. And as a general rule, in describing the property, the prescribed form should be followed. *Weller's Bail*, 6 Dowl. 312. The above rule does not apply to the case of a prisoner (*Webb's Bail*, 1 Dowl. 446); nor where bail are not put in in due time. *Rogers v. Porter*, 3 Dowl. 255.

[4] In general, the affidavit cannot be amended. *Worlison's Bail*, 2 Dowl. P. C. 53. But the word "householders" for "housekeepers" may be corrected. *Anon.* 1 id. 127. So, if the addition be omitted (*Brown's Bail*, 5 id. 220); or the affidavit state that the bail were not security for any defendant, except the above defendant, allowed to be amended by adding, "except in this action." *Warren v. De Burgh*, 7 id. 96.

The bail, however, may justify, if it appear that they are sufficient (*De Bode's Bail*, 1 Dowl. 301. Id. 126. *Popjay's Bail*, 3 Dowl. 170. *Hodgson v. Cooper*, 5 Tyr. 740); and this in respect of property not described in the affidavit. *Jackson's Bail*, 1 Dowl. 172. Id. 179. But if the affidavit be defective, and the objection not simply technical, the defendant must in general pay the costs of the opposition. *Brown v. Ahrenfeldt*, 4 Mee. & W. 76. *Hemming v. Blake*, 1 Dowl. 179.

[5] By R. 99 (Pr.) 1853, "If the plaintiff shall not give one day's notice of exception

(B) *Where no Affidavit, Exception within Twenty Days.*[1]

(C) *Exception must be entered.*[2]

(D) *Irregularity in Notice of Exception may be waived.*[3]

X. When and where Bail to be Justified.[4]

XI. Adding to or Changing Bail.[5]

(A) *Leave of Court or Judge requisite to add or change.*

(B) *In what Cases will be given.*[6]

XII. Notice of Justification.

(A) *When given.*[7]

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to bail by whom such affidavit shall have been made, the recognisance of such bail may be taken out of court, without other justification than such affidavit."

[1] By R. 100 (Pr.) 1853, "Where notice of bail shall not be accompanied by such affidavit, and in bail in error, the plaintiff may except thereto *within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff or his attorney;* or where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the bail-piece is transmitted, and notice thereof given as aforesaid; and no exception to bail shall be admitted after the time hereinbefore limited."

If the 20th day happen to fall on a Sunday, the exception may be made on the Monday. *Rogers v. Astley*, 1 Dowl. N. S. 338.

By R. 86 (Pr.) H. T. 1853, "When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond."

The plaintiff is precluded from excepting after the time limited for that purpose; but if bail be put in after due time they must justify, whether excepted to or not. *Turner v. Cary*, 7 East, 617. *Nunn v. Rogers*, 2 Ch. R. 108. *R. v. Wilson*, 3 Dowl. 255.

[2] The exception must be entered, as well as notice given (*Rex v. The Sheriff of Middlesex*, 5 B. & C. 389; S. C. 8 D. & R. 137–140. *Thwaites v. Glossington*, 4 D. & R. 365. See *Hodson v. Garratt*, 1 Chit. Rep. 174); nor will notice of justification dispense with notice of exception so as to authorise proceedings against the sheriff. *Rex v. The Sheriff of Middlesex*, 5 B. & C. 389; S. C. 8 D. & R. 149. It is sufficient for the plaintiff to except to one of the bail to compel the justification of both, and the defendant cannot treat the exception as a nullity. *Feltham v. King*, 5 Dowl. P. C. 658. Rule to bring in the body cannot be served before excepting to the bail. *Sed qu.? Rex v. The Sheriff of Middlesex*, 7 D. & R. 264. *See* 8 T. R. 258.

[3] The defendant may waive an irregularity in the notice or service of it by afterwards giving notice of justification. Chit. Arch. 10th ed. 797.

[4] By R. 103 (Pr.) 1853, "In all cases bail, either to the action or in error, shall be justified, when required, within four days after exception, before a judge at chambers, both in term and vacation."

[5] By R. 92 (Pr.) 1853, "The bail, of whom notice shall be given, shall not be changed without leave of the court or a judge." When bail is changed by order of a judge, they cannot justify until payment of the costs of the order. *Jourdain v. Gunn*, 2 Tyr. 491. The interval between the 10th August and the 24th October does not affect the time of justifying. *King v. Sheriff of Middlesex*, 2 Dowl. P. C. 286. The above rule applies to the case of bail substituted by the sheriff for the purpose of rendering. *Rex v. The Sheriff of Essex*, 4 M. & Scott, 247.

[6] Where persons become bail without any pretence for supposing they can justify, no time will be given to add other bail. *Anon.* Ex. 10 Price, 8. So where bail attempted to justify, and were rejected on a preliminary technical objection, the court refused to allow fresh bail to be added. *Elliott v. Gutteridge*, 6 Dowl. 255. And where the bail were not excepted to, but afterwards discovered to be insolvent, the court refused an application to compel the defendant to add and justify others. *Lazarus v. Levaux*, 4 Dowl. P. C. 353. And to obtain permission, a reason must be given in the affidavit why competent bail was not put in in the first instance. *Orchard v. Glover*, 9 Bing. 318; S. C. 2 M. & Scott, 396; S. C. 1 Dowl. P. C. 707. Where new bail is put in, the court will grant time for inquiry, but will not give costs of opposition. *Bowman v. Russell*, 3 Tyr. 747. Where the description of bail is so vague that they are rejected, but time is given, the question of costs will be reserved until the justification. *Richardson v. Hodgson*, 11 Price, 379.

[7] By R. 102 (Pr.) 1853, "It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification."

By R. 96 (Pr.) 1853, a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof, as aforesaid, to the defendant, his attorney, or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such

(B) *Form of.*[1]
(C) *By whom to be given.*[2]
XIII. Of Granting further Time to Justify.[3]
XIV. Of Costs of Justifying in Bail.[4]
XV. When Bail to pay Costs of Notices of Justification.[5]
XVI. Rule of Allowance.[6]
XVII. Of Putting in Bail in the Country.
(A) *Before whom.*[7]

time not to exceed three days, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

[1] The notice should be entitled in the cause, and it would seem that, if it does not form part of the notice of putting in bail, it should correspond with it. *See* Notice of Bail, *ante*, p. 86. It need not state whether they will justify in person or by affidavit. *Norton's Bail*, 1 Mee. & W. 632; 5 Dowl. 85. And notice being that bail would justify for three defendants, does not prevent their justifying for two defendants. *Denton & others' Bail*, 1 Dowl. P. C. 2. Describing defendants in the single number in notice of justification does not vitiate it. *Anon.* 1 Tyr. 378.

[2] The notice must be given in the name of the attorney authorising his name to be used, and not of the party using it, when not an attorney of the court. *Chadwick v. Hough*, 2 C., M. & R. 164; S. P. *Marden's Bail*, 3 Dowl. P. C. 654. And where A., the attorney giving the notice, was not one of the court, and the notice was signed Alex. B., in whose name he had liberty to practise, held irregular. *Chadwick v. Hough*, 2 C., M. & R. 29. And it must be given by the same attorney who gave the notice of bail, unless in the meantime the defendant have obtained an order to change (*Hill v. Roe*, 3 Marsh. 257; 6 Taunt. 532; and W. Black. 1323); but if the attorney for defendant refuse to proceed, the bail may appear by their own attorney. *Haggett v. Argent*, 7 Taunt. 47. *See* also *Plomer v. Houghton*, 2 B. & A. 604.

[3] In general, if bail be not in attendance, the judge will grant time, on condition that an affidavit is produced to him giving a satisfactory reason for his absence. When an application for time is necessary by the negligence of the attorney, he will be ordered to pay the costs. *Shillitoe's Bail*, 9 D. & R. 6. Also, before the time for justification has arrived, time may be obtained on summons, if it appear necessary and not sought for delay. *Maude v. Jowett*, 3 East, 145. *Joyce v. Platt*, 6 Bing. 377. *Parker v. Turner*, 2 Chit. R. 71. So, if bail be not allowed to justify from some defect in the proceedings, further time will be allowed. Lofft, 194; 1 Chit. R. 495; 5 id. 92. One bail alone cannot justify without the consent of the plaintiff. *White's Bail*, 5 Dowl. 133.

[4] By R. 98 (Pr.) 185. "If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form prescribed (*ante*, p. 87 n.), and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court or a judge thereof shall otherwise order."

The expenses of inquiring into the competency of the bail allowed to be costs in the cause. *Paine v. Munton*, 2 Tyr. 162. Omitting number of house entitles plaintiff to time to make inquiries, or to have costs of affidavit and appearing to oppose. *Muir v. Smith*, 3 Tyr. 742. If bail be intimidated by the plaintiff from justifying, he will have to pay the costs of substituting others. *Gwynne v. Fuller*, 1 Dowl. P. C. 444. If the affidavit be substantially defective, the justification will only be allowed on payment by defendant of the costs of opposition. *Jackson's Bail*, 1 Dowl. 172. *Hemming v. Blake*, id. 179. *Innes v. Smith*, 2 C. & J. 631; 2 Tyr. 742. But if the defect be merely technical, the defendant is merely deprived of costs, but has not to pay them. *Carte's Bail*, 5 Dowl. 577. *Miller's Bail*, id. 602. *Heald's Bail*, 3 id. 423; 5 Tyr. 231.

[5] By R. 111 (Pr.) 1853. "Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected. This rule does not extend to country bail. Arch. Pr. 10th ed.

[6] As soon as the bail justify, the rule for allowance should be drawn up and served; for, until this is done, the bail are not deemed perfected. *Rex v. Sheriff of Middlesex*, 2 Dowl. P. C. 116. *Holland v. White*, 2 B. & P. 341. *Bignold v. Lee*, 1 B. & C. 285.

[7] When the proposed bail do not reside "within the cities of London or Westminster, or within ten miles thereof, they may put in or justify by affidavit before a commissioner, under 4 & 5 Wm. & Mary, c. 4, s. 1 (*see* 4 Wm. & Mary, c. 4, s. 2. *Anon.* 1 C. & J. 516; or before a judge of assize on his circuit. 4 Wm. & Mary, c. 4,

(B) *By whom, and when.*[1]
(C) *Bail-Piece, Transmission of.*[2]
XVIII. Of Justifying in the Country.[3]
XIX. Bail in Cases of Prisoners.[4]
XX. Paying Money into Court in Lieu of.[5]
XXI. Extent of Liability of Special Bail.[6]

s. 3); and the recognisance need not be taken in the county where the defendant was arrested (*Moore v. Kendrick*, 3 Bing. 603); and it is not necessary that both the bail should justify before the same commissioner. 2 Chit. R. 91. Id. 90. *Levy v. Payne*, 3 M. & Scott, 870. No affidavit of the due acknowledgment of the recognisance is necessary, if put in before a judge of assize. 4 Wm. & Mary, c. 4, s. 3.

[1] Only eight days are allowed, as in town bail. 1 Hodges, 56; 3 Dowl. 409. The observations as to and by whom it may be put in town cases apply to country bail, *ante*, p. 85.

[2] By R. 95 (Pr.) 1853. "In the case of country bail the bail-piece shall be transmitted and filed within eight days."

By 4 Wm. & Mary, c. 4, s. 1. The recognisance or bail-piece so taken shall be transmitted to one of the judges of the court; who, upon affidavit made of the due taking of such recognisance or bail-piece by some person present at the taking thereof, shall receive the same upon payment of the usual fees.

[3] The practice and mode of excepting is the same as in town cases (Arch. Pr. 10th ed. 816); so, also, as to notice of justification, except that the notice states that the bail will justify by affidavit. If notice of country bail is given, it would seem that the four days' notice required by R. 96 (Pr.) 1853, need not be given, but that two days' notice will suffice. *Harbottle v. Clark*, 4 Dowl. 12.

[4] A prisoner may put in and justify bail upon a two-days' notice, as prior to the new rule. *Davies v. Grey*, 2 C. & J. 309; S. C. 2 Tyr. 277. Notice signed by a prisoner as being in custody suffices (*Frith's Bail*, 2 Dowl. P. C. 229; S. P. *Poole's Bail*, 2 Mee. & W. 312; 5 Dowl. P. C. 449); but must state the fact accordingly (*Creighton's Bail*, 1 C. & M. 335; S. C. 1 Dowl. P. C. 609; S. P. *Fuller's Bail*, 5 Tyr. 491); though, if signed by the defendant in custody, it is sufficient, without stating that he was a prisoner. *Frith's Bail*, 2 Dowl. P. C. 229. The four days' notice, as to putting in and justifying at the same time, under R. 98 (Pr.) 1853, does not apply to a prisoner. *King's Bail*, 1 Dowl. P. C. 509; S. P. *Davis v. Grey*, 2 C. & J. 309.

Nor does R. 99 (Pr.) 1853, as to affidavit of justification sufficing, if no exception to bail (*Webb's Bail*, 1 Dowl. 446); nor does R. 92 (Pr.) 1853, as to the changing bail. By R. 123 (Pr.) 1853, "every rule or order of a judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith, where defendant is in a county gaol."

[5] Where the defendant has (under 43 Geo. 3, c. 46, s. 2) *in lieu of bail to the sheriff*, deposited in his hands the sum endorsed on the writ, and 10*l.* to answer the costs, &c., the defendant may, instead of putting in special bail, by 7 & 8 Geo. 4, c. 71, s. 2, allow such sum, with the additional sum of 10*l.* as a further security for costs, to remain in court to abide the event of the suit; or where defendant has not made such deposit with the sheriff, he may pay into court the sum endorsed on the writ, and 20*l.* as a security for costs, to abide the event.

Also by the 7 & 8 Geo. 4, c. 71, s. 4, if the defendant has put in and perfected special bail, he may, on motion to the court, if the court think fit, deposit and pay into court the sum which would have been deposited and paid in had defendant originally elected to do so, together with such further sum as the court shall direct, to abide the event of the suit. And thereupon the court will direct an *exoneretur* to be entered upon the bail-piece.

Any defendant, who has made this deposit at any time before issue joined (*Welshman v. Sturgess*, 13 Q. B. 556; 18 L. J. Q. B. 168. *Alcenius v. Nygren*, 23 L. J. Q. B. 287), or in case of a judgment by default before final judgment, or perhaps before execution (*Geach v. Coppin*, 3 Dowl. 78; id. 604), may receive the same out of court upon putting in and perfecting special bail, or rendering, and on payment of such costs as the court shall direct. *Douglas v. Stonbrough*, 3 Ad. & E. 316.

[6] By R. 109 (Pr.) 1853. "Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognisance;" that is, the sum in judge's order and endorsed on *capias*. 28 L. J. Q. B. 85. And they are *together* only liable for this amount. *Vansandeau v. Nash*, 2 Dowl. 767. *Blaney v. Holt*, 5 B. & Adol. 241. Bail are liable on their recognisance for the residue left unsatisfied after the plaintiff has proceeded against the goods of the principal by *fi. fa. Stevenson v. Roche*, 9 B. & C. 707. They are responsible while their names continue on the bail-piece, although rejected (*Sayer v. Verdenhalen*, 6 M. & S. 218); but where, after bail put in, the declaration was amended by adding new counts on other causes of action, and the plaintiff recovered on all, it was held that the bail were not liable to the costs of the added counts, and that the *onus* of separating the

XXII. Discharge of Special Bail.

(A) *By Death of Principal.*[1]

(B) *By Bankruptcy or Insolvency.*[2]

(C) *By Render.*

(*a*) *By whom and in what Manner.*[3]

(*b*) *Within what Time.*[4]

(*c*) *To what Prison.*[5]

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liability on taxation lay on the plaintiff. *Taylor v. Wilkinson*, 1 Nev. & P. 629. They are, however, liable to the costs of a *sci. fa.* against them, whether they have pleaded or not (*Pocklington v. Peck*, 1 Stra. 638. *Baldwin v. Morgan*, 2 id. 826); and also to the costs of an action against them. *Hughes v. Paidevin*, 15 East, 254. *Perigal v. Mellish*, 5 T. R. 363.

By R. 110 (Pr.) 1853. "To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out."

[1] If the principal die at any time before the return of the *ca. sa.* the bail are discharged (*Sparrow v. Lowgate*, W. Jon. 29); and in such case the bail may apply to have an *exoneretur* entered on the bail-piece; or they may plead the death to any proceeding against them on the recognisance. Ch. Arch. 10th ed. 826. But if the death is after the *ca. sa.* is returnable the court cannot relieve them. *Parry v. Barry*, 2 Stra. 717. *Filewood v. Popplewell*, 2 Wils. 65. And this, although the party die before the return is filed (*Rawlinson v. Gunston*, 6 T. R. 284); or while the writ remains in the office of the sheriff. 2 Sellon, 551.

[2] If the principal become bankrupt and obtain his certificate, or be discharged under the Insolvent Acts before his bail are fixed, the bail may apply to have an *exoneretur* entered on the bail-piece. *Wooley v. Coft*, 1 Burr. 224. *Mannin v. Partridge*, 14 East, 599. *Harner v. Hagger*, 1 B. & A. 332. *Anon. v. Bruce*, 2 Ch. R. 105. *Shakespeare v. Phillips*, 8 East, 433. This application should be made before any proceedings are had against the bail, or they will have to pay the costs of such proceedings. *Martin v. O'Hara*, Cowp. 823. And the court will, generally, order an *exoneretur* to be entered on the bail-piece when the principal is entitled to be discharged out of custody. *Todd v. Maxfield*, 3 B. & C. 222.

[3] Bail above may wholly discharge themselves of their responsibility by rendering their principal, at any time before the return of the *ca. sa.* Ch. Arch. 10th ed. 828. *Mannin v. Partridge*, 14 East, 599. *Armitage v. Rigbye*, 5 Ad. & E. 81. As a matter of favour, also, the court has allowed the bail a further time to render. *Wilmore v. Clerk*, 1 Ld. Raym. 156. *Anon.* 1 Salk. 101. *Armitage v. Rigbye, supra.*

By R. 104 (Pr.) 1853. "Bail though rejected shall be allowed to render the principal without entering into a fresh recognisance."

[4] By R. 105 (Pr.) 1853. "Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night."

The right to render only ceases when the bail ceases to be liable. *The King v. Sheriff of Middlesex*, 6 Bing. 251. A render is equivalent to a justification (*Cassen v. Bond*, 2 Y. & J. 531); and no proceedings can be taken after notice of the render. *Lewis v. Grimstone*, 5 Dowl. 711.

By R. 108 (Pr.) 1853. "Where the plaintiff proceeds by action on the recognisance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; and upon notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only." If the bail do not render within these eight days, their right is gone. *Bird v. Atkins*, 7 Dowl. 769.

[5] If the defendant be not in custody, the render may be to the prison of the court (*i. e.* the Queen's prison), or to the gaol of the county where the defendant was arrested, 11 Geo. 4, and 1 Wm. 4, c. 70, s. 21.

By R. 106 (Pr.) 1853. "On application by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any *exoneretur*."

By R. 107 (Pr.) 1853. "If a defendant shall be in custody of the gaoler of any county gaol by virtue of any process issued out of any of the said courts, he may be rendered in discharge of his bail in any action depending in the said court, in like manner as is last hereinbefore provided, and there-

(*d*) *Of the Notice to Render.*[1]

(*e*) *Enlargement of Time to Render.*[2]

(D) *By Variance between Declaration and Writ and the Affidavit.*[3]

(E) *By giving Time to Principal.*[4]

(F) *By other Causes.*[5]

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upon the bail shall be wholly exonerated, without entering any *exoneretur*."

[1] Render of a party already in custody may be effected by giving a notice in writing to the plaintiff. 11 Geo. 4, and 1 Wm. 4, c. 70, s. 22. But render without notice is of no avail, though subsequent proceedings may be set aside on payment of costs. *Thorne v. Hutchinson*, 3 B. & C. 112; S. C. 4 D. & R. 712. This notice should be given to the plaintiff's attorney: upon such notice being served, proceedings on the recognisance of bail may be stayed on payment of the costs of the writ and service thereof. R. 108 (Pr.) 1853. But tender must be made of the costs incurred, or plaintiff may proceed, notwithstanding the notice of render. The court may, nevertheless, relieve the bail. *Horn v. Whitcombe*, 5 Dowl. 328. But see *Byrne v. Aguilar*, 3 East, 306.

[2] To obtain time to render, the affidavit must clearly disclose the grounds of the application. *Show v. Cash*, 1 Bing. 8. Time for rendering allowed, though bail have not justified, where principal in criminal custody (*Gibson v. White*, 2 C. & J. 85; S. C. 2 Tyr. 162); or in gaol under a conviction for a misdemeanour (*Ashmore v. Fletcher*, 13 Price, 523; S. C. M'Clel. 252; S. P. *Campbell v. Ackland*, 1 Dowl. P. C. 635; S. C. 1 C. & M. 73; S. C. 3 Tyr. 230; S. P. *Roach v. Boucher*, 10 Price, 104); or after conviction and a point reserved (*Joyce v. Pratt*, 6 Bing. 628). So, to enable a bankrupt to make out his accounts under a country commission (*Offley v. Dickens*, 6 M. & Scott, 348); so, when it would be inconvenient for a court of bankruptcy to attend the prison to which the principal would be rendered (*Harris v. Alcock*, 1 Dowl. P. C. 568; S. C. 2 Tyr. 448; S. C. 2 C. & J. 486); so, where the defendant had been committed by a court of bankruptcy, the court gave time to render. *Waugh v. Ashford*, 1 Bing. N. S. 294; 1 Scott, 167; and 3 Dowl. P. C. 23. With respect to allowing time for the render to be enlarged where the party is become bankrupt, there is no distinction between town and country commissions. *Ruston v. Greene*, 2 Dowl. P. C. 617. But, as bail are not precluded from rendering on account of the bankruptcy of their principal, the court refused therefore to enlarge the time until after his final examination. *Coombs v. Dodd*, 3 M. & Scott, 817. So, the court refused on account of illness of principal (*Warrington v. Sammell*, 13 Moore, 170); or on the ground that he has become lunatic (*Wynn v. Pety*, 4 East, 102); or that he was arrested and detained by a foreign enemy. *Grant v. Fagan*, id. 189. In order to obtain this time, it must always be sworn that the application is made on behalf of the bail. *Harris v. Glossop*, 2 Ch. R. 101. If time is not enlarged, the bail must render their principal within the time allowed, or pay debt and costs. *Bird v. Atkins*, 7 Dowl. 769.

[3] If the plaintiff hold two defendants to bail on a joint writ in an action of contract, and declare against one only, the bail are discharged (*Bartrum v. Williams*, 6 Dowl. 397. *Thompson v. Cotter*, 1 M. & S. 55. *Moss v. Birch*, 5 T. R. 722. *Bellotti v. Barella*, 4 Dowl. 719); but this is otherwise in an action of tort. *Wilson v. Edwards*, 5 D. & R. 622; 3 B. & C. 734. *Caldwell v. Blake*, 3 Dowl. 656. *Pepper v. Whalley*, 1 Bing. N. C. 71; 2 Dowl. 821. If the writ be at the suit of one plaintiff only, and the declaration is at the suit of two, the bail are discharged. *Rogers v. Jenkins*, 1 B. & P. 383. So, also, the declaration must correspond with the affidavit to hold to bail; and bail will be discharged if the declaration varies from the affidavit in the character in which the plaintiff sues, or the defendant is sued (*Marzetti v. Jouffroy*, 1 Dowl. 44. *Manesty v. Stevens*, 9 Bing. 400); or in the number of the plaintiffs or defendants. *Spalding v. Mure*, 6 T. R. 363. *Forbes v. Phillips*, 2 N. R. 98. But part of the declaration containing counts on causes of action not mentioned in the affidavit, so long as it has a count to meet that statement, will not discharge the bail, so far as the original cause is concerned. *Taylor v. Wilkinson*, 5 Nev. & M. 189; 3 Ad. & E. 784. *Green v. Elgie*, 3 B. & Adol. 437. *Taylor v. Wilkinson*, 6 Ad. & E. 533.

[4] Any time given to the principal without the consent of the bail, or one of them (*Howard v. Bradberry*, 3 Dowl. 92), which puts them in a different position, will discharge them; as in the case of a *cognovit*, the terms of which extended the time for payment of debt and costs (*Thomas v. Young*, 15 East, 617. *Clift v. Gye*, 9 B. & C. 422); or taking the joint bills of the defendant and another person (*Willison v. Whittaker*, 7 Taunt. 53. *Melville v. Glendinning*, id. 126); or agreeing to take a composition. *Thackeray v. Whitaker*, 1 Moore, 457.

[5] Bail are entitled to be relieved wherever the principal is entitled to his discharge. *Todd v. Maxfield*, 3 B. & C. 222; S. C. 5 D. & R. 258; S. P. *Bottomley v. Medhurst*, M'Clel. 399, overruling *Glynn v. Yeates*, 8 Mod. 31; S. P. *Humphreys v. Knight*, 6 Bing. 569. Taking a *cognovit* of principal without knowledge of bail does not discharge them, unless by its terms he is to have longer time than allowed by the or-

XXIII. Exoneretur.[1]

XXIV. Proceedings against Bail.

(A) Ca. sa. *must first issue against Principal, and Bail-piece filed.*[2]

dinary course of proceeding. *Stevenson v. Roche*, 9 B. & C. 707; S. P. *Whitfield v. Hodges*, 1 Mee. & W. 679; S. C. 1 T. & G. 1061. Even though the plaintiff may have said, on application for further time, that defendant might rely on his honour. *Ladbrook v. Hewett*, 1 Dowl. P. C. 488. And the bail cannot be proceeded against after the death of their principal, where no notice has been given of the principal's default. *Surman v. Bruce*, 10 Bing. 434. And without their consent giving time to the principal, although the bail are not damnified:—*Held*, to discharge them. *Hannington v. Beare*, 4 Dowl. P. C. 256. After the commencement of a negociation with the principal, with the consent of the bail, proceedings cannot be taken against the latter without notice. *Charleton v. Morris*, 6 Bing. 427; S. C. 4 Moore, 114; S. P. *Clift v. Gye*, 9 B. & C. 423:—*Held*, that if the bail apply to be discharged on the ground of time given to the principal, they must apply in the term next after the agreement for giving time comes to their knowledge. *Vernon v. Turley*, 3 C., M. & R. 316: 4 Dowl. P. C. 660. In an action on an attorney's bill, after forfeiture of the bail-bond and an assignment taken, an agreement to stay proceedings for a month, and not tax the bill, does not discharge the bail (*Woosnam v. Price*, 1 C. & M. 352; 1 Dowl. 681); and if during the action the defendant become a peer, or a member of the House of Commons, or if from any other act of the law of our own state it becomes impossible to render the defendant, an *exoneretur* may be entered on the bail-piece. *Phillips v. Wellesley*. 1 Dowl. 9. *D'Argent v. Wilson*, 1 East, 330. *Chapman v. Snow*, 1 B. & P. 132.

[1] After an *exoneretur* has been ordered to be entered, any proceedings against bail are irregular, even before it be actually entered. *Bond v. Isaac*, 1 Burr. 409. An *exoneretur* by consent of the clerk to the agent of the plaintiff's attorney under a mistake of facts may be set aside. *Firth v. Harris*, 8 Dowl. 437.

Where, at the time of 1 & 2 Vic. coming into operation, the defendant was out on bail, and had quitted the kingdom, and it was sworn he intended to remain abroad, the court refused to enter an *exoneretur*. *Lewis v. Ford*, 7 Dowl. P. C. 85, and 4 Mee. & W. 361. After a writ of error brought, an application for an *exoneretur* should be made to the court in which the recognisance was originally taken, and not to the Court of Appeal. *Sherratt v. Floyer*, 2 Bing. 18. On principal being elected M. P., the bail are entitled to an *exoneretur*, even after final judgment. *Phillips v. Wellesley*, 1 Dowl. P. C. 9. *Exoneretur* entered, where the plaintiff described himself by two Christian names in the writ, and only by one in the declaration. *Grindall v. Smith*, 1 M. & P. 24.

[2] A writ of *ca. sa.* against the principal must be sued out and returned before any proceedings can be taken against the bail. *Thackeray v. Harris*, 1 B. & A. 212. If no *ca. sa.* be actually sued out and returned, and an action or *sci. fa.* be brought against the bail, the bail may plead this matter; but the court will not stay proceedings on motion. *Philpot v. Manuel*, 5 D. & R. 616. The *ca. sa.* should be directed to the sheriff where the venue is laid. 2 Saund. 72 a. By C. L. P. Act, 1854, "writs of execution to fix bail may be tested and returnable in vacation."

The *ca. sa.* must remain in the office four entire days before the return day, exclusive of the day when it is lodged, and of the return day (*Furnell v. Smith*, 7 B. & C. 693); and Sunday is not reckoned as one of those days (*Howard v. Smith*, 1 B. & A. 228); or Holy Thursday (*Scott v. Larkin*, 7 Bing. 109), but half-holidays are to be reckoned (*Armitage v. Rigbye*, 5 Ad. & E. 76). Procuring a *ca. sa.* against the principal to be returned *non est*, knowing that he is in custody, vitiates the proceedings against the bail. *Briggs v. Richardson*, 2 Dowl. P. C. 158. Bail can only take advantage of the writ of *ca. sa.* against their principal by pleading it. (*Philpot v. Manuel*, 5 D. & R. 615. But irregularities in the *ca. sa.* against the principal may be objected to by motion, as well as by plea, in proceedings under the *scire facias* against bail. (*Goldney v. Laporte*, 2 Bing. N. S. 456; 4 Dowl. P. C. 639; and 2 Scott, 670. A misdescription of the form of action in the writ of *ca. sa.* is only an irregularity, and does not make it void, and is not such an objection as may be taken advantage of by bail. *Gurney v. Hopkinson*, 1 C., M. & R. 587; 5 Tyr. 211; S. C. 3 Dowl. P. C. 189. It is no ground for setting aside the *ca. sa.* in the original action, or subsequent proceedings against the bail, that the damages and costs recovered exceed the damages laid in the declaration. *Kempeneers v. Holding*, 5 Dowl. P. C. 374. If the plaintiff knows of the defendant being in the sheriff's custody under a different name, and obtains a return of *non est inventus*, in order to fix the bail, the court will set aside the proceedings as irregular. *Briggs v. Richardson*, 2 Dowl. P. C. 158. Where the *ca. sa.* was lodged on 24th October, and proceedings commenced against the bail on 3d November:—*Held*, that it was too late to move to set aside the proceedings for irregularity on the 13th November. *Pocock v. Cockerton*, 7 Dowl. P. C. 21. Where, after the *ca. sa.* had been returned *non est inventus*, the defendant obtained a

(B) Scire Facias *against Bail.*[1]
(C) *Action against Bail.*[2]
(D) *Execution against Bail.*[3]
XXV. Rights of Bail against Principal.[4]

BAIL on Appeals. *See* Appeal, vol. i. p. 578.

BAIL in Ejectment. *See* Ejectment in Outlawry. *See* Outlawry.

BAIL in Error. *See* Error.

BAIL in Criminal Proceedings. *See* Justice of the Peace.

I. On what Charges and in what Manner Bail is taken, p. 94.
(A) *Warrant of Deliverance on Bail being put in*, p. 97.
II. Application to Court of Queen's Bench to be admitted to Bail, p. 97.

I. On what Charges and in what Manner Bail is taken.

Power of justices as to bailing felonies and certain misdemeanours.

11 & 12 Vic. c. 42, s. 23. "Where any person shall appear, or be brought before a justice of the peace, charged with any felony,[5] or with any assault with intent to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace-officer in the execution of his

rule *nisi* for a new trial, with a stay of proceedings:—*Held*, that on the discharge of the rule, the right to issue the *scire facias*, which had been only suspended, revived, and that no fresh entry of judgment, or *alias ca. sa.*, was necessary. *Armitage v. Rigbye*, 5 Ad. & E. 76.

After the *ca. sa.* has been returned and filed, the next step is to file the bail-piece. Ch. Arch. 10th ed. 842.

[1] The plaintiff may proceed against bail, either by *scire facias* or by action.

The *scire facias* may be sued out on the return day of the *ca. sa.*, or at any time afterwards. *Sandland v. Claridge*, 2 Dowl. 115; 1 C. & M. 672. *Armitage v. Rigbye*, 5 Ad. & E. 81. *Stewart v. Smith*, 2 Ld. Raym. 1567. *Shevers v. Brooks*, 8 T. R. 628. It must be tested on the day of its issuing. C. L. P. Act, 1852, ss. 131, 132. By 3 & 4 Wm. 4, c. 42, s. 3, "all actions of debt or *scire facias* upon any recognisance shall be commenced and sued within twenty years after the cause of such actions or suits, but not after."

[2] The plaintiff may bring either one action against both bail, or separate actions against each. 2 Saund. 72 b. Process may be sued out on the return day of the *ca. sa.* (*Shevers v. Brooks*, 8 T. R. 628), or afterwards. It is by summons, as in ordinary cases. The venue may be laid in any county. C. L. P. Act, 1852, ss. 131, 132.

[3] The execution may be as in other actions. *Elliot v. Smith*, 2 Stra. 1139. *Goodchild v. Chatworth*, 2 Salk. 386. But if the principal be taken in execution, the plaintiff cannot take the bail. *Higgins' case*, Cro. Jac. 320. If the proceedings have been by *scire facias*, the execution may be either jointly or separately. 2 Saund. 72 b. *Sainsbury v. Pringle*, 10 B. & C. 751. After levying a part under a *fi. fa.* against the principal, a *ca. sa.* for the residue may be issued against him to fix the bail for the residue. *Stevens v. Rocke*, 9 id. 707. If the plaintiff be not satisfied the full amount of his debt by the execution against the bail, he may still have execution for the residue against the principal. *Felgate v. Mole*, 1 Sid. 107. *Fisher v. Carruthers*, Barnes, 202. But if the bail have been taken on a *ca. sa.* he is for ever precluded from proceeding against the principal. *Allen v. Snow*, 2 M. & S. 341.

[4] Bail may take their principal, even whilst he is attending court as a witness. *Ex-parte Lyne*, 3 Stark. 132. *Horn v. Swinford*, 1 D. & R. (N. P. C.) 20. Or a bankrupt during his privilege from arrest. *Payne v. Spencer*, 6 M. & S. 231. And render by sheriff's bail without the principal's consent, a false imprisonment, for which an action will lie. *Birt v. Roberts*, 1 M. & M. 177.

Bail who pay each his share may jointly recover the amount. *May v. May*, 1 C. & P. 44.

[5] Although a discretion is given to justices to bail in all cases of felony without exception, they never in practice admit to bail on a charge of murder. The admitting to bail a person charged with treason is prohibited by the 11 & 12 Vic. c. 42, s. 23. For misdemeanours in general the justices exercise a discretion.

duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace-officer, or with any misdemeanour, for the prosecution of which the costs may be allowed out of the county-rate, such justice of the peace may in his discretion admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to insure the appearance of such accused person at the time and place when and where he is to be tried for such offence, and thereupon such justice shall[1] take the recognisance[2] of the said accused person, and his surety or sureties,[3] conditional for the

[1] To refuse bail in a case in which the defendant is entitled to it is a serious dereliction of duty on the part of the justice, and may subject him to a criminal information. *Reg. v. Badger*, 4 Q. B. 468. *Reg. v. Saunders*, 2 Cox, Cr. C. 249. He must not endeavour to dissuade a person offering to become bail for one who has a right to be bailed from so doing, as he is not justified in interfering to prevent a man from assisting his neighbour. *Reg. v. Saunders, supra.* And he ought not to be influenced by motives of a political nature in rejecting persons offered as bail, or by any other consideration than the sufficiency of such persons. See *Reg. v. Badger, supra.* However, even if he improperly refuse sufficient bail, no action will lie against him, unless he were in so doing actuated by malice, the duty being one of a judicial nature. *Linford v. Fitzroy*, 18 L. J. M. C. 108.

The propriety, it has been said, of admitting to bail a prisoner charged with felony, is to be determined with reference to the probability of his appearing to take his trial, and not with reference to the guilt or innocence of the party. *Rex v. Scaife*, 9 Dowl. 553.

[2] The mode of taking the bail is by stating verbally to the prisoner and his sureties the substance of the recognisance, as thus:—

You, A. B. of and you L. M. of and you N. O. of severally acknowledge yourselves to owe to our Sovereign Lady the Queen the several sums following; (that is to say,) you, the said A. B., the sum of &c. &c.

Then the condition of the recognisance should be stated.

The following are the forms provided by the statute:—

Recognisance of Bail.

—— } Be it remembered, that on the
to wit. } day of in the year of our Lord A. B. of [*labourer*], L. M. of [*grocer*], and N. O. of [*butcher*], personally came before [*us*] the undersigned, two of Her Majesty's justices of the peace for the said [*county*], and severally acknowledged themselves to owe to our Lady the Queen the several sums following; (that is to say,) the said A. B. the sum of and the said L. M. and N. O. the sum of each of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands, and tenements respectively, to the use of our Lady the Queen, her heirs and successors, if the said A. B. fail in the condition endorsed.

Taken and acknowledged the day and year first above mentioned at before us.

J. S.
J. N.

Condition.

The condition of the within written recognisance is such that whereas the said A. B. was this day charged before [*us*] the justices within mentioned, for that, &c. [*as in the warrant*]; if, therefore, the said A. B. will appear at the next court of oyer and terminer and general gaol delivery [*or* court of general quarter session of the peace], to be holden in and for the county of and there surrender himself into the custody of the keeper of the [*common gaol*] there, and plead to such indictment as may be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognisance to be void, or else to stand in full force and virtue.

Notice of the said Recognisance to be given to the Accused and his Bail.

Take notice, that you A. B. of are bound in the sum of and your [*sureties, L. M. and N. O.*] in the sum of each, that you A. B. appear, &c. [*as in the condition of the recognisance*] and not depart the said court without leave; and unless you the said A. B. personally appear and plead and take your trial accordingly, the recognisance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this day of 18

J. S.

Upon the prisoner and his bail entering into the foregoing recognisance the above notice should be given to each.

At any time during which the responsibility of the bail continues, they may surrender the defendant to custody, and so relieve themselves of their liability. To do this they should, either themselves, apprehend and take him before a justice, who thereupon will commit him, or require him to give fresh bail, or the bail may make a complaint before a justice of their belief that the defendant will abscond, and thereupon a warrant will be granted for his apprehension.

[3] To demand excessive bail is unlawful, and is so declared to be by the Declaration

appearance[1] of such accused person, at the time and place of trial, and that he will there surrender and take his trial, and not depart the court without leave; and in all cases where a person charged with an indictable offence shall be committed to prison to take his trial for the same, it shall be lawful at any time afterwards, and before the first day of the sitting or sessions at which he is to be tried, or before the day to which such sitting or session may be adjourned, for the justice or justices of the peace who shall have signed the warrant for his commitment, in his or their discretion to admit such accused person to bail in manner aforesaid; or if such committing justice or justices shall be of opinion that, for any of the offences hereinbefore mentioned, the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanour, certify[2] on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required; and it shall be lawful for any justice of the peace attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate, to admit such accused person to bail in manner aforesaid, or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognisance of bail, then such committing justice or justices may make a duplicate[3] of such certificate as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough or place, it shall be lawful for such last-mentioned justice to take the recognisance of the surety or sureties in conformity with such certificate, and upon such recognisance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment as aforesaid, to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognisance of such accused party, and to order

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of Rights. 1 Wm. & M. s. 2, c. 2. It is usual for magistrates to require two sureties, but they may, if they please, accept one. It is not necessary, but it is customary, to require that the bail should be householders. Generally, the defendant is bound in double the amount of his sureties.

[1] The 11 & 12 Vic. c. 42, s. 23, contains also provisions for the condition of the recognisance where the defendant, in cases of misdemeanour, is entitled to traverse; but by the 15 & 16 Vic. c. 100, s. 127, the right to traverse is abolished.

[2] *Certificate of Consent to Bail by the Committing Justice endorsed on the Commitment.*

I hereby certify that I consent to the within-named A. B. being bailed by recognisance, himself in and [*two*] sureties in each.

J. S.

Upon this certificate being endorsed, the prisoner may at any time before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, be admitted to bail by any justices attending or being at the gaol where he is confined. But without such certificate it is competent to the actual committing justice (but no other) to admit the person to bail. 11 & 12 Vic. c. 42, s. 23, *supra*, p. 94.

[3] *Certificate of Consent to Bail by Committing Justice on a separate Paper.*

Whereas A. B. was on the committed by me to the [*House of Correction*], at charged with, &c. [*naming the offence shortly*]. I hereby certify that I consent to the said A. B. being bailed by recognisance, himself in and [*two*] sureties in each.

Dated the day of 186

J. S.

When bail is not at once given upon the commitment, a condition is often imposed by the justices that the prisoner before being admitted to bail shall give a notice in writing of his intention, with the names and residences and degree of his proposed sureties. The length of this notice will vary according to circumstances, rarely, however, exceeding twenty-four hours. When this condition is imposed, it should be inserted in the justice's certificate, and it may be stated thus:—"But I require the said A. B. to give twenty-four hours' written notice to the prosecutor, C. D., of his intention to tender such bail, with the time and place of so tendering, and the names, abodes, and quality of his proposed sureties." In such a case, upon receiving notice, the prosecutor should endeavour to ascertain the sufficiency of the proposed bail, and if he have any valid grounds for objecting to them he should attend at the time and place specified, and then substantiate his objections.

him to be discharged out of custody as to that commitment as hereinafter mentioned; and when any person shall be charged before any justice of the peace with any indictable misdemeanour other than those hereinbefore mentioned, such justice, after taking the examinations in writing aforesaid, instead of committing him to prison for such offence, shall admit him to bail in manner aforesaid; or if he have been committed to prison, and shall apply to any one of the visiting justices of such prison, or to any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid; and in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognisance or recognisances of bail to the committing justice or justices, or one of them, to be by him or them transmitted with the examinations to the proper officer." See *Linford v. Fitzroy*, 13 Q. B. 240.

Amount of Bail.—As regards the amount of recognisance, this will depend upon the magnitude of the offence and the position of the parties, and will in every case be a fit subject for the exercise of a wise discretion; no rule can be laid down: care, however, should be observed, that whilst the amount is not unnecessarily heavy, it is, nevertheless, sufficiently large to make its forfeiture a matter of serious inconvenience to the parties. The recognisance of the accused himself is usually double that of each of his sureties.

The amount depends upon the character of the offence and position of the parties.

If the justices consent to take bail, and the prisoner is prepared with them, they may at once enter into their recognisance. Before, however, their doing so, the justices should satisfy themselves that they are persons of substance, and likely to comply with the terms of their recognisance.

The mode of taking the bail is, we have seen, *ante*, p. 95 n., by stating verbally to the prisoner and his sureties the substance of his and their recognisance. It is not essential that it should be signed. 1 Hawk. P. C. 62, c. 15.

(A) *Warrant of Deliverance on Bail being put in.*

11 & 12 Vic. c. 42, s. 24. "In all cases when a justice or justices of the peace shall admit to bail any person who shall then be in any prison charged with the offence for which he shall be so admitted to bail, such justice or justices shall send to, or cause to be lodged with the keeper of such prison, a warrant of deliverance under his or their hand and seal, or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper he shall forthwith obey the same."

The justices admitting a prisoner to bail deliver a warrant of deliverance to the keeper of the prison.[1]

II. Application to the Court of Queen's Bench to be admitted to Bail.[2]

[1] The following is the form of the warrant of deliverance provided by the act:—

—— } To the keeper of the [*house of correction*] at in the said [*county*] of
to wit. }

Whereas A. B. late of [*labourer*] hath before [*us, two*] of her Majesty's justices of the peace in and for the said [*county*], entered into his own recognisance and found sufficient sureties for his appearance at the next court of oyer and terminer and general gaol delivery [*or*, court of general quarter sessions of the peace], to be holden in and for the county of to answer our Sovereign Lady the Queen for that, &c. [*as in the commitment*], for which he was taken and committed to your said [*house of correction*]: these are therefore to command you, in her Majesty's name, that if the said A. B. do remain in your custody in the said [*house of correction*] for the said cause, and for no other, you shall forthwith let him go at large.

Given under our hands and seals this day of in the year of our Lord at in the county aforesaid.

J. S. (L. S.)
J. N. (L. S.)

[2] Should the justices decline to take bail, the prisoner may apply to the Court

BAIL, Personating. *See* Personating.

BAILEE, Larceny by. *See* Larceny; 20 & 21 Vic. c. 54, s. 4; *post*, 118 n.

BAILIE. In Scotland, a municipal magistrate.

BAILIFF. *See* Franchise; Hundred; Manor; Sheriff.

BAILIWICK. The district or jurisdiction of a bailiff or sheriff.

BAILMENT.[1] *See* also Bankers, *infra*, p. 119; Borrower; Capture; Carrier; Deposit; Detinue; Driving; Ferry; Hire; Horse; Innkeeper; Lender; Lien; Livery-Stable-Keeper; Loan; Pawn; Pawnbroker; Principal and Agent; Salvage; Trespass; Trover; Warehouseman; Wharfinger.

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of Queen's Bench, or to a judge of that court at chambers, for permission to be admitted to bail. This application is made upon a verified copy of the depositions, and upon such affidavits as the prisoner may be enabled to make or obtain, setting forth such facts as will show his innocence and the probability of his appearing to take his trial. Upon these materials the motion in form is for a writ of *certiorari* to bring up the depositions, and for a rule calling upon the justices and the prosecutor to show cause why the prisoner should not be admitted to bail. If the prisoner is in confinement in the country, the rule is usually (to avoid the expense of the prisoner's being brought up by *habeas corpus*) why he should not be admitted to bail in the country. When the charge is of manslaughter, the rule usually calls upon the coroner, prosecutor, and next of kin to show cause. Upon the return of the *certiorari* with the depositions, and upon the return also of the rule or summons, cause may be shown, when the court or judge grants or refuses the application, according to circumstances. Should the application be granted, the court or judge will decide upon the number of sureties, and the amount for each, and upon this a rule will be drawn up and transmitted to the country (if bail is there to be taken), and the prisoner will be admitted to bail accordingly. The number of bail required is usually two, and the amount according to the rank and affluence of the accused. There is no objection to the defendant's attorney being one of the bail (2 Dougl. 466 n.); but a married woman is disqualified. Styles, 369; 3 M. & S. 1. If a party be discharged on insufficient security, fresh bail may be ordered by the magistrate. 2 Hale, P. C. 128. The bail may seize the principal at any time or place, even on a Sunday, in discharge of the recognizance.

[1] Bailment (from *bailler*, Fr.) is defined to be "a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, according to his directions, as soon as the purpose for which they were bailed shall be answered." Jones on Bailment, 1; 2 Ld. Raym. 909; 2 Kent's Com. 558; Story on Bailment, 2; 2 Steph. Com. 129.

It is clear that the restoration of the thing bailed to the bailor, either in specie or in a new form agreed upon, does in fact constitute a part of the contract in nearly all the varieties of bailment, but it is no less clear that in one species, and that perhaps the most important of all (the *locatio operis mercium vehendarum*, or bailment of goods to be carried for hire), is entirely free from such contract on the part of the bailee. The difficulty in defining bailment is to explain with sufficient clearness what the contract is, and to avoid at the same time going into particulars not common to every one of its varieties.

A party who delivers property to another is called a bailor; the party who receives it, a bailee.

According to the judgment of *Lord Holt*, in *Coggs v. Bernard*, 2 Ld. Raym. 912, there are six distinct species of bailment. The first is a bare naked bailment of goods delivered by one man to another, to keep for the use of the bailor, and this is called a *depositum*. The second is when goods or chattels that are useful are lent to a friend gratis, to be used by him; this is called *commodatum*. The third, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth is when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor, and this is called in Latin, *vadium*, and in English, a pawn or pledge. The fifth is when goods or chattels are delivered to be carried, or something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth is where there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage. But Sir William Jones, in his elegant and learned work on this subject, acknowledges but five species of bailment; and in commenting upon *Lord Holt's* division of this subject he says, "His division of bailments into six sorts appears in the first place a little inaccurate; for, in truth, his fifth sort is no more than a branch of his third, and he might with equal reason have added a seventh, since the fifth sort is

I. *Depositum*, or Bailment for *no* Particular Purpose without Reward, p. 101.

(A) *Relative Situation of Bailor and Bailee, when created*, p. 101.
(B) *Duties of such a Bailee*, p. 102.
(C) *Rights of such a Bailee*, p. 103.
(D) *Remedies against such a Bailee*, p. 105.

II. *Mandatum*, or Bailment for *some* Particular Purpose without Reward, p. 105.

(A) *Duties of such a Bailee*, p. 106.
(B) *Rights of such a Bailee*, p. 108.
(C) *Remedies against such a Bailee*, p. 108.

III. *Commodatum*, or Bailment for *use*, where the thing is bailed to be used by Bailee *without* Reward, p. 108.

(A) *Duties of such a Bailee*, p. 109.
(B) *Rights of such a Bailee*, p. 109.
(C) *Remedies against such a Bailee*, p. 110.

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capable of another subdivision. I acknowledge, therefore, but five species of bailment, which I shall now enumerate and define, with all the Latin names, one or two of which *Lord Holt* has omitted. 1. *Depositum*, which is a naked bailment without reward of goods to be kept for the bailor. 2. *Mandatum*, or commission, when the mandatory undertakes without recompense to do some act about the things bailed, or simply to carry them; and hence Sir Henry Finch divides bailment into two sorts, to keep and to employ. Finch's Law, b. 2, ch. 18. 3. *Commodatum*, or loan for use, when goods are bailed without pay, to be used for a certain time by the bailee. 4. *Pignori acceptum*, when a thing is bailed by a debtor to his creditor in pledge, or as a security for the debt, 5. *Locatum*, or hiring, which is always for a reward, and this bailment is either, [i.] *Locatio rei*, by which the hirer gains a temporary use of the thing; or, [ii.] *Locatio operis faciendi*, when work and labour, or care and pains, are to be performed or bestowed on the thing delivered; or, [iii.] *Locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place, either to a public carrier or to a private person."

In another part of Sir William Jones's treatise this last species of bailment is thus defined: "Letting to hire is, 1st. A bailment of a thing to be used by the hirer for a compensation in money; or, 2dly. A letting out of work and labour to be done, or care and attention to be bestowed by the bailee on the goods bailed, and that for a pecuniary recompense; or, 3dly. Of care and pains in carrying the things delivered from one place to another for a stipulated or implied reward." *See* Remarks, 1 Smith, L. C. 97, 98 n.

Although this division and classification of the different species of bailment by Sir W. Jones is sufficiently comprehensive to include every case which may occur within the strict definition of the term, yet circumstances may arise which may confer the possession of property upon another, without its having been confided by the owner to the care of the latter; as where a chattel comes into the custody of a party by finding, or by maritime capture. With reference to the duty of a finder of property, there does not appear to be any case at all approaching to a direct authority. The only decisions where the relative rights of finder and loser have been at all discussed are in the cases of *Binstead v. Buck*, 2 Bl. Rep. 1117, abridged *post*, Lien; and *Nicholson v. Chapman*, 2 H. Black, 254, abridged *post*, Lien. In the first it was holden that the finder of a dog had no lien upon the animal against the owner for the expense of his keep; and in the other, the non-existence of a finder's lien was admitted: but it was intimated by *Lord C. J. Eyre*, in delivering the judgment of the court, that the finder of property lost might be entitled to maintain an action for a compensation from the owner for his care of it. His lordship, however, added, that "it was better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But, at any rate, it was fitting that he who claims the reward in such case should take upon himself the burden of proving the nature of the service he has performed, and the *quantum* of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover." Assuming, therefore, that the finder of a chattel, by taking possession and bestowing protection and labour upon the property, acquires a right to compensation, it would seem to follow, that the responsibility he incurs is equal to that imposed on the hirer of a chattel. *Vide* text, Div. v. With reference to the duty of a captor, Sir William

IV. *Pignori acceptum*, or Bailment for Pledge or Security, p. 110. *See* also Lien; Mortgage; Pawnbroker.

(A) *Duties of Pawnee*, p. 110.

(B) *Rights of Pawnee*, p. 111.

V. *Locatum*, or Bailment where the thing is let to Hire, or is Bailed for Work and Labour to be bestowed on it, or to be Carried from Place to Place, p. 111.

1st. Locatio, conductio Rei; *or Bailment when Property is let to Hire*, p. 112.

(A) *Duties of Hirer*, p. 112.

(B) *Rights of Hirer*, p. 113.

2d. Locatio Operis faciendi; *or Bailment to have Labour or Care bestowed on it, with Reward to Bailee*, p. 113. *See* also Auctioneer, *ante*, p. 65; Factor; Innkeeper; Wharfinger.

(A) *Duties of such a Bailee*, p. 114.

(B) *Rights of such a Bailee*, p. 115.

(C) *Remedies against such a Bailee*, p. 116.

3d. Locatio Operis Mercium vehendarum; *or Bailment where Property is to be carried from Place to Place. See* Carrier.

VI. Actions and Pleadings connected with Bailment, p. 116.

VII. Criminal Proceedings relating to, p. 118.

Scott, in the case of the "William," 6 Rob. Rep. 316, introduced the following observations:—"On questions of this kind there is one position sometimes advanced which does not meet with my entire assent, namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such cases; for a man may, with respect to his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person by one, who is or may be supposed to be acquainted with his character, the care which he would take of his own property might indeed be considered as a reasonable criterion. But in cases of capture there is no confidence reposed, nor any voluntary election of the person in whose care the property is left. It is a compulsory act of justifiable force; but still of such force as removes from the owner any responsibility for the imprudent or incautious conduct of the prize-master." It is not enough, therefore, that a person in that situation uses as much caution as he would about his own affairs. The law requires that there should be no deficiency of due diligence. It was held in that case, that a captor was liable to the claimant for loss occasioned by not taking a pilot on board. In case of the "Hoop," 4 Rob. Rep. 14, where a demand was made on the Marshal of the Admiralty for the loss of a long-boat whilst the ship was under his custody, he was held liable, he not showing it was lost without his default.

From the obligation contained in the definition of bailment to restore the thing bailed at a certain time, it follows that the bailee must keep it, and be responsible to the bailor if it be lost or damaged; but as the bounds of justice would in most cases be transgressed if he were made answerable for the loss of it, when a degree of care proportionate to the nature of the bailment has been exercised, it follows that the investigation of this degree in every particular contract is the problem which involves the principal difficulty.

There are infinite shades of care or diligence, from the slightest momentary thought or transient glance of attention to the most vigilant anxiety and solicitude; but extremes in this case, as in most others, are inapplicable in practice: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded, since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure from every man who borrows a book or a seal. The degrees then of care, for which we are seeking, must be somewhere between these extremes; and by observing the different manners and characters of men we may find a certain standard, which will greatly facilitate our inquiry: for although some are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive that the generality of rational men use nearly the same degree of diligence in the conduct of their own affairs,

I. *Depositum*, or Bailment for no Particular Purpose without Reward.

(A) *Relative Situation of Bailor and Bailee, when created.*

Lethbridge v. Phillips, 2 Stark. 544.

In an action of *assumpsit*, it appeared that the plaintiff was the proprietor of a valuable picture; that A. B. being desirous of showing it to the defendant, obtained it from the plaintiff for that purpose; no communication took place between the plaintiff and defendant, nor had the latter requested B. to obtain it: while the picture was in the defendant's possession it was injured in consequence of being injudiciously placed near a stove: it was submitted that these facts were sufficient to establish the defendant's liability to be answerable for the loss.

Sed per Abbott, C. J. "The action cannot be maintained; it is impossible to argue with any probability of success that the defendant, without his knowledge or consent, could be considered as bailee of the property." Plaintiff nonsuited. *See* Story as to involuntary deposits, s. 44.

The consent of the bailor to the thing being bailed to him is essential, in order to make him responsible; therefore, where a picture was sent, by the interference of a third person, to the defendant's house, where it was accidentally injured, held that no action could be supported.

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and this care, therefore, which every person of common prudence, and capable of governing a family, takes of his own concerns, is a proper measure of that which would uniformly be required in performing every contract, if there were not strong reasons for exacting in some of them a greater, and permitting in others a less, degree of attention. Here, then, we must fix a constant determinate point on each side, of which there is a series consisting of variable terms, tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be favourable, a degree of care less than the standard will be sufficient; if rigorous, a degree more will be required, and in the first case the measure will be that care which every man of common sense, though absent and inattentive, applies to his own affairs; in the second, the measure will be that attention which a man remarkably exact and thoughtful gives to the securing of his personal property.

The fixed mode or standard of diligence may be called *ordinary*. The degrees on each side of the standard being indeterminate, need not be distinguished by any precise denomination; the first may be called less, and the second more than ordinary diligence.

In the same manner there are infinite shades of fault or neglect, from the slightest inattention or momentary absence of mind, to the most reprehensible supineness and stupidity; these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omission of care which every prudent man takes of his own property, is the determinate point of negligence, on each side of which is a series of variable modes of default, infinitely diminishing in proportion as their opposite modes of care infinitely increase; for the want of extremely great care is an extremely little fault, and the want of the slightest attention is so considerable a fault that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust and a deviation from common honesty. This known or fixed point of negligence is, therefore, a mean between fraud and accident; and as the increasing series continually approaches to the first extreme without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last term being as before excluded, we must look within them for modes applicable to practice, and these we shall find to be the omissions of such care as a man of common sense, however inattentive, and of such as a very cautious and vigilant man respectively take of their own possessions.

The constant or fixed mode of default may be called ordinary; the different degrees may be called the greater, and the second less than ordinary, or the first gross, and the other slight neglect.

The different degrees of neglect may be thus concisely defined and enumerated:—

Ordinary *neglect is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns.*

Gross *neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property.* It is a term properly used to describe the sort of negligence for which a gratuitous bailee is responsible. It cannot properly be said of an unskilled person, who does not use skill; it is only applicable where a skilled person does not use the skill he has. *Phillips v. Clark*, 5 Jur. N. S. 1081.

Slight *neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.*

With the same brevity may be defined and enumerated the duties and responsibilities incident to each species of bailment:—

(B) *Duties of such a Bailee.*

Mytton v. Cock, 2 Stra. 1099. S. P. Kettle v. Bromsall, Willes. 121. Per Lord Holt, in Coggs v. Bernard, 2 Lord Raym. 913 n., but less fully reported, 1 Com. 133; 1 Salk. 26; 3 Salk. 11; Holt, 1; Enty. Salk. 735; 3 Lord Raym. 163. S. P. Lane v. Frankland, 1 Lord Raym. 64; 6 S. C. 1 Com. Rep. 100. Doorman v. Jenkins, 2 Ad. & E. 256. Finucane v. Small, 1 Esp. 315.

A depositary is, in all cases, responsible for a fraud or gross neglect, and is bound to observe the same care over property bailed as a man of ordinary prudence would observe over his own property under the same circumstances.

The plaintiff being the owner of a cartoon, left it with the defendant, an auctioneer, without any particular agreement to take care of it, or re-deliver it safe, and without any agreement for a reward. In a special action on the case for not re-delivering it safe, but suffering it to be spoiled, it appeared upon the evidence that the painting was upon paper pasted on canvas, and that it had been kept by the defendant in a room next to a stable, in which there was a well that made the picture damp and peel. And upon this it was left to the jury to determine whether this was an act of gross neglect. Verdict for plaintiff with 30*l.* damages.

On a motion for a new trial the Court adjudged, that in the case of a simple *depositum* without a reward, the law raises only a promise not grossly to neglect or abuse the deposit; and therefore it had been left properly to the jury, and that no new trial ought to be granted. *See* 12 Mod. 487; 2 Lord Raym. 913.

Garside v. The Proprietors of the Trent and Mersey Navigation, 4 T. R. 581; S. P. *In re* Webb, 2 B. Moore, 510; S. C. 8 Taunt. 443.

He is, therefore, not responsible for the evil consequences of an accident,

The goods in question in this case had been carried by the defendant from A. to B., and there deposited in his warehouse merely for the convenience of the owner, until they could be forwarded by another conveyance (the owner not paying the defendant anything for the warehouse-room), and were consumed by an accidental fire there: it was holden that the defendant could only be con-

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1. A depositary is responsible only for gross neglect, or in other words, for a violation of good faith. *See* Hill on Torts, 609.

2. A depositary, whose character is known to his depositor, shall not answer for mere neglect if he take no better care of his own goods, and they also be spoilt or destroyed.

3. A mandatory to carry is responsible only for gross neglect, or a breach of good faith.

4. A mandatory to perform a work is bound to use a degree of diligence adequate to the performance of it.

5. A man cannot be compelled by action to perform his promise of engaging in a deposit or a mandate.

6. A reparation may be obtained by suit for damage occasioned by the *non-performance* of a promise to become a depositary or mandatory.

7. A borrower for use is responsible for slight negligence.

8. A pawnee is answerable for ordinary neglect.

9. The hirer of a thing is answerable for ordinary neglect.

10. A workman for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking.

11. A letter to hire of his care and attention is responsible for ordinary negligence.

12. A carrier for hire, by land or by water, is answerable for ordinary neglect.

To these rules and propositions there are some exceptions:—

1. A man who spontaneously and officiously engages to keep or to carry the goods of another, though without reward, must answer for slight neglect.

2. If a man, through strong persuasion and reluctance, undertake the execution of a mandate, no more care is required of him than a fair exertion of his ability.

3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed, on a lawful demand.

4. A borrower and a hirer are answerable in all events if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement.

5. A depositary and a pawnee are answerable in all events if they use the things deposited or pawned.

6. An innkeeper is chargeable for the goods of his guest within his inn, if the guest be robbed by the servants or inmates of the keeper.

7. A common carrier, by land or by water, must indemnify the owner of the goods carried, if he be robbed of them.

sidered as a warehouseman, and that there was no pretence for saying that he was liable for such an accident as the present. See *Doorman v. Jenkins*, 2 Ad. & E. 256.

over which he could have no control.

ROOTH v. WILSON, 1 B. & A. 60.

Per Lord Ellenborough. "If A. sends his horse to B., a mere gratuitous bailee, who turns the horse after dark into a dangerous pasture, to which it was unaccustomed, though the place might be perfectly safe to his own cattle, yet to this animal it would be otherwise, B. would be liable to A. for any injury resulting to the animal from such incautious conduct." Story, s. 180.

The degree of care to be observed must be regulated by the nature of the property bailed.

KETTLE v. BROMSALL, Willes. 119.

The plaintiff declared in *detinue* that he had delivered certain antiques to the defendant, to be by him safely kept; the defendant pleaded that the articles were delivered to him to take care of as his own, and to be shown to a person to ascertain their value, and that the defendant having put them in his pocket for that purpose, they were stolen from him without his default by some person unknown. Upon demurrer to the replication, which put in issue the terms of the delivery, the court recognised a distinction between "to keep, and to keep safely," and gave judgment for the plaintiff.

An increased responsibility is incurred where the bailee expressly agrees to exercise it;[1]

Willis, C. J., in delivering the judgment of the court, observed, "According to *Southcote's case* (4 Rep. 83) and the case of *Coggs v. Bernard*, *post*, 108, and several other cases, if the goods were delivered to be kept safely, though the defendant had been robbed of them, this is a good plea." Story, s. 62.

but in ordinary cases he is not liable, if he be robbed.[2]

(C) *Rights of such a Bailee.*

HARTROP v. HOARE AND ANOTHER, 2 Stra. 1187; S. C. 1 Wils. 8, 9. S. C. more fully reported 4 Vin. Ab. 9, pl. 7.

In trover for jewels, the jury found a special verdict, that the plaintiff being the owner of the jewels, lodged them in the hands of S., a goldsmith, for safe custody, and enclosed in a paper sealed up, and that also enclosed in a bag sealed up with the plaintiff's seal, and took a receipt from him for the same. That S. broke the seals and carried the jewels by the defendant's shop open in Fleet Street, where they traded in jewels, and often lent money on the security of jewels, and there borrowed 300*l.* and deposited the jewels as his own, by way of security, at the same time giving them his note for the money. That S. had

A bailee for safe custody cannot sell or pawn the property bailed, so as to affect the rights and interests of the bailor.

[1] Or when a man spontaneously or officiously proposes to keep the goods of another, he may prevent the owner from intrusting them with a person of more approved vigilance, for which reason he takes upon himself the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties. Jones on Bailments, 48. *Nelson v. Mackintosh*, 1 Stark. 237. Story on Bailment, s. 180 n.

[2] It being then established that a depositary is answerable only for a fraud or for a gross neglect, which is considered as evidence of it, and not for such ordinary inattentions as may be compatible with good faith, if the depositary himself be a careless and inattentive man a question may arise whether, if proof be given that he is in truth very thoughtful and vigilant in his own concerns, he is not bound to restitution if the deposit be lost through his neglect, either ordinary or slight; and it seems easy to support the affirmative, since in this case it is that which the bailee uses in his own affairs. It must, however, be confessed, that the character of the individual depositary can hardly be an object of judicial discussion; if he be slightly or even ordinarily negligent in keeping the goods deposited, the favourable presumption is, that he is equally negligent of his own property: but this presumption, like all others, may be repelled; and if it be proved, for instance, that the house being on fire he saved his own goods, and having time and power to save also those deposited suffered them to be burned, he shall restore the worth of them to the owner. If, indeed, he have time to save only one or two chests, the one being a deposit, the other his own property, unless that contained small comparative value, and the other full of much more precious goods, as fine linens and silks, in which case he ought to save the more valuable chest, he has a right to claim indemnity from the depositor for the loss of his own. Still, if he commit a gross neglect in regard to his own goods as well as to those bailed, he cannot be said to have violated his duty to the bailee.

no authority from the plaintiff to sell, order, pawn, or dispose of the jewels, and the defendants have converted them to their own use. The court said, the general question in this case is, whether the property found to be originally in the plaintiff is divested by any act stated to have been committed. In order to consider this, it will be proper to see, 1st. How S. stands with regard to the plaintiff; and 2dly. How with regard to the defendant. 1st. As to the plaintiff, he is a mere bailee for safe custody only, without any authority to open the bag the jewels were in, and he was a trespasser by committing that act. 4 Co. 23; Co. Litt. 89 n. 2dly. As to the defendants, though they came honestly by them, yet they are within the general rule of *caveat emptor*, unless something appears particularly to exempt them. What they rely upon is, that they were purchasers of them in a market-overt, it being found that they bought them in an open shop where they dealt in jewels, which, according to the custom of London, is a market-overt for that purpose. To this it was properly answered by the plaintiff, that this custom not being found, the court cannot judicially take notice of it. *Argyle v. Hunt*, 1 Stra. 187. Another, and a proper answer, was likewise given, that if we could take notice of the custom, yet that extends only to the case of a *sale*, and not of a pawn. Perks. 435; Noy. 28, 29; id. 139; Jenk. Vent. 83. It is a rule that all customs must be taken strictly, and not extended to similar cases; but here a pledge is not a similar case: sales in market-overt are encouraged, because it is a circulation of property, whereas pawning is *pro tempore* a locking of it up. Judgment for the plaintiff.

See the argument in *Pickering v. Busk*, 15 East, 42.

Rooth v. Wilson, 1 B. & A. 59.

But such a bailee may support an action on the case against a third person for an injury done to the chattels intrusted to his care.[1]

This was an action on the case against defendant for keeping the fences of a close adjoining that of the plaintiffs in such bad repair, that a horse of the latter, in consequence thereof, was precipitated from the one close into the other, and was killed. The defendant's counsel did not dispute the liability to repair; but upon its appearing that the horse was the property of the plaintiff's brother, that he had lent it to him for the night, and that the latter had after dark turned it into the said close, whereby the accident had happened; it was contended that the plaintiff had not such a property or interest in the horse as to entitle him to maintain the action, and that the suit could only be instituted by the owner of the animal, he being alone damnified. A verdict was, however, found for the plaintiff; and upon its being urged against a rule obtained for a new trial, that as he had possession of the horse as a gratuitous bailee, and as possession was sufficient against a wrong-doer, he could not be defeated in the adoption of the remedy he had followed. The court discharged the rule, observing, that case was a complete possessory action; that the statement in the declaration, that the horse was the property of the plaintiff, would have been sufficient even in an indictment; and that it must be besides recollected, that the fact of defendant's being responsible to the original owner on account of his negligence in turning the horse after dark into a dangerous pasture, to which it was unaccustomed, was of itself sufficient to enable the plaintiff to maintain the action in order to guard himself against any ultimate loss. Rule discharged. *See* 2 Roll. Abr. 551, 560, pl. 5; 1 Bulst. 69; Bro. Tresp. 67; 2 Saund. 476; 7 T. R. 12.

May v. Harvey, 13 East, 197.

Property belonging to several joint-owners, who concurrently

The assignor and assignee of a lease agreed that, in order to save the expense of a counterpart, it should be deposited in the hands of a bailee. The assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account of himself and the assignor, and no communication was

[1] And when there has been an unlawful taking, either the general owner or the bailee, if answerable over, may support trespass, but a recovery by one is a bar to an action by the other. 2 Saund. 47; Bro. Tresp. 67; 2 Roll. Abr. 569.

made of the deposit to the assignor, who never interfered further in the matter. The defendant afterwards (with the privity of the bailee, *who acted as his agent*) procured an illegal and void conveyance of the property in it from the assignee. The court held that the assignee, or his legal representatives, might alone maintain an action of trover for the lease after demand and refusal, as there was no evidence to show that it was jointly deposited by the assignor and assignee, or that the bailee had accepted it upon any such trust; but they observed that it was clear that if the lease had been deposited by the two, and the bailee had consented to have accepted it on the joint account of the two, it would not have been in the power of one of them, or of his legal representatives, to have taken it out of his hands without the consent of the other.

deposit it with a bailee, on their joint-account, cannot be legally demanded without the consent of all parties; but a different rule prevails if the bailee be not privy to such arrangement, but accept the property from one of them, by whom, as well as the bailee, it is treated as belonging to him individually.[1]

(D) *Remedies against such a Bailee.*[2]

II. *Mandatum*,[3] or Bailment for *some* Particular Purpose without Reward.

[1] A demand of a chattel by one of two co-owners is not sufficient. *Atwood v. Ernest*, 1 W. R. 436; 21 L. T. 185. Joint-bailors cannot maintain an action for the delivering up of the goods without the order of the others. *Brandon v. Scott*, 26 L. J. Q. B. 163.

[2] An action of *assumpsit* (*see* Precedents, *Petersdorff's Index*) or on the case (*see* 3 East, 62; 1 T. R. 274; 1 N. R. 47; 6 East, 33), is sustainable against a bailee without reward for not taking due care of and redelivering the property intrusted to his care, but in general trespass is not sustainable against a bailee who has the possession coupled with an interest, unless he destroy the chattel. And it is laid down that if a bailee of a living creature kill it, trespass cannot be supported, but only an action on the case, because a general confidence has been reposed in him. Bar. Ab. Trespass, G. 1; Moore, 248: but this would seem to be an erroneous opinion; for though the act may not render the party a trespasser *ab initio*, yet he may be considered as a trespasser for the wrongful act itself (Co. Litt. 57; Cro. Eliz. 777, 784; 5 Co. 13 b.; Bro. Tresp. pl. 295; 1 Leon. 87; 11 Co. 82); and it is now a well-established rule, that if a person be bailee, though coupled with a beneficial interest, as of sheep to feed his land, or of oxen to plough it (Co. Litt. 57, 58; Cro. Eliz. 784), and he kill or destroy them, trespass lies, because his interest therein is thereby determined, the same as where a tenant-at-will cuts down trees. *See* 7 T. R. 11; Co. Litt. 57 n.; Cro. Eliz. 784; 5 Co. 13 b; 11 Co. 82 n.; Dyer, 121, b. pl. 17.

[3] The distinction between this and the preceding species of bailment is, that the latter lies in *feasance*, the former only in *custody*. The bailee in this case is considered as having engaged himself to use a *degree of diligence and attention adequate to the performance of his undertaking*, and he is obliged to exert himself *bonâ fide* to the utmost of his usual ability in proportion to the exigence of the affairs in hand, and neither do anything, how minute soever, by which his employer may sustain damage, nor omit anything, however inconsiderable, which the nature of the act requires to be done.

Lord Holt, in delivering his judgment in *Coggs v. Bernard*, introduced the following commentary upon the facts of that case, and the duties of a mandatory:—"As to this sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet by his ill-management the goods are spoiled. Secondly, it is to be understood that there was a neglect in management. But, thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, c. 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his Commentaries upon Justinian, lib. 3, tit. 27, c. 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, '*Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis.*' I do not find this word in any other author of our law besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

"The reasons are, first, because in such a case a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced

(A) *Duties of such a Bailee.*

COGGS v. BERNARD, 2 Ld. Raym. 909; S. C. Com. 133; Salk. 26; 3 id. 11; Holt, 13; Entry. 2 Salk. 735; 3 Ld. Raym. 163.

Where a person, without reward, undertakes to remove casks of brandy from one cellar, and lay them safely in another, but manages them so negligently that one of the casks is staved, he will be liable.[1]

Bernard had assumed without pay safely to remove several casks of brandy from one cellar, and lay them down safely in another, but managed them so negligently that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff Coggs, a motion was made in arrest of judgment, on the insufficiency of the declaration, in which it was neither alleged that the defendant was to have any recompense for his pains, nor that he was a common porter, but the court were unanimously of opinion that the action will lay.

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the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action (1 Roll. Abr. 10; 2 Hen. 7, c. 11). This is a strong case. It was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because, when the party has taken upon him to keep the sheep, and afterwards suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

"But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6, c. 49, and the other cases cited, show that this is the difference; and in the 11 Hen. 4, c. 33, this difference is clearly put. There the action was brought against the carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, What if he had built the house unskilfully? and it is agreed in that case an action would have lain. There has been a question made, If I deliver goods to A., and in consideration thereof he promises to redeliver them, if an action will lie for not re-delivering them? (Yelv. 4;) but a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession."

[1] But an action for a mere nonfeasance cannot be maintained upon a gratuitous undertaking, even when accompanied with special damage; as if a carpenter promise to build a house within a given time, and refuse to proceed, in consequence of which an injury is sustained, no action will lie (11 Hen. 4, c. 33, A; 21 Hen. 4. c. 55 b.; 1 Roll. Abr. 9, pl. 4, c. l. 2; 2 Lord Raym. 919, 1920; *Elsee v. Gatward*, 5 T. R. 143); except in certain cases, where, from their situation, persons are bound to do what is requested of them in the course of their employment, and are entitled to a recompense. As in the case of a carrier (*vide post*); or innkeeper (*vide post*); or where a farrier, having materials for the purpose, refuses to shoe the horse of a traveller, or a ferryman to convey a party over a common ferry, and the like. This doctrine was fully established and illustrated in a late case, in which the first count of the declaration stated that the plaintiff had retained the defendant, who was a builder, to build and repair certain premises within a given day, and that the defendant accepted the retainer, but did not perform the work within the given time, in consequence of which the walls of the plaintiff's house were injured, and the plaintiff, in other respects, was damaged, and put to expense. The second count stated that the plaintiff, being in possession of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff's, and to use the old materials, but that the defendant, instead of using them, made use of the new ones, thereby increasing the expense. And upon a general demurrer to the whole declaration, the court gave judgment for the defendant.

Lord Kenyon, C. J., observed, "that no consideration results from the defendant's situation as a carpenter, nor is he bound to perform all the work tendered to him." And *Mr. J. Ashhurst*, in giving his opinion on the same case, remarked the following distinction:—"If a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work. But if he undertake, and do not proceed on the work, no action will lie against him for the nonfeasance. In this case, the defendant's under-

SHIELLS AND OTHERS v. BLACKBURN, 1 H. Black. 158.
MYTTON v. COCK, 2 Stra. 1099.

The defendant, who was a general merchant in L., having received orders from his correspondent in M. to send thither a quantity of leather cut out for shoes and boots, employed G., the bankrupt, who was a shoemaker, to execute the order. G. accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather on his own account, which he packed in a separate case, to be sent to M. on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels, and he, in order to save the trouble of a separate entry at the Custom-house, voluntarily, and without any compensation, by agreement with G., made one entry of both the cases, but did it under the denomination of wrought leather, instead of dressed leather, which it ought to have been. In consequence of this mistake in the entry the two cases were seized, and this action was brought by the assignees of G. to recover the value of the leather which he had prepared to export on his own account. The court held that the defendant was not liable for the loss since he had acted *bonâ fide*, and taken the same care of the goods as of his own, and not being of a profession which implied knowledge in the particular transaction, the wrong entry could not in him be considered as gross negligence. *Lord Loughborough, C. J.*, observed: "I agree with Sir W. Jones, that where a bailee undertakes to perform a gratuitous act from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do anything to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entry; but when an application under the circumstances of this case is made to a general merchant to make an entry at the Custom-house, such a mistake as this is not to be imputed to him as gross negligence." *See* 8 East, 352; 1 Stark. 237; 1 B. and A. 59; and *Rowth v. Howell*, 3 Ves. 565.

But a person who undertakes without reward to perform a particular service, where his situation is not such as to imply skill or knowledge in the particular transaction, will not be responsible for a loss when he has acted *bonâ fide*, and exercised the same care which he takes of his own affairs.

NELSON v. MACKINTOSH, 1 Stark. 237.

A captain of a vessel who had, without a reward, taken charge of a box containing doubloons, dollars, and other valuable articles belonging to a person who was to have worked his passage, but was accidentally left behind, during the course of the voyage opened the box for the purpose of ascertaining whether it contained contraband goods, and upon the arrival of the ship toward the end of the voyage he again opened it in the presence of several passengers, and taking out the contents, which he put into a canvas bag, deposited them in his chest in the cabin, in which his own valuables were kept. When the vessel arrived at Gravesend a river pilot was taken on board, and the captain and one mate left the vessel, another mate remaining on board; an excise officer was also there, and two young men were allowed to sleep in the cabin. On the next morning the bag containing the valuables was missing, and was not afterwards discovered. In an action to recover the value of the property, the captain was

A party by improperly intermeddling with goods casually left in his possession, may impose upon himself an additional degree of responsibility on account of such interference.

taking was merely voluntary, no consideration for it being stated. There was no custom of the realm, or any legal obligation, to compel him to perform the work, and that distinguishes the case from those of a common carrier, porter, and ferryman, who are bound, by their situations in life, to perform the work tendered to them; but a carpenter, as such, is not bound by any such obligation." 5 T. R. 143. See *Balfe v. West*, 22 L. J. C. P. 175. *Wilson v. Brett*, 11 Mee. & W. 113. *Whitehead v. Greetham*, 2 Bing. 464; 10 Moore, 183. *Max v. Roberts*, 12 East, 89. *Beauchamp v. Powley*, 1 M. & Rob. 38; 2 Hill on Torts, 609.

holden to have imposed upon himself the duty of carefully guarding against all perils to which the property was exposed by means of the alteration, and having failed to take such care, in consequence of which the loss had been sustained, he was responsible for the damage, although as a bailee without hire he was only bound to take prudent care of them.[1]

(B) *Rights of such a Bailee.*[2]

(C) *Remedies against such a Bailee.* See *ante*, p. 105 n.

III. *Commodatum*,[3] or Bailment for *use*, where the thing is bailed to be used by Bailee *without* Reward.

[1] This case is only confirmatory of the rule, that a *mandatory*, as well as a *depositary*, may bind himself by *special* agreement to be answerable even for casualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or its equivalent, *gross* neglect.

[2] The bailee, whether the object of the bailment has or has not been fulfilled, has no right to detain the thing bailed in opposition to the demand for its restoration by the bailor. See *Bate v. Cartwright*, 7 Price, 540; and *Case v. Roberts*, Holt, N. P. C. 500. Nor can such bailee dispose of or pledge the chattel. *See ante*, p. 103.

[3] This species of bailment may be termed loan for *use*, to distinguish it from a loan for consumption; or, in other words, to distinguish it from that *loan*, such as money, wine, corn, and other things, that may be valued by number, weight, or measure, and are to be restored in equal value or quantity, and not in specie; and where an absolute property in the loan has been transferred to the bailee, he must bear every kind of loss or injury thereto, while, in a loan for use, the property lent must be re-delivered specifically, and the *bailor* must abide the loss, if they perish through accident, which a very careful and vigilant man could not have avoided. *See* Noy's *Maxims*, 91; Bythewood's edit. 211.

The duties of gratuitous lender and borrower of a chattel are, in some degree, correlative. The loan must be taken to be for the purpose of a beneficial use by the borrower, and the borrower is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, and for anything which may be defined as legal fraud. The lender is responsible for defects in the chattels, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which, directly, the borrower is injured. By the necessarily-implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender, which may make the loan perilous or unprofitable to him. *Blackmore v. Bristol Railway*, 4 Jur. N. S. 657; S. C. 27 L. J. Q. B. 167. *See* 2 Hill on Torts, 610.

A person who rides a horse gratuitously at the owner's request, for the purpose of showing him for sale, is bound in so doing to use such skill as he actually possesses; and if he be proved to be a person conversant with and skilled in horses, he is as much liable as a borrower would be for an injury done to the horse while being ridden by him. *Wilson v. Brett*, 11 Mee. & W. 113. And although there be no consideration for the undertaking of one party to procure an insurance for another, yet where a party voluntarily undertakes to do it, and proceeds to carry his undertaking into effect by getting a policy underwritten, but does it so negligently or unskilfully that the other can derive no benefit from it, he is liable to an action for such negligence. *Wilkinson v. Coverdale*, 1 Esp. 75. The only duty imposed upon a party who, without reward, undertakes to lay out the plaintiff's money in the purchase of an annuity, the defendant not acting in a professional character, is to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do. *Dartnall v. Howard*, 4 B. & C. 345.

Defendant, a carrier and wharfinger, received into his warehouse certain goods of the plaintiff, on the terms that they should be conveyed by defendant's barges to London, where the plaintiff should direct, at the usual freight, and that, in the meantime, they should be kept by defendant without charge for warehousing:—*Held*, in an action for not keeping the goods safely, that defendant was not a gratuitous bailee. *White v. Humphrey*, 11 Q. B. 43; 12 Jur. 417.

A. lent a picture to B., who wished to show it to C.; B., without any previous communication, and unknown to C., sends the picture to his house, where it was accidentally injured:—*Held*, that C. was not responsible for not keeping the picture safely. *Lethbridge v. Phillips* (*Knt.*), 2 Stark. 544: *Abbott.*

A., a general merchant, undertakes, voluntarily and without reward, to enter a parcel of goods, the property of B., together with a parcel of his own, of the same sort, at the Custom-house, for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A., having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he

(A) *Duties of such a Bailee.*

Coggs v. Bernard, 2 Lord Raym. 915.

Per Holt, C. J. "As to the bailment designated by the description of *commodatum*, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable: as if a man should lend another a horse to go westward or for a month, if the bailee go northward or keep it above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable, because he has made use of the horse contrary to the trust it was lent to him under, and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This rule is mentioned in Bracton. I refer to this author, though I confess he is an old one, because his opinion is reasonable and very much to my present purpose, and there is no authority in law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable-door open, and the thieves take the opportunity of that and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist."

The borrower of goods is responsible for any damage or loss, if it was occasioned by his neglect. Or if he used the goods in a manner not warranted by the conditions of the loan.

But he is not responsible for a loss by robbery, unless the robbery was facilitated by some neglect on his part.

(B) *Rights of such a Bailee.*

Bringloe v. Morrice, 1 Mod. 210; S. C. 3 Salk. 271.

Trespass for immoderately riding the plaintiff's mare. The defendant pleaded that the plaintiff lent to him the said mare, *et licentiam dedit eidem equitare* upon the said mare, and that by virtue of this license the defendant and his servants *alternatim* had ridden the animal. The plaintiff demurred.

For the plaintiff it was contended that the license was personal, and incommunicable; as 12 Hen. 7, pl. 25; 13 Hen. 7, pl. 13. The *Duchess of Norfolk's case*, 18 Edw. 4, pl. 14. On the other side it was contended, that the license being given by the party, and not created by law, no trespass lies. 8 Co. 146, 147.

Per Cur. The license is annexed to the person, and cannot be communi-

Although a hirer for money may, in general, exercise the right of lending or letting the chattel, yet a person who has the *gratuitous* loan of it cannot.[1]

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had undertaken, is not liable to an action for the loss occasioned to B. *Shiells v. Blackburn*, 1 H. Black. 158.

A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—*Held*, that A. was entitled to put a competent person on the horse, for the purpose of trying it, and was not limited to merely trying it himself. *Camoys (Lord) v. Scurr*, 9 C. & P. 383.

Where property is lent for a use in which the lender has a common interest with the borrower, in this case, as in other bailments reciprocally advantageous, the bailee can be responsible for no more than ordinary neglect: as if A. and B. invite some common friends to an entertainment prepared at their joint expense, for which purpose B. lends a service of plate to his companion, who undertakes the whole management of the feast, A. is obliged to take only ordinary care of the plate. Jones on Bailment, 10.

[1] Nor can he dispose of or pawn the thing bailed, but must be prepared, at all times, to return it to the owner; as in *Delaurney v. Barker*, 2 Stark. 539, where it was holden in an action of trover, that goods delivered by a bailor on a contract of sale or return, the bailee had no authority to pledge the goods.

In this case, as the bailor does not participate in any benefit from the use of the goods bailed, the bailee is liable for slight neglect. Jones on Bailm. 65. And he has no right to deviate from the conditions of the loan. Thus, if a horse be lent to a person to ride, this will not entitle him to allow the horse to be ridden by his servant. *Bringloe v. Morrice*, 1 Mod. 210; 3 Salk. 271. But where a horse was for sale, and the vendor allowed the defendant to have the horse in order to try it, it was held that he had a right to allow a competent person to ride the horse for this purpose. *Camoys v. Scurr*, 9 C. & P. 383.

cated to another, for this riding is matter of pleasure. *North, C. J.*, took a difference where a certain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse was lent has an interest in the horse during that time, and in that case his servant may ride; but in the other case not. A difference was taken betwixt *hiring* a horse to go to York, and *borrowing* a horse; in the first place, the party may allow his servant to ride; in the second, not.

(C) *Remedies against such a Bailee.* See *ante*, p. 105 n.

IV. *Pignori acceptum*, or Bailment for Pledge or Security.

(A) *Duties of Pawnee.*

Coggs v. Bernard, 2 Ld. Raym. 917.

The pawnee is bound to observe ordinary care over the thing bailed.[1]

Per Lord Holt. "As to the fourth sort of bailment, *viz. vadium*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril: for whereas if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Owen, 123. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, &c., then the pawnee may use the horse

[1] But he is not bound to use more; and therefore, if it be lost notwithstanding such diligence, he shall still resort to the pawnor for his debt. *Vere v. Smith*, 1 Vent. 121. *Anon.* 2 Salk. 522. Being answerable for ordinary neglect, he is not discharged if the pawn be simply stolen from him, unless he can show that he used due care to protect it; but he shall be excused if he be forcibly robbed thereof. *Anon.* 2 Salk. 522. And a pawnbroker is not responsible if the goods pawned be destroyed by fire without his negligence or default. *Rex v. Cording*, 1 Nev. & M. 35. If several things be pledged for the same debt, and one of them be lost without default in the pawnee, the residue are liable to be retained for the whole debt. Bac. Abr. Bailment, B. If the creditor tender the debt to the bailee, and he refuse to deliver up the pledge, it seems that he is liable, although it be subsequently lost or even forcibly taken from him. *Ratcliffe v. Davis*, Yelv. 179; Bull. N. P. 72. If the pawnor make default in paying at the stipulated time, the pawnee may sell the pledge (*Pothoner v. Dawson*, Holt, 383. *Tucker v. Wilson*, 1 P. Wms. 261. *Lockwood v. Ewer*, 9 Mod. 278); or he may sue the pawnor for his debt, retaining the pawn as a security. Bac. Abr. Bailment, B. But the pawnee has not, in general, any right to use the thing pledged; although, if such use were necessary for its preservation, or otherwise beneficial to it, or if, where the pawn is an animal, it is used as a recompense for the expense of its keep, the law would perhaps imply the consent of the pawnor to the use of the article. *Mores v. Carham*, Owen, 123. Story on Bailm. 221. It is competent for a pawnee to set up the right of a third person to the thing pledged, subject, of course, to the burthen of proof. *Cheeseman v. Exall*, 6 Ex. 341.

The stat. 39 & 40 Geo. 3, c. 99, regulates the business, rights, duties, and liabilities of pawnbrokers; and where a pawnbroker is guilty of a violation of that statute, the contract of pledge is altogether void. *Ferguson v. Norman*, 6 Scott, 794. It has been held that a pawnbroker is bound, even after the expiration of a year, to return the pledge on tender of principal and interest, provided the article remain in his hands unsold, although at the end of the year he is entitled to sell the same. *Walter v. Smith*, 5 B. & A. 439; 1 D. & R. 1. *See post*, Pawnbroker.

As soon as the debt or purpose for which the property has been pledged as a security has been discharged or fulfilled, the bailee is bound to re-deliver such property over to the owner, when requested by him so to do. That such an obligation flows from the very nature and definition of the contract is clear. See *Riches v. Bridges*, Yelv. 4. Cro. Eliz. 883. *Pickas v. Guile*, Yelv. 128. *Wheatly v. Low*, Cro. Jac. 668.

in a reasonable manner, or milk the cow, &c. in recompense for the meat. As to the second point, Bracton, 99 b, gives you the answer. '*Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit et ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere.*' In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's case.* But, indeed, the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found."

(B) *Rights of Pawnee.*[1]

V. *Locatum*, or Bailment where the thing is let to *Hire*,[2] or is Bailed for Work and Labour to be bestowed on it, or to be Carried from Place to Place.

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[1] The nature and object of this species of bailment entitles the pawnee to detain the article until he is repaid the sum advanced upon it; but it may be observed, that where goods have been pledged by a person having a limited interest, the pawnee cannot detain them for the sum advanced against the party entitled to it, after that interest has expired. As where a tenant for life of plate pledged it with a pawnbroker, who had no notice of the settlement under which the interest was derived, the pawnbroker was not allowed to retain the property after the death of the tenant for life against the remainderman, notwithstanding his ignorance of the pawnor's partial interest. *Hoare v. Parker*, 2 T. R. 376. *See* 16 Viner's Abr. Pawn, 264; 4 Camp. 121; 7 East, 5. So, formerly, where a factor pledged the goods of his principal without authority, the pawnee could not detain them against the principal until he was repaid the sum advanced (2 Stra. 1178; 5 T. R. 604; 6 East, 538; 1 M. & S. 140, 484; 4 B. & A. 443); not even to the extent of the loan which the factor would have been entitled to had they remained in his possession. 7 East, 6. *See* 4 Geo. 4, c. 83.

If goods are deposited as a security for money, it will in some cases be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit. In *Pothoner v. Dawson*, Holt, N. P. C. 385, *Gibbs, C. J.*, said, "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited by way of security to indemnify a party against a loan of money it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this:—If I (the borrower) repay the money, you must re-deliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself. I think, therefore, the defendant had a right to sell."

If the pawnee, notwithstanding all his diligence, lose the pledge, yet he shall recover the debt. *Manby v. Westbrooke*, 19 Geo. 2. K. B., cited Bull. N. P. 720; S. P. 29 Assiss. 28; *Southcote's case*, 4 Co. 83. But if he lose it after the money tendered he shall be chargeable, for he is a wrong-doer after money paid (and tender and refusal is the same), it ceases to be a pledge, therefore the pawnor may either bring an action of *assumpsit* and declare that the defendant promised to return the goods upon request, or an action of trover, the property being vested in him by the tender. *Ratcliffe v. Davies*, Yelv. 178.

[2] By this bailment the hirer obtains a temporary qualified property in the thing

1st. Locatio, conductio rei ; *or Bailment when Property is let to Hire.*

(A) *Duties of Hirer.*

Coggs v. Bernard, referred to *supra*, pp. 109, 110.

It is said that the hirer of goods is bound to use the utmost diligence ;[1] such as the most diligent father of a family would exercise.

Per Holt, C. J. "As to this description of bailment, the bailee is bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must refer to Bracton, fol. 62 b. '*Qui pro usu vestimentorum, auri vel argenti vel alterius ornamenti, vel jumenti, mercedum dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserat, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus proprius adhiberit, nisi talem adhibuerit de qua superius dictum est.*' From whence it appears, that if goods are let out for a reward the hirer is bound to

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hired, and the owner acquires an absolute property in the price of the hiring. For the hire or reward answers to the price in a sale, and the right of enjoying the thing hired to the right of property acquired by the sale. Just. Inst. 3. c. 25; D. 19. 2; Grotius, b. 2. c. 12. s. 18; Puff. b. 5. c. 6. s. 1.

[1] But this position is not correct, and it is now fully understood that a hirer is not bound to exercise more than ordinary diligence and care over the thing let to hire, such as a prudent man would use if it were his own. Jones, 89; Story, 398, 399, 400.

A bailee with whom goods are bailed that work may be performed thereon, or with respect thereto, for reward, is bound not only to perform his contract as to the work to be done, but also to use ordinary diligence in preserving the property entrusted to him. *Finucane v. Small*, 1 Esp. 315; and see *Ross v. Hill*, 2 C. B. 877. Accordingly, he is bound to exert himself in order to protect the thing bailed from any unexpected danger to which it may be exposed. *Leck v. Maestaer*, 1 Camp. 138. Thus, where A. entrusted B., who was a chronometer-maker, with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which it was deposited, he was held liable to A. for its value, B.'s servant having stolen it, and he having deposited his own watches in a more secure place. *Clark v. Earnshaw*, Gow, 30. And so where a wharfinger takes on himself the mooring of vessels which are sent alongside his wharf, he is liable for any accident which may occur to such a vessel from her being negligently moored. *Wood v. Curling*, 16 Mee. & W. 628; 15 id. 626. So, if cattle be agisted, and the agister leave the gates of his field open, he uses less than ordinary diligence, and if the cattle stray out and are stolen he must make good the loss. *Broadwater v. Bolt*, Holt, 541. See *Corbett v. Packington*, 6 B. & C. 268. But a bailee of this class is not liable for a loss occasioned by mere accident (*Garside v. Trent Navigation Co.* 4 T. R. 581), although in case of loss it lies on him to prove that such loss occured from no want of ordinary care on his part. *Mackenzie v. Cox*, 9 C. & P. 632. As to the extent of the liability of innkeepers, which is usually treated of under this head, *see post*, Innkeeper.

If A. place a dog with B., and the dog be received by B. to be kept by him for reward to be paid him by A., B. is not answerable for the loss of the dog if he took reasonable care of it: but if the dog be lost the *onus* lies on B. to acquit himself by showing that he was not in fault with respect to the loss. *Mackenzie v. Cox*, 9 C. & P. 632.

Where chattels are bailed to an artisan for the purpose of executing certain work upon them at an agreed price, the bailor may reclaim the chattels before such work is fully executed, and the bailee has only a lien upon them to the extent of what would be a fair price for so much of the work as has been thereon executed. *Lilley v. Barnsley*, 2 M. & Rob. 548.

Under an agreement between plaintiff and the defendants that C. D. should be employed by "the parties hereto" for a certain time, and the plaintiff should be employed for a certain time also, and that "the parties hereto" should be allowed to have the use of certain property for a certain period, and at the expiration of the agreement the property should be given up to the plaintiff:—*Held*, that the words "parties hereto" meant the defendants only, and, therefore, the plaintiff was not a partner with the defendants in the goods. *Bryant v. Wardell*, 2 Ex. 479. The goods having been during term applied by the defendants to a purpose in contravention of the agreement, and not having been delivered by them at the end of the term:—*Held*, that the bailment had been determined, and that the plaintiff might maintain trover. Id.

There is no duty on the part of a lodging-house-keeper to take care of his lodger's goods, and, therefore, in the absence of any misfeasance by him, he is not responsible for a loss arising from neglect to take such care of his house as a prudent owner would take, or from the wrongful act of a stranger, to whom, with the license of the lodger according to the usage between landlord and tenant, he had shown the apartments, for the purpose of letting them after the expiration of the lodger's tenancy. *Holder v. Soulby*, 29 L. J. C. P. 246; 2 L. T. (N. S.) 219.

the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man, is not so liable as a careless man, the bailee shall not be answerable in this case if the goods are stolen." *See* 2 Hill on Torts, 610.

LONGMAN v. GALLINI, Abbott on Shipping, 89.

It was decided by *Lord Kenyon* in this case, that the hirer of a musical instrument to be used at the Opera-house, and which was destroyed by fire there, was not responsible. *See* 3 Burr. 1592; 1 Bell's Com. 453; Story, s. 407.

But he is not liable if the chattel be destroyed by accidental fire.[1]

(B) *Rights of Hirer.*

BRINGLOE v. MORRICE, 1 Mod. 210; S. C. 3 Salk. 271; more fully abridged, *ante*, p. 109.

A difference was taken between *hiring* a horse and borrowing such an animal: in the first place the party may set his servant upon it; in the second, not.

A hirer may allow another person to use the chattel.

2dly. Locatio Operis faciendi;[2] *or Bailment to have Labour or Care bestowed on it, with Reward to Bailee.*

[1] Although the other numerous cases connected with this important division of bailment will be arranged under the respective titles of "Driving," "Horses," "Landlord and Tenant," "Master and Servant," it may be proper here to subjoin in a note a collection of the general principles deducible from the cases. Most of the decisions have been pronounced upon questions arising out of the treatment of hired horses; for instance, it has been adjudged that if A. hire a horse, he is bound to ride it as moderately, and feed (2 B. & B. 359) and treat it as well and carefully, as any man of discretion would ride, feed, and treat his own horse; and if through his misconduct or negligence, as if he immoderately ride the horse (Jones, 89; 5 Esp. 35), or badly feed (2 B. & B. 359), or treat it, as if the animal be ill, and he does not call in a farrier, but imprudently gives it medicine himself (3 Camp. 5); or if the horse be exhausted and refuse its feed, and he still uses it (1 Gow, C. N. P. 1), and the horse be injured and die by any of these means; or if he leave the door of the stable open at night and the horse be stolen (Jones, 89); he will be answerable for it: but he would not be liable if he managed or treated the horse as a prudent man would do his own (1 Mod. 210); or for any injury or loss occasioned without his default, or by accident, or the forcible violence of third persons. If, therefore, the horse fall by accident (3 Camp. 5 n.); or be burnt in a fire; or the hirer be robbed of it by a highwayman (Jones, 89); he would not be liable, unless, indeed, either of these circumstances arose from great want of care; nor would he be liable if he called in a farrier to attend a hired horse, and the farrier administer improper medicine. If A. hire a carriage and any number of horses, and the owner send with them his postilion or coachman, A. is discharged from all attention to the horses, and remains obliged only to take care of the glasses and the inside of the carriage while he sits in it (Jones, 89; 5 Esp. 35). The negligence of a servant acting under his master's directions, express or implied, is the negligence of the master; so that if the servant of A. injure or kill the horse by riding it immoderately, or suffer thieves to steal it by leaving the stable-door open, A. must make the owner compensation for his loss (Salk. 182; Ld. Raym. 916; 3 Camp. 5); and it is just the same if he take ready-furnished lodgings, and his guests or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. 4 T. R. 319; 5 id. 373. It will not be improper to add, that if *immovable* property, as an orchard, a garden, or a farm, be let by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving trees, plants, or implements, that every person would use if the orchard, garden, or farm, were his own. *See* 5 T. R. 373; 4 East, 154.

[2] Although a stipend or reward in money be the essence of the contract called *locatio*, yet the same responsibility for neglect is justly demanded whenever a valuable consideration of any kind is given or stipulated. This is the case where the contract *do ut des* is formed by a *reciprocal bailment* for use. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works;* as if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree that the first shall finish all the masonry, and the second all the woodwork in their respective buildings. In these cases the bailees must answer for the omission of ordinary diligence in preserving the things with which they are intrusted. Jones, on Bailment, 93. *Cooper v. Burton*, 3 Camp. 5 n. Such a bailee is not answerable for a loss by accidental fire. *Longman v.*

(A) *Duties of such a Bailee.*

The bailee of property to be kept for hire is only bound to exercise that degree of care which should be observed by every prudent man with regard to his own property; hence he is not answerable for a theft committed by his servant.

FINUCANE v. SMALL, 1 Esp. 314.

A trunk containing goods was deposited with an upholsterer for a reward, the contents of which was stolen by his servants, notwithstanding he had put it, as he imagined, in a place of safe custody: he was not holden responsible for the value, since he had taken as much care of them as his own, and that positive evidence of negligence must be given to sustain such an action; the mere proof that at different times several articles of value had been stolen from the defendant, and that he had frequently been heard to complain of the dishonesty of his servants, is not sufficient. *See* 29 Ass. pl. 28. *Moore v. Mourgue*, Cowp. 480. Abbott on Shipping, 239, n. 1. *Sed vide dict. per Wilson, J.*, in *Shiells v. Blackburn*, 1 H. Black. 161.

But if, under such circumstances, it can be shown that the bailee has used greater precautions to secure his own property than he used with

CLARK v. EARNSHAW, 1 Gow, 30.

In an action of *assumpsit* against a watchmaker, the declaration alleged that the defendant, in consideration that the plaintiff had left with him as such watchmaker a chronometer to be repaired, he had undertaken to take reasonable care of it. It was shown by evidence in support of this count, that the defendant had suffered his servant, who had stolen the watch, to sleep in the shop in which the chronometer was deposited, and that he had placed the plaintiff's watch in a less secure repository than where he had fastened up his own watches; it was proved by witnesses in the same trade, that it was the practice

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Gallini, Abb. Ship. by Shee, p. 89 n. And it seems, to support an action of negligence in using a hired horse, it is not sufficient merely to prove that the horse was returned with broken knees (*Cooper v. Burton*, *supra*) without some proof of neglect. The hirer of a horse is not liable for the ill-treatment thereof by a regular farrier, whose attendance he requires; but if he himself prescribe for the horse he is responsible. *Dean v. Keate*, 3 Camp. 5. We have seen (*ante*, p. 113 n.) he is bound to discontinue the use of it if it become exhausted and refuse its food. It has been held, that where one hires a chaise and horses to go a journey he is not liable for an injury occasioned by the negligence or misconduct of the post-boy. *Dean v. Branthwaite*, 5 Esp. 35. *Laugher v. Pointer*, 5 B. & C. 546. *Croft v. Alison*, 4 B. & A. 590. *Bush v. Steinman*, 1 B. & P. 409. *East India Company v. Pullen*, 1 Stra. 690. And where the owners of a carriage were in the habit of hiring horses to draw it, and the owner of the horses provided a driver, it was held that the owners of the carriage were not liable for an injury caused by the negligence of the driver. *Quarman v. Burnett*, 6 Mee. & W. 499. If the lender of a carriage agree to keep it in "repair without any further charges whatever," the hirer is not liable for repairs rendered liable by accident and without his wilful default. *Reading v. Menham*, 1 M. & Rob. 234. A bailee of goods for hire, by selling the goods determines the bailment, and the bailor may sue the purchaser in trover, though the purchase was *bonâ fide*. *Cooper v. Willomatt*, 1 C. B. 672. And so if, during the continuance of the bailment, the goods are taken in execution for a debt due from the bailee, this puts an end to the bailment, and the bailor may sue in trover for the goods. *Bryant v. Wardell*, 2 Ex. 479.

A warehouseman is only bound to take reasonable and common care of any commodity entrusted to his charge. *Cailiff v. Danvers*, Peake, 114: *Kenyon*. His liability commences from the time the crane is applied to raise the goods into the warehouse; and it is no defence that they were injured by falling into the street from the breaking of the tackle, the carman who brought the goods having refused the offer of slings for further security. *Thomas v. Day*, 4 Esp. 262: *Ellenborough*.

Where an order is given previously to the delivery of goods to a bailee, carrier, or other person, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly; a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. *Streeter v. Horlock*, 1 Bing. 34.

Where A. hired a room in the house of B. at 2*s.* per week, for the purpose of depositing goods for safety, and kept the key of a padlock by which the room door was fastened, and the goods were stolen by one of B.'s family: — *Held*, that B. could not be sued as bailee for the value of the goods stolen. *Peers v. Sampson*, 4 D. & R. 636. *See* 29 L. J. C. P. 54.

A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed. *Leck v. Maestaer*, abridged *supra*, p. 115.

to put articles left to be repaired in the same place for security as where they secured their own property. *Dallas, C. J.*, held that the defendant was guilty of gross neglect, as he had been less mindful of the safety of his customer's property than his own, and that he ought to have deposited the chronometer in such a place as to protect it against depredations that might be committed by the persons in his employ.

regard to the property bailed, he will, if it be stolen, be liable to the bailor.

Broadwater v. Blot, Holt, 547.

In an action upon the case against the defendant for negligently losing his horse, which plaintiff had sent to him to agist at a specified price, it was proved that the defendant was generally careless, and frequently left his gates open, and that his fences were defective; but there was no direct evidence that in consequence of the gates being left open, and the fences being in bad condition, the horse had escaped from the enclosure.

Per Gibbs, C. J. "Evidence has been given to show general negligence, but no proof of direct negligence has been adduced. The question, therefore, is, Were the defendant's fences in an improper state at the time the horse was taken in to agist? Did the agistor apply such a degree of care and diligence to the custody of the horse, as the plaintiff who intrusted the animal to him had a right to expect? I shall leave it to the jury."—Verdict for the plaintiff. *See* 8 Rep. 32; Jones, 91; Story, s. 407; 1 Bell. Com. 458.

And the agister of cattle is liable, if there be a want of due care and diligence; as if he leave open the gates of a field, or suffer the hedges to be in such a bad state of repair that the cattle escape, or are injured, or stolen.

Leck and another v. Maestaer, 1 Camp. 138.

The defendant, the proprietor of a dry dock in the Thames, received the plaintiff's ship into it to be repaired. During a remarkably high tide the water burst open the dock-gates, and the vessel being driven against another, was greatly damaged. The workmen, with the exception of one watchman, although the accident happened in the day-time, were all absent. It was submitted on behalf of the plaintiffs that the defendant, having failed in the day-time to have a competent number of workmen in the dock, showed a less degree of care of the plaintiff's ship than it might reasonably be expected he would have taken of her had she been his own property. *Lord Ellenborough* concurred in this argument, and the plaintiff had a verdict. See *Amien v. Stevens*, 1 Stra. 128; Bull. N. R. 69; Story, s. 407.

The proprietors of a dry dock, into which a vessel is put for repair, is answerable for an injury arising in the day-time from the bursting in of the dock-gates, though the gates were strong enough to have resisted the ordinary pressure of the water; if the accident might have been prevented had a sufficient number of men been on the spot.

Lubbock and others v. Inglis, 1 Stark. 104.

In an action of trover it appeared that the plaintiff had directed the London Dock Company to deliver a quantity of hides belonging to him in their custody to B. (supposing that B. had purchased them from him), and the Dock Company delivered them upon an order purporting to be the order of B., but which was a mere forgery, B., in fact, not having purchased the goods; it was holden by *Lord Ellenborough* that the Dock Company were liable to A., although he neglected to apply to B. till four months afterwards, when the supposed time of credit expired, and although A. might, after discovering the fraud, have recovered possession of his hides from another person. See *Ogie v. Atkinson*, 5 Taunt. 759; Story, s. 451. *Brandon v. Scott*, 26 L. J. Q. B. 163.

And it is incumbent on part of a bailee for hire not to deliver the goods bailed to an unauthorised person.

(B) *Rights of such a Bailee.*

Menetone v. Athawes, 3 Burr. 1592.

This was an action by a shipwright for *work and labour done*, and materials provided in repairing the defendant's ship. It appeared that the plaintiff was the proprietor of a dock, and the defendant's ship being damaged, was put into it in order to be repaired by the plaintiff. The defendant agreed to pay him

The money due for the work done may be reco-

vered, though the thing bailed be destroyed.

5*l.* for the use of the dock. When only three hours' work was wanting to complete the repairs a fire happened at an adjacent building, which, communicating to the dock, destroyed the ship: the question was, whether the plaintiff was entitled to recover the money for the repairs.

Per Cur. This is a desperate case for the defendant, but it is similar to the case of a horse that a farrier was curing, being burnt in the owner's own stable: there the court held that the farrier should be paid for what he had actually performed; so here the defendant paid 5*l.* for the use of the dock.—Judgment for plaintiff.

WOODWARD'S CASE, 1 Leach, C. L. 357 n.

A bailee for hire may be described in an indictment as the owner of the property.[1]

Perryn, Baron, in this case held, on the authority of 4 Inst. 293, and 2 Roll. Ab. 551, that an agister of cattle might, either in an indictment or in an action of trespass, describe the cattle to be his, as he has the possession of them.

(C) *Remedies against such a Bailee.* See *ante*, p. 105.

VI. ACTIONS AND PLEADINGS CONNECTED WITH BAILMENT.[2]

[1] So in *Paches' case*, Old Bailey, April sessions, 1714, it was holden that goods stolen from a washerwoman who takes in linen of other persons to wash may be laid to be her property; for persons of this and a similar description have a possessory property, and are answerable to their employers, and could all maintain an appeal of robbery or larceny, and have restitution. 2 East, P. C. 658. *See* S. P. *The King v. Deacon & Smith*, 2 Leach, 862.

[2] In the case of a gratuitous bailment, either the bailor or bailee may sue for an injury to the property; and a recovery by the party which first obtains damages operates as a complete satisfaction: *per Parke, B.*, 2 C., M. and R. 453. In other instances the bailor may sue for injury to his reversionary interests, and the bailee to his possessory right. In the case of a pledge of goods the pawnor retains his property in the chattel pawned, subject only to the rights of the pawnee. He may, therefore, transfer to another the qualified property which he himself possesses, and the purchaser may maintain trover against the pawnee for a wrongful conversion of the chattel. *Franklin v. Neate*, 13 Mee. & W. 481, 485. So if several chattels are pawned for one entire sum, and subsequently sold by the pawnor to several purchasers, trover will lie for a conversion at suit of each purchaser against the pawnee, though the latter will not be bound to part with any of the chattels until the whole debt be paid. *See* 13 Mee. & W. 485, 486.

A bailee dealing negligently with goods intrusted to him, does not thereby necessarily lose his character of bailee, so as to be liable as for a conversion. See *Heald v. Carey*, 11 C. B. 977. *Contra* if he commits an active wrong which determines the bailment. *Clark v. Gilbert*, 2 N. C. 356. *Cooper v. Willomatt*, 1 C. B. 672. See *Austin v. Manchester, &c. Railway Co.* 10 id. 454. *See* 3 Ad. & E. 196; and *post*, Trover.

A bailee, accepting goods from another to be kept for him, is estopped from denying the title of the bailor to the goods at the time of bailment, but may assert that his title has been defeated. *Thore v. Tilbury*, 27 L. J. Ex. 407; 3 H. & N. 534. *See* 3 Camp. 215 n.

A warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them if they are the property of another. *Ogle v. Atkinson*, 5 Taunt. 759; 1 Marsh. 323.

Such a bailee, who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is remeasured, and that before the malt in question was remeasured the seller became bankrupt. *Stonard v. Dunkin*, 2 Camp. 344: *Ellenborough.*

If a thing be deposited by one with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. *May v. Harvey*, 13 East, 197.

It is sometimes doubtful whether a count on a bailment is framed in contract or in tort (*Corbett v. Packington*, 6 B. & C. 268); particularly since the introduction of a less technical form of declaration. To obviate the doubt which might in such case arise as to the appropriate form of the general issue, the C. L. P. Act, 1852, s. 74, after reciting "that certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts," provides, "that any plea which shall be good in substance shall not be

objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." As to the different effect of " non-assumpsit" and of " not guilty" in such cases, *see* Pleas.

The general issue, " never indebted," to an *indebitatus* count for the care and custody of goods under a bailment, puts in issue the care and keeping of them at the defendant's request, and the reasonableness of the charges made. The general issue, " non-assumpsit," to a special count framed on a contract, denies the contract alleged, and puts in issue the express contract, if there be one, on the bailment of the goods, and the other circumstances from which the contract might be implied (R. 6, T. T. 1853).

We have seen that a bailee, accepting goods from another to be kept for him, is estopped from denying the title of the bailor to the goods at the time of the bailment, but may assert that his title has been defeated. *Thorne v. Tilbury, supra.*

In *assumpsit* against a bailee it was proved that the defendant, a coffeehouse-keeper, having custody of money without reward, lost it, and made the following statement:—" That he had, unfortunately, put it with a larger sum of money, with his own, into his cash-box, and which was kept in his tap-room; that the tap-room had no bar in it, and was open on a Sunday; but the rest of his house, which was inhabited, was not open on a Sunday; and that the cash-box, with his own and plaintiff's money, had been stolen on that day." The judge left it to the jury whether the defendant was guilty of gross negligence; and he told them that the loss of the defendant's own money did not necessarily prove reasonable care. The jury found for the plaintiff:—*Held*, first, that the question of gross negligence was properly left to them; secondly, that there was evidence upon which they might find for the plaintiff. *Doorman v. Jenkins*, 2 Ad. & E. 256

In the case of the simple bailment of a chattel without reward it may be recovered in trover, either by the bailor or bailee, if taken wrongfully out of the bailee's possession. *Nichols v. Bushmel*, 2 C., M. & R. 659; 1 Tyr. & G. 156; 1 Gale, 295. Trover for horses, cows, furniture, &c. *Plea*, that J. H. was possessed of the cattle, goods, and chattels in the declaration mentioned, and fraudulently sold them to the plaintiff to avoid an execution against the goods of J. H., and that the defendant (the sheriff) seized them under such execution. *Replication*, that J. H. did not fraudulently sell the cattle, goods, and chattels, in the declaration mentioned, to the plaintiff, and issue thereon. The particular of demand was merely " one cow." It appeared that the plaintiff had lent a cow to J. H.; that the goods of J. H. were fraudulently sold to avoid an execution, and the greater part of them bought by the plaintiff; that the plaintiff's cow was not sold, nor was any cow sold at such sale:—*Held*, that the plaintiff was entitled to a verdict on the above issue. Id.

A count stated that J. Y. delivered to the defendant, a livery-stable-keeper, a horse of the plaintiffs, to be kept by him for J. Y., and to be delivered, upon the request of J. Y., on satisfaction of the defendant's demands; and it thereupon became and was the duty of the defendant, on being paid his demand in respect of the horse, to deliver it on the request of J. Y. *Averment*, that J. Y. requested the defendant to deliver the horse to the plaintiff, and that the plaintiff paid the defendant all his demands in respect of the horse, yet the defendant did not when requested deliver the horse to the plaintiff, but wrongfully kept and detained him, whereby the plaintiff lost the profit arising from the possession and employment of the horse:—*Held*, on motion in arrest of judgment, that the count was bad, as not showing any duty in the defendant to redeliver the horse to the plaintiff; and that it could not be supported as an informal count in trover, the detention under such circumstances not amounting to a conversion. *Foilitt v. Sherstone*, 5 Mee. & W. 283; 7 Dowl. P. C. 456.

Declaration against the sureties of the treasurer of a benefit society, conditioned that he should faithfully discharge the duties of his office, and account to the trustees for money, goods, and chattels which he should receive on account of the trustees, alleged that he, as treasurer, received 70*l.*, the monies of the society; and that, according to the rules of the society, he ought to have paid over the same to the bankers of the society to the credit of the plaintiffs. *Plea*, that after he had received the monies, and before the time when he ought to have paid the same to the bankers, he, without any default on his part, was robbed by violence of the whole, by the same being feloniously and violently stolen from his person; and thereby he was unavoidably, and without any act or default of his, prevented from paying the monies to the bankers:—*Held*, after verdict for defendants, that the treasurer of a benefit building society was bailee of the monies which he received on account of the society, and did not become, by 6 & 7 Wm. 4, c. 32, s. 4, and 10 Geo. 4, c. 56, s. 20, debtor to the society, and therefore he was discharged by the robbery, and, consequently, the plea was an answer to the action. *Walker v. British Guarantee Association*, 16 Jur. 885; 21 L. J. Q. B. 257.

In all cases of bailment the duty of the bailee may be alleged in the declaration to be " safely and securely" to keep the goods intrusted to him. *Ross v. Hill*, 2 C. B. 877; 3 D. & L. 788; 10 Jur. 435; 15 L. J. C. P. 182. Therefore, in an action against a cab-proprietor for loss of luggage, an allegation that defendant promised safely and securely to carry and convey plaintiff and his luggage was held to be established by the promise implied by law, that defendant was to use due and reasonable care. Id.

A bailee for hire of goods, who sells them by private sale to a *bonâ fide* purchaser,

VII. Criminal Proceedings relating to.[1] *See* also Larceny.

BAIRNS. Sc. In Scotch law a known term, used to denote one's whole issue. Ersk. *Inst.* b. 3, lit. 8, s. 48. But it is sometimes used in a more limited sense. Bell's *Dict.*

BAIRNS' Part of Gear. In Scotch law, the share of the father's property to which by law the child is entitled. Bell's *Dict.* A third part of a defunct's free movables, debts deducted, if his wife survive; and a half, if there be no relict, due to his children. Wharton's *Lex.*

BAITING Animals. *See* vol. i. p. 358.

BALANCE of Account.[2] *See* vol. i. p. 116.

thereby determines the bailment, and the bailor may maintain trover for the recovery against the purchaser. *Cooper v. Willomatt*, 1 C. B. 672; 9 Jur. 598; 14 L. J. C. P. 219.

The bailment in detinue is not traversable. *Clossman v. White*, 7 C. B. 43; 6 D. & L. 563; 18 L. J. C. P. 151.

A railway company enters into an agreement with A. for the delivery to them, during a certain period, of a certain quantity of coals, to be carried by them for hire, to be paid by A., and in A.'s waggons; the company to have the right to detain any waggons of A. on certain defaults on his part. In order to complete this agreement, A. agrees with B. to supply a portion of the coals, to be sent on to the line in waggons which had been hired for a term from A. by B., but re-let for hire by him to A. for this purpose. A., having made default, the company seize and detain the waggons then on the line as being A.'s, but they are, in fact, waggons sent on by B., under his agreement with A. The company cannot retain them against B. *North v. Great Northern Railway Co.* 6 Jur. N. S. 98, C. P.

[1] The 20 & 21 Vic. c. 54, s. 4, enacts, "If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." A., who had been the farm-servant of B., but who had ceased to be so, was employed by B. to collect his debts, it being B.'s intention to go to America, and to take A. with him, and set him up there in business for himself. There was no agreement for any remuneration to be paid by B. to A. for collecting the debts:—*Held*, that A. could not be convicted on this evidence of embezzling the sums received by him on behalf of B. Held, also, that a person who receives money on behalf of another does not thereby become a bailee within the meaning of the 20 & 21 Vic. c. 54, s. 4. *Reg. v. Hoare*, 1 F. & F. 647.

[2] If a balance be ascertained and settled between several persons not partners in trade, or as regards parties who are not continuing partners, the law implies a promise from those against whom the balance appears to pay over the amount of such balance to the others; and any admission made by the defendant of some definite balance being against him, or of a sum certain being due from him to the plaintiff, will be evidence of an "account stated," and raise an implied promise to pay over the amount. *Knowles v. Michel*, 13 East, 249. *Prouting v. Hammond*, 8 Taunt. 688; Gow. 41. *Ashby v. Ashby*, 3 M. & P. 186. *Porter v. Cowper*, 1 C., M. & R. 394, 395. *Davies v. Wilkinson*, 10 Ad. & E. 99. *Chesnian v. Count*, 2 Scott, N. R. 596. *Puredon v. Puredon*, 10 Mee. & W. 562. *Penny v. Slade*, 15 L. J. Q. B. 10: 8 Q. B. 115. Or where partners have settled accounts on the close of their partnership, and an ascertained balance is admitted to be due from the one to the other; or where a transfer of an estate has been effected pursuant to an oral agreement, and the grantee has got possession of the subject-matter of the contract, and has agreed to pay a stipulated price. *Cocking v. Ward*, 1 C. B. 858. But the law implies no promise from an infant or lunatic, or person incapable of contracting, in respect of an account stated. *Tarbuck v. Bispham*, 2 Mee. & W. 7; *ante*, vol. i. p. 123. If a trustee states an account with his *cestui que trust*, and admits that he owes the latter a specific sum, the law implies a promise from him to pay the amount. But so long as the trust remains open and the accounts are unadjusted, and an ascertained balance has not been admitted to be due, or, if admitted, has been the result of a clear mistake, no such implied promise arises. *Roper v. Holland*, 3 Ad. & E. 99. But where trustees, for the separate use of the wife, admitted that they had received and held a certain sum to her separate use, and refused to pay it over without her separate receipt, it was held that an action on account stated would not lie by the husband and wife for the sum so admitted to be due to her. *Bond v. Nurse*, 16 L. J. Q. B. 196.

A fluctuating balance may form a consideration for a bill of exchange. *Pease v. Hurst*, 10 B. C. 122; 5 M. & R. 89; S. C. *Colenridge v. Farquharson*, 1 Stark. 259. *Richards v. Mucey*, 14 Mee. & W. 484; and for a bond, *Henneker v. Wigg*, 4 Q. B. Rep. 792; and see *Cholmley v. Darley*, 14 Mee. & W. 344. Where a banker's acceptances for his customers exceeds the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker as a colla-

BALLOT, Voting by.[1]

BANCO, or Bank. L. Latin, *Bancus.*

The "regular Term" of a court of law, as distinguished from a sittings at Nisi Prius. The ancient phrase *in banco*, sometimes translated "in bank" or "banc," once exclusively used to denote the sittings of the Court of Common Bench, is now constantly applied to any superior court of law to denote the full court sitting at its regular terms for the hearing of arguments, and is thus distinguished from a sitting at Nisi Prius, or a circuit court held by one of the judges for the trial of causes before a jury.

BANKERS.[2] *See* also Bank of England, p. 133; Joint-Stock Banks; Lien; Payment; Principal and Agent; Set-off.

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(A) *The Deposit of Money with a Banker is in the Nature of a Loan*, p. 120.

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(A) *Requisites and Qualities of*, p. 123.

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(1) *And may be made by a Lawful Holder*, p. 125.

(2) *But the Banker is protected in Payment, unless Crossing plainly appear, &c.*, p. 126.

(B) *Presentment of Cheque for Payment*, p. 126.

(*a*) *In sufficient Time if made on Day following Receipt by Holder*, p. 126.

(C) *Payment of Cheque*, p. 128.

(*a*) *Payment on Forged Cheque cannot be charged to Customer*, p. 128.

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teral security, it was held that, whenever the acceptances exceeded the cash balance, the bankers held the collateral bills for value. *Bosanquet v. Dudman*, 1 Stark. 1; and see *Bolland v. Bygrave*, 1 R. & M. 271. *Atwood v. Brodie*, 1 Stark. 483. Where bills or notes are deposited as a security for the balance of an account current, the successive balances form a shifting consideration for the bills.

[1] Corporations generally are not prohibited by the common law from adopting any mode of voting they deem expedient, as by voting-papers, ballot, show of hands, &c.; but in *municipal* corporations the mode of election is, in most cases, regulated and ascertained by the Municipal Corporations Act and subsequent statutes, and they cannot deviate from the arrangements so made. Indeed, voting by ballot is in effect abolished by the stat. 5 & 6 Wm. 4, c. 76. Several of the old charters of municipal corporations expressly gave the power of voting by ballot. See *R. v. Askew*, 4 Burr. 2186. *Peter v. Kendal*, 6 B. & C. 703. Grant on Corporations, 256. A custom to elect by ballot has been held good in an Irish corporation.

With regard to vestries, the common-law mode of election is by show of hands, or by poll. It is clear that, where parties have the right of voting, the restriction of voting by ballot cannot be imposed. See *Faulkner v. Elyer*, 4 B. & C. 449. Besides, under the Vestry Act, where one person may have any number of votes to the amount of six, other objections might present themselves to voting by ballot. It is therefore evident, that the common-law mode of voting ought to be adhered to.

[2] The nature of their business is part of the law merchant, and to be judicially noticed by the courts. *Per Lord Campbell*, 6 Moore, P. C. 173. *See* 12 Clark & Fin. 787.

(*b*) *But Indorsement on Cheque payable to Order is sufficient Authority to Pay*, p. 129.

(*c*) *A Paid Cheque is no Evidence of Payment to Payee, unless Indorsed by him*, p. 129.

III. Action against Banker for Dishonouring Cheque, p. 129.

(A) *Is Maintainable without Proof of actual Damage*, p. 129.

IV. Remedies on, p. 130.

I. Of the Duty of Bankers with Reference to their Customers' Accounts.

(A) *Money deposited with a Banker creates a Loan.*

Pott v. Glegg, 16 Mee. & W. 321.

A deposit of money with a banker is in the nature of a loan to him.[1]

Per Cur. Money deposited by a customer of a banker with his banker is equivalent to money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer.

[1] "The customer," said *Alderson, B.*, "does not bail the money to be kept with reasonable diligence and returned in specie. But the customer lends the money to the banker, and the banker promises to repay the money, and, whilst indebted, to pay the whole, or any part of the debt, to any person to whom the creditor, his customer in the ordinary way, requires him to pay it." 16 Q. B. 573.

"Money when paid into bank ceases altogether to be the money of the depositor; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it, or ordered to pay it. It is the bankers' money he deals with as his own: he makes what profit he can of it, which profit he retains to himself, paying back only the principal sum, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money, therefore, being his own, he is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it in jeopardy by engaging in hazardous speculations; but he is, of course, answerable for an equivalent amount to be paid to his customer when demanded." *Foley v. Hill*, 2 H. L. C. 36. Money deposited with bankers to be paid to a third person, is not money had and received to the use of that person until the bankers have bound themselves to pay it over. *Malcolm v. Scott*, 5 Ex. R. 610. *Watts v. Christie*, 11 Beav. 551. *See* 2 B. & A. 42. A bequest in a will of all my "ready money," "all my stock in trade," "all my debts," passes money at a banker's. 1 Phill. C. C. 356; 3 Ves. 217; 1 Mer. 541 n.

If interest is to be paid by the banker, the transaction amounts to a letting or hiring of the money as a loan at interest. If no interest is to be paid on the deposit, it is a *commodatum* or gratuitous loan; and in that case, if the money remains for six years in the banker's hands without any payment by him of any part of the principal, or any acknowledgment by him in writing of the existence of the loan debt, the Statute of Limitations will be a bar to its recovery by action. *Pott v. Glegg, supra.* See *Howard v. Daubeny*, 2 C. B. 806. *Sims v. Bond*, 2 Nev. & M. 608. *Foley v. Hill, supra.*

Bills deposited in the hands of a banker remain the property of the customer, unless there be a special agreement transferring the property in them to the banker, so that on the death or failure of the banker the customer has a right to the bills so long as they remain in specie, but the banker has a lien upon them if the customer has overdrawn his account. Where a customer was in the habit of depositing bills with his bankers, which bills were indorsed by him, and were entered into the bank books to his credit as bills, not as cash, and after such entry the customer was allowed to draw to the full amount of such bills by cheques, and the bankers became bankrupt, it was held that the customer, who had a cash balance in his favour at the time of the bankruptcy, was entitled to the bills, there being no evidence that he had agreed that when the bills were deposited they were to become the property of the bankers. *Thompson v. Giles*, 3 D. & R. 732; 2 B. & C. 422. *See* Willes, 400; 1 B. & P. 539; 27 L. J. Bank. 5.

An order by a customer to his bankers to hold the customer's money at the disposal of A. B. is revocable until actual appropriation or payment (*Gibson v. Minet*, R. & M. 68; S. C. 1 C. & P. 247), or until a promise by the banker to A. B. to make such payment. 5 Ad. & E. 548; 9 Mee. & W. 411.

Where C., a merchant who received consignments of goods from abroad, was accustomed to deliver to a bank where he kept an

account the bills of exchange drawn on him against such consignments, together with the bills of lading, the bank paid the bills of exchange and placed the amount against C.'s account, and they handed over the bills of lading to a broker, on receiving his undertaking to repay the amount of the bills of exchange out of the proceeds of the goods when sold. On these occasions, if the sum so placed to C.'s debit was taken as an actual debit, his account was overdrawn, but if that sum was not regarded, there was a balance in his favour. C. was, nevertheless, allowed to draw against his cash account, as if the amount advanced had not been placed to his debit. At length some goods remaining unsold, and the market price having gone down, the bank refused to pay a cheque drawn by C., whereupon he brought an action. The court held that it was properly left to the jury to say whether the course of dealing between C. and the bank was on the footing that he was to be allowed to draw against the cash part of his account, and that the sums guaranteed of the broker were not to be taken into account against him, unless the goods failed to satisfy them, or whether the bank was merely in the habit of indulging him by allowing him to overdraw his account; and if the former, that C. was entitled to reasonable notice that the bank declined to continue that course of dealing. *Cumming v. Shand*, 5 H. & N. 95; 29 L. J. Ex. 129.

A customer paid a bank-note into the bank after the ordinary hours of business, and the bankers, having previously resolved to stop payment, did not carry the amount of the note to the customer's account, but placed the note aside in a separate place of deposit, taking care not to mix it with the general assets of the house; it was held that the note still remained the property of the customer. *Sadler v. Belcher*, 2 M. & Rob. 489. 2 De Gex & J. 194; 27 L. J. Bank. 5.

If bank-notes deposited by a customer turn out to be worthless paper, by reason of the insolvency of the bank which issued the notes, the loss falls upon the customer, if there have been no laches on the part of the bank with whom the notes were deposited. If the banker give a receipt for the notes as cash, he is not precluded by such receipt from subsequently showing that what he received was not cash but spurious paper. *Timmis v. Gibbins*, 17 Jur. 378; 21 L. J. Q. B. 403; S. P. 26 id. 202.

When a cheque is paid into a bank to be placed to the account of a customer, the banker is bound to use due diligence in getting the cheque paid, and must give prompt notice to his customer in case it is not paid; and if he omits to do either of these things he makes the cheque his own, and must bear the loss, if loss there be. Where the plaintiff received a cheque drawn upon the defendants, who were his own bankers, and took the cheque to their bank and handed it to a clerk, with directions to place it to his account, and the clerk received the cheque without any observation, and the plaintiff departed, and the bankers, finding that the drawer of the cheque had overdrawn his account, and was keeping out of the way, gave the plaintiff notice next day that the cheque would not be honoured, and that the amount of it would not be placed to the plaintiff's credit; it was held that the bankers were not precluded, by having received the cheque without comment in the first instance, from subsequently refusing to credit the plaintiff with the amount; but that if the plaintiff, at the time he deposited the cheque, had asked the bankers whether they would pay it, he would have been entitled to an answer, and that the bankers would have been bound by such answer. *Boyd v. Emmerson*, 2 Ad. & E. 202. It is often impossible to know till the close of the day, at the closing hour, what sums of money may be paid in to each particular account, and what are the drafts upon it; and bankers, therefore, may receive cheques drawn upon them by their customers, and may reserve to themselves the right of honouring them, according to the result of the day's transactions at the clearing-house. Where bankers, at the time of receiving a cheque drawn upon them by one customer and accepted by another, stated that they were not then in funds, but that they would keep the cheque in the hope of being furnished with money to pay it in the course of the day, it was held that they were bound to appropriate the first monies they received from their customer, the drawer, in satisfaction and discharge of such cheque. *Kilsby v. Williams*, 5 B. & A. 819.

In a banking account of the ordinary kind between the banker and his customers it is not competent to any third party to interpose, and to say that the customer was his agent, and that the banker has contracted with such third party through the medium of such customer, his agent. Neither is it competent to the banker, after he has placed the money to the credit of the customer, to deny the title of the latter to the money, and to set up a *jus tertii*, or to revoke the credit. Accordingly, where A., the farming-bailiff of Lord D., after his employment as such had ceased, received a cheque for 180*l*., in payment for wheat belonging to Lord D., which he had sold on his account while acting as bailiff, and paid it into his own account with B. & Co., his bankers, who received the cash for it, and gave A. credit for the amount, but afterwards, under an indemnity from Lord D., refused to honour his drafts, the court held that, even assuming the cheque had been improperly obtained by A., still, as between him and his bankers, the amount was recoverable by A., as money had and received by them to his use, or money paid. *Tassell v. Cooper*, 9 C. B. 509.

If several joint-owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker must treat that as a contract with the one individual dealing with him, and the latter cannot impose upon the banker as many contracts as there are owners of the money. *Sims v. Britain*, 4

(B) *Of the Duty of Bankers to comply with the Directions of their Customers.*[1]

B. & Adol. 375. *Pinto v. Santos*, 5 Taunt. 447.

Generally, between banker and customer, the banker looks only to the customer in respect of the account opened in that customer's name, and whatever cheques that customer chooses to draw the banker is to honour; he is not to inquire what the monies are that are paid in to that account, or for what purpose they are drawn out: but when the customer opens two separate accounts, the one being a private account of his own, and the other as a trustee or receiver of the money of a known third party, the bankers are bound to take notice that the monies placed to the last-named account are not the monies of their customer, and they cannot make an arrangement with the latter for the appropriation of the balance on the fiduciary account to liquidate a balance due to them from their customer on his own private account. They have no right to combine with the receiver for the appropriation of his principal's money to discharge the private debt due to them from the receiver; for every person dealing with another, knowing him to have in his hands monies belonging to a third person, cannot deal with the individual holding those monies for his own private benefit, when the effect of the transaction is, that a fraud is necessarily committed upon such third party. *Bodenham v. Hoskins*, 21 L. J. Ch. 864; 16 Jur. 721.

If a trustee, or agent, who has received a sum of money for the use of his principal, or *cestui que trust*, pays the money into a bank in the name of the principal or *cestui que trust*, and places it to the account of the latter, the amount then remains in the bank at the risk of the principal, and if the banker fails, the principal must bear the loss; but if the agent or trustee pays in the money to his own account, or his own credit, this, of course, is a use of the money, for which he will be responsible. If he had an implied authority to use the money, and has so exercised it, then he stands, as before-mentioned, in the position of a borrower for use and consumption. In either case he is bound to make good the loss. *Robinson v. Ward*, R. & M. 276. *Wren v. Kirton*, 11 Ves. 377. *Rocke v. Hart*, id. 61. *Massey v. Banner*, 4 Madd. 418; 1 J. and W. 241.

[1] See *Rolin v. Steward*, 14 C. B. 595. *Whitaker v. Bank of England*, 1 C., M. & R. 744. It is the duty of the banker to pay the debt due to the customer pursuant to the order, cheque, or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over, or transferred from his own account to the account of any other person he pleases; he may do so by written instrument or verbal direction, but the banker is entitled to require some written evidence of the order for the transfer. *Watts v. Christie*, 11 Beav. 566; 18 L. J. Ch. 173. It is the very essence of transaction between banker and customer that the latter, having a balance in his favour, shall be able to command immediate payment. 11 Beav. 546.

Where the plaintiff paid a sum of money to a banker in London, and directed him to forward the money to certain country bankers at Northampton, to the plaintiff's credit, by a particular day, and the London banker received the money and neglected to forward it, or an equivalent, it was held that he was responsible for all damages sustained by the plaintiff by reason of his not having the money at the time and place appointed. *Shillibeer v. Glyn*, 2 Mee. & W. 143. *Wheatley v. Low*, Cro. Jac. 668; Palm. 281.

The acceptance by a customer of a bill of exchange, payable at his banker's, is tantamount to an order from him to his banker to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge for it; *i. e.* to the person who becomes the holder by a genuine indorsement; or if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank to the person who seems to be the holder. *Kymer v. Laurie*, 18 L. J. Q. B. 218. *Robarts v. Tucker*, 16 Q. B. 578.

If bankers have accepted a bill of exchange drawn by a customer, and the bill is presented to them when it arrives at maturity, and they pay it on the day it becomes due, the bankers so paying may reserve to themselves the right to examine into the state of the accounts between them and the acceptor, their customer, and determine whether they honour the bill for the acceptor, or take it up on their own account as indorsers. *Pollard v. Ogden*, 2 E. & B. 464; 22 L. J. Q. B. 439. See *Tidmarsh v. Groves*, 1 M. & S. 735.

Where bankers have taken up bills for a customer on the security of the produce of consignments, and, by a course of dealing with him, permitted him to draw on his account current, they cannot, by charging that account with the advances, in the absence of express notice treat it as overdrawn, and dishonour his cheques before the consignments are realised. *Cumming v. Shand*, 29 L. J. Ex. 129.

If bankers pay a cheque under circumstances of suspicion, which ought to have put them on their guard, and induced them to make inquiry before paying it, they cannot debit their customer with the amount if the cheque was never uttered or put into circulation by the customer. Thus where the customer, finding that he had drawn a cheque for a wrong sum, tore the cheque into four pieces, and threw them away, and these four pieces were gathered together by some unknown person, and were neatly pasted together, and presented at the bank by a stranger for payment; but the rents and the pasting of the paper were quite visible, and the face of the cheque was soiled and dirty; but the cashier, neverthe-

II. Of Bankers' Cheques.[1]

(A) *Requisites and Qualities of.*

(*a*) *Cannot be for a less Sum than Twenty Shillings.*[2]

(*b*) *Cheque must bear Stamp.*

Are subject to a stamp-duty.[3]

21 & 22 Vic. c. 20, s. 1. "From and after the 24th May, 1858, all drafts or orders for the payment of any sum of money on demand, which, being drawn on any banker or on any person or persons acting as a banker, and residing and transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are now exempt (by 17 & 18 Vic. c. 83; n. [3]) from stamp-duty, shall be chargeable with the stamp-duty of one penny for every such draft or order."

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less, paid it without demur or inquiry; it was held, that the bankers had been guilty of a neglect of duty in paying a cheque which presented such an appearance, and could not, under the circumstances, debit their customer with the payment. *Scholey v. Ramsbottom*, 2 Camp. 485. *See* Story on Bills, s. 417; Bayl. 326 to 981.

Where money is paid into a bank on the joint account of several persons *nominatim*, it cannot be drawn out by one of them alone, for the bankers are not discharged from liability by payment to one of the depositors without the authority of the others. *Innes v. Stephenson*, 1 M. & Rob. 147. *See* 10 C. B. 640; 26 L. J. Q. B. 163. Entries in the pass-book are only *primâ facie* evidence against the banker. 1 Macq. H. L. C. 214. As to transfer of accounts, *see* 29 L. J. Ex. 214. As to overcharges, see *Adams v. Aston*, 1 F. & F. 603. A banker as a witness is bound to answer what the balance of a party to a cause was on a given day. *Loyd v. Freshfield*, 2 C. & P. 325.

[1] A cheque is a written order or request, addressed to persons carrying on the business of bankers, and drawn upon them by a person having money in their hands, requesting them to pay on presentment to the bearer, or to a person therein named, or bearer, a certain specified sum of money. Chit. on Bills, 341, 10th ed. Under the 55 Geo. 3, c. 184, sched. 1, it was held, a draft drawn on "A. B. bricklayer," was not exempt from stamp-duty as a cheque, 2 B. & P. 283.

It would seem that the death of the drawer before payment would amount to a countermand of the cheque; but *Lord Chancellor Loughborough* appears in one case (*Tate v. Hilbert*, 2 Ves. jun. 111; see *Cutts v. Perkins*, 12 Mass. Rep. 206, Am.) to have thought that payment by the banker even then would entitle the payee to retain the money.

If a stakeholder cash a cheque which is deposited with him he is guilty of no breach of duty if both parties have agreed to treat it as money. *Wilkinson v. Godefrey*, 9 Ad. & E. 536.

A cheque is not capable of being the subject of a *donatio mortis causâ*. *Tate v. Hilbert*, 2 Ves. jun. 111. But it will be a good gift if the money is obtained by the payee before the drawer's death (*Riddell v. Dobree*, 3 Jur. 722), and perhaps even after his death. See *Tate v. Hilbert, supra.*

A banker's cheque is not considered as money, although it affords the means of receiving money immediately; but it is a mere chose in action. *Moore v. Barthrop*, 1 B. & C. 5. In practice, however, cheques are taken in payment as cash, and the acceptance by a creditor of a cheque drawn in his favour by his debtor operates as payment until it is dishonoured. *Pearce v. Davis*, 1 M. & Rob. 365. *Belshaw v. Bush*, 11 C. B. 191. Indeed it has been held that a banker in London, who receives bills from his correspondent in the country, to whom they had been indorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a cheque on a banker for the amount, although it turn out that such cheque is dishonoured. *Russell v. Hankey*, 6 T. R. 12. *Sed quære? Ward v. Evans*, 2 Ld. Raym. 928. But a cheque to operate as payment must be unconditional in its terms, and therefore if a debtor transmit to his creditor a cheque drawn for a less amount than the debt, and expressed to be for the balance of account, the creditor may commence an action for the debt, notwithstanding the cheque is in his hands still unpresented; for the presentment of such a cheque would at least furnish some evidence that the creditor had received it as payment of the balance of account. *Hough v. May*, 4 Ad. & E. 954. And even if the cheque were unconditional, the creditor would have a right to exercise his discretion whether or not he would receive it. Id.

[2] Cheques were void which were drawn for a less sum than twenty shillings (48 Geo. 3, c. 88, s. 2), and any person using such a cheque, or a cheque on which less than that amount remained due, incurred a penalty of not more than 20*l.* nor less than 5*l.* (Id. s. 3.) Under the 17 Geo. 3, c. 30, an act limiting the negotiation of negotiable instruments for sums under 5*l.*, a cheque for any less sum would have been void; but now, by 23 & 24 Vic. c. 111, s. 19, it shall be lawful for any person to draw on his banker any draft or order for the payment to the bearer, or order on demand, of any sum of money less than 20*s.*

[3] By 17 & 18 Vic. c. 83, s. 7, after reciting that it is expedient to prevent the circulation of drafts or orders on bankers unstamped, at any place beyond the distance of fifteen miles from the place where the same

(*c*) *Are Negotiable.*[1]

are made payable, enacts, that no such draft or order shall, unless the same be duly stamped as a draft or order, be remitted or sent to any place beyond the distance of fifteen miles in a direct line from the bank or place at which the same is made payable, or be received as payment or as a security, or be otherwise negotiated or circulated, at any place beyond the said distance; and if any person shall remit or send any draft or order, not duly stamped as aforesaid, to any place beyond the distance aforesaid, or shall receive the same in payment or as a security, or in any manner negotiate or circulate the same at any such last-mentioned place, he shall forfeit the sum of 50*l.*

By the 8th section it is enacted, that "it shall be lawful for any person who shall receive any such draft or order as aforesaid, at any place within the said distance from the bank or place at which the same is made payable, which draft or order shall have been lawfully issued unstamped, to affix thereto a proper adhesive stamp, and to cancel such stamp by writing thereon his name, or the initial letters of his name, and thereupon such draft or order may lawfully be received and negotiated at any place beyond the distance aforesaid."

Before the above acts, cheques complying with certain conditions were altogether exempt from stamp-duty by virtue of the 55 Geo. 3, c. 184, sched., which, while it subjected bills in general to stamps, exempted from stamp-duties "all drafts or orders for the payment of any sum on demand, and drawn upon any banker who shall reside or transact the business of a bank within *ten* miles [afterwards fifteen miles, 9 Geo. 4, c. 49, s. 15. See *Borrodale v. Middleton*, 2 Camp. 55. *Rex v. Pooley*, 3 B. & P. 311. *Swan v. Bank of Scotland*, 10 Bligh, N. S. 627] of the place where such drafts or orders should be issued, provided such place should be specified in such drafts or orders [*Waters v. Brogden*, 1 Y. & J. 457. *Strickland v. Mansfield*, 8 Q. B. 675. *Ward v. Oxford Railway Co.* 2 De G. M'Cl. & G. 750. *Bopart v. Hicks*, 3 Ex. 1. *Bond v. Warden*, 1 Coll. 583. *Ex-parte Bignold*, 3 Mont. & Ayr. 633]: and provided the same should *bear date* on or *before the day* on which the same should be issued [*Serle v. Norton*, 9 Mee. & W. 309. *Steadman v. Duhamel*, 1 C. B. 892. *Allen v. Keeves*, 1 East, 435. *Whitwell v. Bennett*, 3 B. & P. 559. *Martin v. Morgan*, 1 B. & B. 289. *Poulson v. Watson*, 15 Jur. 1111. *McDowell v. Lyster*, 2 Mee. & W. 52. *Jenkins v. Creech*, 5 Dowl. 293]; and provided the same did not direct the payment to be made by bills or promissory notes." *Parsons v. Middleton*, 6 Hare, 261. *Braybrooke v. Meredith*, 7 Jur. 144.

A cheque, therefore, is not admissible in evidence, unless stamped either with a penny stamp or with a bill-stamp, if made in other respects not falling within the conditions of exemption (*Bopart v. Hicks*, 3 Ex. 1. *Waters v. Brogden*, 1 Y. & J. 457), except it be for a collateral purpose, as to prove a crime (17 & 18 Vic. c. 83, s. 27), or to establish fraud (*Keable v. Payne*, 8 Ad. & E. 555. *Poulson v. Watson*, 15 Jur. 1111), or illegality. *Coppock v. Bower*, 4 Mee. & W. 361. *Blair v. Bromley*, 11 Jur. 617. *Smart v. Nokes*, 6 Man. & G. 911.

The 55 Geo. 3, c. 184, imposes penalties for any infringement of that act by the making and issuing of any draft or order on a banker, payable to bearer on demand, not duly stamped, and not in all respects coming within the above exemptions: namely, the drawer of the draft shall forfeit 100*l.*; any person knowingly taking it, 20*l.*, and the banker knowingly paying it, 100*l.*; and, besides, he shall not be allowed the sum so paid by him in account against the person by whom or for whom it was drawn, or against any person claiming under them respectively. The day mentioned may be any day before or the day when the cheque was issued. The cheque must not be post-dated (*Allen v. Keeves, supra. Whitwell v. Bennett*, 3 B. & P. 559. *Oliver v. Mortimer*, 2 F. & F. 127); that is, it must not bear date on a day after that on which it was in fact issued. Therefore, unless it be duly stamped, it is void, although it was not intended to be used till the day of the date; and it is void even against a *bonâ fide* holder (*Searle v. Norton*, 9 Mee. & W. 369. *Field v. Woods*, 7 Ad. & E. 144. *Steadman v. Duhamel*, 1 C. B. 892, supporting *Field v. Woods. Bond v. Warden*, 1 Coll. 580. *Allen v. Keeves, supra. Ex-parte Bignold*, 1 Deac. 735. Byles on Bills, 58, 6th edit.); and the objection may be taken under a plea denying the drawing. 1 F. & F. 702.

The payee of a post-dated cheque, knowing it to be so, and also knowing the maker was insolvent, presents it to a banker, who, being ignorant of these circumstances, pays the cheque for the honour of the drawer; the banker recovered from the payee the whole amount of the cheque. *Martin v. Morgan*, 3 J. B. Moore, 635.

A cheque is not issued till it is in the hands of a third party entitled to demand cash for it. *Ex-parte Bignold*, 1 Deac. 735; 2 Mont. & Ayr. 633.

It must be proved that the banker cashed the cheque with the full knowledge that it was issued in the prohibited manner, before he can be made liable to the above-mentioned penalty for knowingly paying. *Ex-parte Bignold*, 1 Deac. 735. In a case which occurred before the statute, it was shown to be contrary to usage of London bankers to pay a cheque before the day of its date, and therefore a banker, who had so cashed a cheque that had been lost, was made to repay the amount to the party who had lost the cheque. *Da Silva v. Fuller*, cited in Chitt. Bills, 148; and *per Parke, B.*, 7 Mee. & W. 178. If he pay a post-dated cheque in ignorance that it is post-dated, he is protected. *Poulson v. Watson*, 15 Jur. 1111.

[1] There is no limit to the transferability of cheques but that which is imposed for the

(*d*) *Crossing is a material Part of the Cheque.*

The crossing of a cheque is a material part of the cheque.

21 & 22 Vic. c. 79, s. 1.[1] "Whenever a cheque or draft on any banker, payable to bearer or to order on demand, shall be issued, crossed with the name of a banker, or with two transverse lines, with the words 'and company,' or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and, except as hereafter mentioned, shall not be obliterated or added to, or altered, by any person whomsoever, after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or, if the same be issued as aforesaid without a banker's name, to any other than a banker."

(1) *And may be made by a Lawful Holder.*

And such crossing may be made by the lawful holder.[2]

Sect. 2. "Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words 'and company,' or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque or draft, while the same so remains uncrossed, or crossed with the name 'and company,' or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words 'and company,' or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned

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purposes of revenue; they are treated by the daily practice of merchants, and by the courts as negotiable instruments, and being payable to bearer they pass from hand to hand without indorsement. *Boehm v. Stirling*, 7 T. R. 423. *Moule v. Brown*, 4 Bing. N. C. 266. *Rothschild v. Corney*, 9 B. & C. 388. *Serle v. Norton*, 2 M. & Rob. 401. *Robinson v. Hawksford*, 9 Q. B. 58. *Samuel v. Green*, 10 id. 262. *Grant v. Vaughan*, 3 Burr. 1516. *Down v. Halling*, 4 B. & C. 330. Where made payable to order, they must, in order to their being transferred, be first indorsed by the payee. But if a cheque is issued before the day it bears date a transfer thereof is invalid, because the instrument being post-dated is a nullity. *Serle v. Norton*, 9 Mee. & W. 309; 2 M. & Rob. 401. *See* p. 124 n.

As in the case of other instruments which are payable on demand, cheques cannot properly be said at any time to be overdue. *Brooks v. Mitchell*, 9 Mee. & W. 15. *Boehm v. Stirling*, 7 T. R. 423. *Serle v. Norton*, 2 M. & Rob. 400. No lapse of time less than six years can affect the holder's right to sue, unless actual loss to the drawer can be proved. *Law v. Rand*, 3 C. B. 442; 27 L. J. C. P. 76. In the language of the market they are sometimes termed "stale," but the mere circumstance of a person receiving a cheque a few days after its date does not subject him to the equities which might have affected it in the hands of the person from whom he received it. *Rothschild v. Corney*, 9 B. & C. 388.

In case of dishonour of a cheque payable to bearer, an indorser may be sued thereon by the holder. *Keene v. Beard*, 29 L. J. C. P. 287; 6 Jur. N. S. 248.

[1] This statute was passed in consequence of the decision of the Court of Exchequer in *Bellamy v. Marjoribank*, 7 Ex. 389, in which that court laid down that the custom was reported to have been stated by some of the jury in *Stewart v. Lee*, M. & M. 158, namely, that when a cheque is crossed, bankers generally refuse to pay it to any one except a banker; and if they do pay it to a person not a banker, they consider that they do it at their peril in the event of the party to whom the payment is made not being entitled to receive it: that the object is to secure the payment, not to any particular banker, but to a banker in order that it may be easily traced for whose use the money was received, and that it was not intended thereby at all to restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit. The negotiability of a cheque is not impaired by crossing. *Carlon v. Ireland*, 5 E. & B. 765. A French cheque drawn upon an English house is not recoverable against the French drawer if the cheque should be stolen, and negotiated through the drawer having neglected to cross it. *Imperial Court, Paris*, 8 April, 1861.

[2] By the 3d sect. of 21 & 22 Vic. c. 79, it is enacted, that "if any person shall obliterate, add to, or alter any such crossing, with intent to defraud, dispose of, or put off with intent to defraud, any cheque or draft on a banker, whereon such fraudulent obliteration, alteration, or addition has been made, knowing it to have been so made, such person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or to such other punishment as is enacted and provided for those guilty of forgery of bills of exchange in the statute in that case made and provided."

shall be deemed a material part of the cheque or draft, and shall not be obliterated, or added to, or altered, by any person whomsoever, after the making thereof, and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed as last aforesaid."

(2) *But the Banker*, bonâ fide *paying a crossed Cheque to the Holder, is not responsible, unless the Crossing plainly appear, or he is negligent.*

But the banker is not responsible for a payment to the holder if the crossing or alteration does not plainly appear, unless he has been guilty of negligence.

Sect. 4. "Provided always, that any banker paying a cheque or draft, which does not, at the time when it is presented for payment, *plainly* appear to be, or to have been, obliterated, added to, or altered as aforesaid, shall not be in any way responsible, or incur any liability; nor shall such payment be questioned by reason of such cheque having been so crossed as aforesaid, or having been so obliterated, added to, or altered as aforesaid, and of his having paid the same to a person other than a banker, or other than the banker with whose name such cheque or draft shall have been so crossed, unless such banker shall have acted *malâ fide*, or been guilty of negligence in so paying such cheque."

(B) *Presentment of Cheque for Payment.*

(*a*) *In sufficient Time if made on Day following its Receipt by Holder.*

HARE v. HENTY, 7 Jur. N. S. 523; 9 W. R. 738.

Presentment is in sufficient time if made on the day following the receipt of the cheque.[1]

Action against bankers at Worthing, for a neglect of their duty to present a cheque upon a bank at Lewes for payment. The evidence was, that the plaintiff paid in the cheque to the credit of his account with the defendants on Friday morning, the 8th July, and that the defendants sent it by Friday's post to their correspondents in town, for presentation at the country bank's clearing-house on

[1] The holder of a cheque does not lose his remedy against the drawer by reason of non-presentment within any prescribed time after taking it, unless in the interval the banker has become insolvent; that is, unless there is an actual loss to the drawer. *Robinson v. Hawksford*, 9 Q. B. 52, 15 L. J. Q. B. 377. The holder is bound, in order to guard against loss by the insolvency of the banker on whom the cheque is drawn, to present it for payment with reasonable promptitude; that is, in the course of the day succeeding that on which he receives the cheque from the drawer, whether he present it himself or through his bankers. If he neglect so to do, and the drawees afterwards become insolvent or stop payment, the loss will fall upon the holder of the cheque. If the cheque is presented in due time, and payment is refused, the loss will fall upon the drawer.

When the party receiving a cheque wishes to secure the benefit of the usual course of presentment through a banker, he must stipulate that his bankers' names shall be crossed upon the cheque, which will amount to an agreement, on the part of the drawer, that the usual course of presentment through a banker shall be observed. *Alexander v. Burchfield*, 3 Scott, N. R. 563; 7 Man. & G. 1161. If the cheque be delivered by the drawer to the holder after banking hours, and when it is impossible to pay the cheque to a banker on that day, the delivery will count from the succeeding day; and if the cheque be drawn upon a country bank, situate at a distance from the place where the cheque was delivered, such distance must be taken into consideration in determining whether the cheque was presented within a reasonable time. *Bond v. Warden*, 1 Coll. Ch. C. 288.

According to the custom in the city of London, a person who receives a cheque with his banker's name written across it pays it at the banker's, and the banker, if he receive it in time, presents it at the clearing-house, and obtains payment the same day; but where a debtor paid his creditor by a crossed cheque, and the latter on the same day transmitted it to his banker's, the banker negligently, as it was alleged, omitted to present it at the clearing-house in time for that day, when it would have been paid, and on the next day it was dishonoured, the firm on which it was drawn having stopped payment, it was held that the supposed negligence of the banker, though it might render him liable to his customer, did not discharge the drawer, the holder of the cheque being entitled to the general law the day after he receives it. *Boddington v. Schlencker*, 4 B. & Adol. 752. On the contrary, where the plaintiffs, on the 10th of March, received a crossed cheque in payment for some horses, in sufficient time to allow of its being paid to their banker that day, but they did not pay it till the 11th, and the banker, having no connexion with the clearing-house, did not present it for payment

Saturday, to the correspondent of the Lewes bank. Accordingly, the cheque was so presented, and sent on by the post of Saturday to the bank at Lewes, where it arrived on Sunday (practically, on Monday), and the payment was refused, there being then no effects; but if it had arrived on Saturday, it would have been paid. On these facts, a verdict having been entered for the plaintiff, the court made absolute a rule to enter a nonsuit. The considered judgment of the court was delivered by,—

Erle, C. J. "Where the course of sending cheques on country bankers to the country bank's clearing-house in London has not been adopted, we consider that the time in which a banker, holding a cheque for a customer, ought by law to present it, is defined correctly in the case of *Rickford v. Ridge*, 2 Camp. 537. There the plaintiffs, bankers of Aylesbury, had discounted for the defendants a cheque on Smith, Payne, & Co., of London, at noon of the 13th June. On the 14th the plaintiff sent it to Praed & Co., their London agents, for presentation. Praed & Co. received it on the 14th, and sent it for presentment on the 15th, when payment was refused. Notice of dishonour was given on the 16th, and an action was brought to recover the money paid in discounting. It was held that the cheque was presented in time. The bank, receiving the cheque on the 13th, was not bound to send it off till the 14th; the agent, receiving it on the 14th, was not bound to present it before the 15th, on which day it was due. Although, in the present case, the cheque was on a country bank, and the defendants received it without advancing on it, and held it for their customer, still we think these circumstances make no difference in respect of the time allowed for presentment. *Lord Ellenborough* says, the rule which convenience requires must be adopted; and he decided as above stated. That decision has been recognised and acted upon, and establishes the general rule, in all cases, as

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till the 12th, the day on which the drawer's banker stopped payment, it was held that there had been no laches in the banker, but such laches in the plaintiffs themselves, in not paying it into their banker's on the 10th, as discharged the drawer from his liability. *Alexander v. Burchfield*, 7 Man. & G. 1061.

As against an intermediate transferrer, the holder is bound to present the cheque for payment, or, if at a distance from the place of presentment, to dispatch it for that purpose, not later than the day *after that on which he received it*, or otherwise the person from whom he received it will be discharged from liability by such laches in the event of the banker's insolvency. *Moule v. Brown*, 4 Bing. N. C. 268. *Robinson v. Hawksford, supra.* Where the defendant paid a cheque, of which he was not the drawer, into a branch bank at Malmesbury, on the 28th of March, and it was forwarded the same day to the head office at Melksham, and thence despatched, on the 30th, to Bath, where it was presented on the 31st, and dishonoured, it was held that the plaintiffs had not observed that due diligence which entitled them to recover from the defendant (*Moule v. Brown, supra*); but where the plaintiffs cashed a cheque at Aylesbury for the defendant on the 13th June, and despatched it by coach next day for London, and it was presented at the banker's there on the 15th, at noon, it was held that there were no laches. *Rickford v. Ridge, supra.* In case of due presentment and dishonour, the holder may sue an intermediate indorser or transferrer on the cheque. *Keene v. Beard*, 29 L. J. C. P. 287.

Where a cheque, instead of being presented for payment in due course, is transferred, and circulates through several hands, it is conceived that there is a distinction between the time of presentment necessary, as against the original drawer, in the event of the banker's insolvency, and the time necessary to charge the person from whom the cheque was immediately received. The liability of the drawer cannot, it is apprehended, be enlarged by circulating the cheque, and therefore, in order to charge *him*, if the banker fail, the cheque, in whose hands soever it may be, must be presented within the period within which the payee or first holder must have presented it; but as against the party transferring the cheque to the holder it is sufficient, whatever be the date of the cheque, to present it, or forward it for presentment, on the day next after the transfer. Byles on Bills, 14, 5th ed. But no case has decided whether the drawer's risk may be extended by the holder, instead of presenting the cheque, putting into circulation. Chit. on Bills, 348, 10th ed.

But the drawer's liability on the cheque is not discharged, however great be the delay in presenting it, unless some loss be occasioned to the drawer by reason of the laches of the holder (*Laws v. Rand*, 27 L. J. C. P. 76. *Robinson v. Hawksford, supra. Robson v. Bennett*, 2 Taunt. 388); and there cannot be laches earlier than on the expiration of banking-hours on the day after the cheque is issued, nor so early, if presentment must be made at a distance. *Hare v. Henty, supra* in text.

between parties to the cheque; and we think the rule applies, not only as between the parties to the cheque, but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present earlier, or to defer presentment to a later period, can be inferred."

(C) *Payment of Cheque.*[1]

(*a*) *Payment on Forged Cheque cannot be charged to Customer.*

HALL v. FULLER, 5 B. & C. 750; 8 D. & R. 464.

Bankers cannot charge their customers with a payment made by them on a forged cheque.[2]

A cheque drawn by a customer on his banker for a sum of money described in the body of the cheque, in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the cheque, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the customer this larger sum. The customer brought an action against the bankers to recover the balance of his account. The bankers claimed to deduct the entire amount paid by them upon the cheque. Upon a case stated,—

The court were of opinion that the banker could not charge the customer for anything beyond the sum for which the cheque was originally drawn. The banker, as the depositary of the customer's money, is bound to pay, from time to time, such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer; and to justify the payment he must show that the order is genuine, not in

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[1] It appears that, by the practice of London bankers, if one banker who holds a cheque drawn upon another banker presents it after four o'clock, though it is not then paid, a mark is put upon it to show that the drawer has effects, and that it will be paid; and this marking binds the banker to pay on the following day at the clearing-house. *Robson v. Bennett*, 2 Taunt. 388. But a promise to pay cannot be inferred from the circumstance of the cheque being retained a whole night by the banker on whom it is drawn, by one customer, and to whom it is presented by another, with the simple request on the part of the holder to place it to his credit (*Boyd v. Emmerson*, 2 Ad. & E. 184), for it is presumed that the banker takes it as the agent of the holder; and therefore if, during the detention of the cheque, funds sufficient to pay it were to come in, the banker must appropriate them to the payment of that cheque, and not in liquidation of a debt due to himself. *Kilsby v. Williams*, 5 B. & A. 815. See *Woodland v. Fear*, 26 L. J. Q. B. 202. If a banker innocently pays a post-dated cheque it is a valid payment. *Poulson v. Watson*, 15 Jur. 1111. Should the payee of a cheque, knowing it to be post-dated, and that the maker is insolvent, present it to the banker, who pays him the amount in ignorance of these facts, the banker may afterwards recover the money from the payee. *Martin v. Morgan*, 1 B. & B. 289. As to payment where there are several branch banks, see *Woodland v. Lear*, 7 E. & B. 519; 26 L. J. Q. B. 202.

[2] The customer, however, and not the banker, will be responsible if a fraud has been committed through the negligence or carelessness of the former in drawing the cheque. Thus, where the customer signed several blank cheques, and left them in the hands of his wife to be filled up, and she handed a cheque to a clerk to be filled up for 50*l.* 2*s.* 3*d.*, and the clerk filled up the cheque for the specified amount, and showed it to the wife, but the fifty was commenced in the middle of the line, so that the words "three hundred and" could easily be written before it, and space was left at the bottom of the cheque for the insertion of the figure 3 between the £. and the figure 50; and the clerk, on his way to the bank, altered the cheque to 350, and got that amount from the banker and absconded;—It was held that the customer must bear the loss, as it had been occasioned by his own negligence and the negligence of his agents in dealing with the cheques. *Young v. Grote*, 12 Moore, 489; 4 Bing. 257; cited 7 C. B. 400.

If bankers wish to avoid the responsibility of deciding on the genuineness of the indorsement of a bill of exchange, they must require their customers to make them payable at their own offices, and to honour them by giving a cheque on their bankers, for they cannot debit a customer with a payment to a party who claims through a forged indorsement, and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to pay the bill without reference to the genuineness of the indorsement, or a subsequent admission on the part of the customer of the genuineness of the indorsement inducing the bankers to alter their position, so as to preclude the customer from showing it to be forged. *Robarts v. Tucker*, 16 Q. B. 578. They may recover back, after the conviction of the forger, the amount paid to him. 2 L. T. (N. S.) Ch. 47.

signature only, but in every respect. This is not a genuine order, for the customer never ordered the payment of the money mentioned in the cheque. See *Smith v. Mercer*, 6 Taunt. 76; S. C. 1 Marsh. 453.

(*b*) *Indorsement on Cheque payable to Order is sufficient Authority to Pay.*

16 & 17 Vic. c. 59, s. 19. "Any draft or order drawn upon a banker for a sum of money payable to order on demand, which when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the sanction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof."

Banker not bound to show that indorsement was made by payee's order.

(*c*) *A Paid Cheque no Evidence of Payment to Payee, unless Indorsed by him.*[1]

III. Action for Dishonouring Cheque.

(A) *Is Maintainable without Proof of actual Damage.*

Rolin v. Steward, 14 C. B. 595; 23 L. J. C. P. 148.

This was an action against bankers at the suit of a customer for dishonouring a bill and certain cheques at a time when they had in their hands sufficient assets of his to meet them. There was no evidence of special damage, and the jury on the trial found for the plaintiff, with 500*l.* damages. A rule for a new trial, on the ground that the jury ought to have been directed that they could find nominal damages only, was discharged.

In an action against a banker for dishonouring a cheque of a customer when he had assets, nominal damages are recoverable if no actual damage is proved, and substantial damages may be recovered, although no special damage is alleged.[2]

Per Cur. In *Marzetti v. Williams*, 1 B. & Adol. 415, the court held that the action was maintainable against the banker, notwithstanding there was no evidence of the customer having sustained any damage. In that case, *Taunton, J.*, says: "Independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendant to pay the cheque; and as it was the duty of the defendant to pay the cheque when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages. Why? Because the jury had a right to assume that it would be to some extent injurious, and if so, it was for them to say to what extent. When it is alleged and proved that the plaintiff is a trader, the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract; just as in the case of a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage. The damages in this case, however, seem excessive; and that part of the rule which asks for a reduction will remain open for the present, to afford an opportunity of an arrangement in that respect."

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[1] The appearance of a person's name in a cheque as payee, and receipt of money by means of it (unless shown to be paid to him), is no evidence to connect him with the drawer (*Lloyd v. Standilands*, Gow, 15; but see *Montford v. Harper*, 16 Mee. & W. 825); or to prove a loan from the drawer to the payee, or a debt due from the latter (*Cary v. Gerrish*, 4 Esp. 9. *Aubert v. Walsh*, 4 Taunt. 293. *Boswell v. Smith*, 6 C. & P. 60.) Nor is the production of a paid cheque, which contains the plaintiff's name as payee, any evidence of a payment of a debt due to the plaintiff, unless he or his agent have indorsed his name on the back of it. *Egg v. Barnett*, 3 Esp. 196. The production by the bankers of a cancelled cheque is evidence of the payment of a debt, but not of a loan by them to their customer. *Fletcher v. Manning*, 12 Mee. & W. 571.

[2] It is a good defence to the action, that before presentment of the cheque the banker had applied the money to the payment of the customer's acceptance made payable at the banker's (*Kymer v. Laurie*, 18 L. J. Q. B. 218), that being a sufficient authority to him to make such a payment. *Robarts v. Tucker*, 16 Q. B. 575.

IV. Remedies on.[1]

V. Liability of, Criminally. *See* 7 & 8 Geo. 4, c. 29, ss. 49, 50; Grant's Banking, 144; 2 M. & Rob. 425; 4 C. & P. 46; 2 B. & C. 422; *Paul's case*, Grant, 145.

BANKERS' Cash-Notes.

I. Defined, p. 130 n.

II. In some respects they resemble Money, p. 130.

III. And they may Operate as Payment, p. 131.

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I. Defined.[2]

II. In some respects they resemble Money.[3]

[1] The payee, or bearer, or indorsee, may sue, and an indorser, we have seen (p. 108 n.) may be sued by the holder. *See* Forms of Declaration, B. & L. 63. Cheques are within "The Bill of Exchange Act" (18 & 19 Vic. c. 67). *Eyre v. Waller*, 29 L. J. Ex. 246; S. C. 5 H. & N. 460; S. P. 1 F. & F. 602.

[2] Bankers' cash-notes are in effect promissory-notes. They were introduced by the goldsmiths about thirty years previously to the reign of Queen Anne, when the banking transactions in England were entirely in the hands of those persons. See *Orr v. The Union Bank of Scotland*, 1 Macq. H. of L. C. 513. *Moore v. Warren*, 1 Stra. 415. *Turner v. Mead*, id. 416. *Hayward v. Bank of England*, id. 550. *Brook v. Middleton*, 1 Camp. 449. *Buller v. Crips*, 6 Mod. 30. *Nicholson v. Sedgwick*, 1 Ld. Raym. 180. Although regarded by the merchants as negotiable, Lord Holt strenuously opposed their negotiability, as he did that of promissory notes; and they were not generally settled to be negotiable until the stat. 3 & 4 Anne, c. 9, which relates to these as well as common promissory notes. They appear originally to have been given by bankers to their customers as acknowledgments of money received for their use (*Ford v. Hopkins*, Holt, 119); and they may be generally payable to bearer. *Grant v. Vaughan*, 3 Burr. 1516. At present, cash-notes are seldom issued except by country bankers, their use having been superseded by the introduction of cheques. When formerly issued by London bankers they were sometimes called shop-notes. In point of form they are similar to common promissory notes, payable to bearer on demand, and are stated in pleading as such. By the 7 Geo. 4, c. 6, the circulation of bankers' or any notes payable on demand under the sum of 5*l.* has been prohibited; and the issue of such notes for any amount whatever is now controlled by the Bank Restriction Acts. By the 10th section of the 7th Geo. 4, c. 6, notes under 20*l.*, payable to bearer on demand, must be made payable at the bank or place where the same are issued; but such notes may be made payable at several places, provided one of such places be the bank or place where the same are issued. Chit. on Bills, 10th ed. 352. Byles on Bills, 6.

Like bankers' cheques, these notes are generally transferred from one person to another by delivery. They may, however, be negotiated by indorsement, in which case the act of indorsing will operate like the making of a bill of exchange, and the instrument may be declared on as such against the indorser. *Mendez v. Carreroon*, 1 Ld. Raym. 742. *Hill v. Lewis*, 1 Salk. 132. *Brown v. Harradan*, 4 T. R. 148. In other respects they are affected by the same rules as bills of exchange. Surviving partners may issue. 27 Bea. 446; S. C. 29 L. J. Ch, 236.

[3] On account of their being payable on demand they generally pass as cash, whether payable to order or bearer (*Tassell v. Lewis*, 1 Ld. Raym. 743. *Peacock v. Rhodes*, 2 Dougl. 633. *Owenson v. Morse*, 7 T. R. 64); but if presented in due time and dishonoured, they will not amount to payment. *Ward v. Evans*, 2 Ld. Raym. 928. A tender of them is good unless objected to on that account. *Lockyer v. Jones*, Peake, 239. If they are deposited with a stakeholder, they cannot be recovered from him as money had and received unless he agreed to receive them as money. *Pickard v. Banks*, 13 East, 20.

The time when bankers' cash-notes must be presented for payment is governed by the rules relating to other notes and cheques payable on demand. *See ante*, p. 126. If the bankers who issued them should stop payment, the notes must, nevertheless, be presented for payment in due time, and due notice must be given to the person who transferred them, or they must be returned to him. *Camidge v. Allenby*, 6 B. & C. 373. *Turner v. Stones*, D. & L. 122. *Lichfield v. Greene*, 1 H. & N. 884.

MILLER v. RACE, 1 Burr. 452.

Lord Mansfield. "Bank-notes are not goods, not securities or documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas are, or any other current coins that are used in common payments as money or cash. They pass by a will, which bequeaths all the testator's money or cash,[1] and are never considered as securities for money, but money itself. On payment of them, whenever a receipt is required, the receipt is always given as for money, not as for securities or notes. So in bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash."[2]

In some respects resemble money.

III. AND THEY MAY OPERATE AS PAYMENT.

LICHFIELD UNION v. GREENE, 1 H. & N. 884; 26 L. J. Ex. 140.

This was a special case, in which the question was, whether the sureties of the treasurer of a poor-law board were responsible for a certain sum of money, which their principal, who was a banker, had paid in his own notes only two days before he stopped payment, and which were not presented until after he had stopped payment. *Cur. adv. vult.*

If bankers' cash-notes are received as payment at the time of the transaction, they operate as payment.[3]

Bramwell, B. "The effect as to payment by bank-notes when the bank either has stopped at the time of payment or shortly after, has been frequently the subject of legal discussion; and the case of *Camidge v. Allenby*, 6 B. & C. 373, seems to contain the existing law upon the subject. In that case a distinction was taken between a payment of bank-notes at the time of the sale or of the original transaction, and a payment by bank-notes on a pre-existing debt. *Mr. Justice Bayley* says, 'If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money; but if he consented to receive notes as money, they would have been taken by him at his peril. If, indeed, he could show fraud or notice of the insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards.' But *Mr. Justice Holroyd* and *Mr. Justice Littledale* both say that if country bank-notes are paid and received as money in any transaction as payment, and both parties be innocent, it is payment. The latter learned judge expressly says, that in his opinion there is no guarantee by the party passing a note payable on demand that the maker of the note is solvent at the time when it was so passed. It has been already stated what, in the opinion of *Mr. Justice Bayley*, is the effect of payment of bank-notes at the time of the transaction or sale; but in the same case it is said by the same learned judge, that if a man take bank-notes in payment of a pre-existing debt, and the bank stop the following day, he is entitled at once to return the notes, and treat them as non-payment. So also if he circulate them on or before the day, and they are returned to him by a person entitled to return them by reason of the stoppage of

[1] *Fleming v. Brook*, 1 Scho. & Lef. 318. *Stewart v. Marquis of Bute*, 11 Ves. 662. They will pass as a *donatio mortis causâ*. *Drury v. Smith*, 1 P. Wms. 405. *Miller v. Miller*, 3 id. 356; 1 Wms. Exors. 692.

[2] At common law, bankers' notes, like money, could not be taken in execution; but now they may by stat. 1 & 2 Vic. c. 110, s. 12. If banker's notes have been lost, an action of trover will not in general lie by the true owner against a *bonâ fide* holder. *Lowndes v. Anderson*, 13 East, 130. Nor an action for money had and received against the finder to recover their value. *See* Bank of England, p. 133.

[3] *See* also, *per Abbott, C. J., Van Wart v. Wooley*, 3 B. & C. 445. Where, however, bankers' notes are given for a pre-existing debt, they are only a conditional payment, to become afterwards absolute. *Belshaw v. Bush*, 11 C. B. 191: *per Cur. Lichfield Union v. Greene*, *supra* in text. And they also operate as a discharge of that debt, unless the party who takes them does all that the law requires to be done in order to obtain payment of them. Id. *See* also *Camidge v. Allenby*, cited *supra*.

the bank, his right to return them to his debtor still continues. *See* also Byles on Bills, p. 154.[1] No case has arisen like the present, where the person paying was the maker of the bank-notes himself; but as to the case of the payment upon the 28th, the case of the payer not being the maker seems to afford an analogy. If Mr. Richard Greene had paid the orders by bank-notes of another bank in Lichfield, which had stopped on Monday the 31st, they payment by him would have been good according to the case of *Camidge v. Allenby*. The circumstance of the notes not having been presented for payment or circulated by the plaintiffs on the Saturday, would have made it a good payment by R. Greene, and the loss would have fallen on the plaintiffs; and we think that, in analogy to this, the plaintiffs having kept in their possession during Saturday the 95*l.*, they thereby conclusively elected to treat the order as paid, and that the sureties have a right to treat the transaction as payment."

IV. Circulation of.[2]

V. When good Tender.[3]

VI. Stamp-Duties on Bank-Notes.

17 & 18 Vic. c. 83, s. 12. "All bills, drafts, or notes which by or under this act, or the said three several acts last mentioned (7 & 8 Vic. c. 32; 8 & 9 Vic. c. 37; 8 & 9 Vic. c. 38), or any of them respectively, are declared or deemed to be bank-notes, shall be subject and liable to the stamp-duties or composition for stamp-duties imposed by or payable under any act or acts in force upon or in respect of promissory notes for the payment of money to the bearer on demand, and to all provisions, regulations, penalties, and forfeitures contained in any act or acts relating to the issuing of such promissory notes."

BANKING-Hours.[4]

[1] In order to keep alive his right against the person from whom he takes them, the holder of bank-notes must, on the day after he receives them, either put them again into circulation or despatch them for presentment at the bank (*Turner v. Stones*, 1 D. & L. 122), or if he do not present them, owing to the known insolvency of the bankers, he must tender them to the person from whom he received them (*Rogers v. Langford*, 1 C. & M. 77); or, in case of their presentment and non-payment, he must give the previous holder prompt notice, and offer to return them to him, *Turner v. Stones, supra.*

[2] Bankers' cash notes, says a learned writer, differ from other promissory notes in this, that they are intended to pass from hand to hand, and are issued that they may circulate as money, returning to the bank as seldom as possible; but they are not intended as a continuing security in the hands of any one holder. Therefore, a man who takes bankers' notes or bankers' cash-notes in payment, must present them or forward them for presentment the day after he receives them, in order to enable him, in the event of the bank failing, to sue the person from whom they were received for the consideration that was given for them. But as it would be inconsistent with the very nature and design of such notes that every man who takes them should present them for payment, it is sufficient to exonerate the latter from the charge of laches if he circulate them within the time within which he ought otherwise to have presented them. Byles on Bills, 154. *Camidge v. Allenby, supra.* And without circulating them, it should seem that if, according to the course of business, it be usual to retain such notes a reasonable time, that may be an excuse for omitting instant presentment. See *Shute v. Robins*, M. & M. 133; 3 Car. & P. 80. Moreover, the transmission of notes payable to bearer being attended with risk, the sender will, it seems, be allowed to cut the notes in halves, and send one set of halves the next day and one set the day after, or to send one set by coach and one by post. *Williams v. Smith*, 2 B & A. 496. And it may make a difference in the time allowed for presentment if the notes be received by a servant or agent. *James v. Houldsditch*, 8 D. & R. 40. Byles on Bills, 155.

[3] Even at common law, a tender (*Grigby v. Oakes*, 2 B. & P. 526. *Wright v. Reed*, 3 T. R. 554); in a provincial or country banker's notes (*Polglass v. Oliver*, 2 C. & J. 15); or a draft or cheque on a banker (*Jones v. Arthur*, 8 Dowl. 442; Tidd, 9th ed. 187 n. m; citing *Wilby v. Warren*, Sit. Mid. M. T. 28 Geo. 3, Re B. in *Buller, J.*); is valid if the creditor do not at the time object to receive such notes or cheques as a payment on account of their quality, but object to the amount only.

[4] The courts take judicial notice of what are banking-hours in the city of London. *Parker v. Gordon*, 7 East, 385. *Jameson v. Livinton*, 2 Taunt. 224. What are banking-hours in other parts of the metropolis, and in provincial towns, must be proved in each

BANK-Notes. *See post*, p. 137.

BANK of England.[1] *See* also Forgery; Mandamus; Stock; Stock-Brokers; Stock-Exchange.

case in which the question becomes material. Where it was the usage of a banking-house that money paid in after banking-hours should be put into a separate place of deposit, and entered in a counter-book, but not carried to the customer's account till the next day, and a customer paid in 500*l.* Bank-of-England note after banking-hours, and the banker, having before resolved not to re-open for business, placed the note in a separate place, and next morning stopped payment, and became bankrupt, the customer recovered from the assignees, the bank-note being held to remain his property. *Sadler v. Belcher*, 2 M. & Rob. 489. See *Threlfall v. Giles*, there cited.

[1] This institution was projected by William Paterson, and received its charter of incorporation July 27, 1694. It was constituted as a joint-stock association, with a capital of 1,200,000*l.* This sum was lent to the government of William and Mary. At its very origin it was a servant of the government, and in a lesser or greater degree it has enjoyed this character through all the stages of its subsequent history. At first the charter was for eleven years only; it has been at various times renewed. It was renewed in 1844, and the charter of that year still subsists, its terms are subject to modification or revocation by the legislature at pleasure. By that act or charter the bank was divided into two departments—the *issue* and the *banking*. The object was to prevent issues of notes beyond a certain amount, unless against an equal amount of gold held by the issuing bank, so that the mixed currency of notes and coin might thus expand and contract like a self-acting metallic currency.

In the *issue* department of the bank its sole business is to give out notes to the public. Before the separation of the departments, the government was indebted to the bank 11,015,000*l.* This sum was declared to be a debt due to the issue department, and for the issues of notes to that amount no gold requires to be held by it. This was the same thing as if the bank had originally lent 11,015,000*l.* of its notes to government, and these notes had found their way into circulation. The bank was also allowed to issue additional notes on securities—that is, to lend them to a limit which at present amounts to 3,459,900*l.*, and this also without holding gold. The amount of notes which may thus be issued, without gold being in reserve against it, is 14,475,000*l.* All notes issued above that amount can be issued only in exchange for gold.

Viewed in its *banking* department, the bank differs from other banks in having the management of the public debt, and paying the dividends on it; in holding the deposits belonging to government, and in making advances to it when necessary; in aiding in the collection of the public revenue, and in being the banker of other banks. For the management of the public debt the bank receives about 247,000*l.*, against which there has to be set 124,000*l.* of charges. The remaining profits of the bank are derived from its employment, like other banks, of its deposits, on which it allows no interest, and of its own capital. The capital was originally 1,200,000*l.*; in 1816, it reached 14,553,000*l.*, the present amount. There is, besides, a rest of about 3,000,000*l.* The deposits (public and private) vary between 13,000,000*l.* and 22,000,000*l.*

The courts take judicial notice that the Bank of England is within the city of London. *Partridge v. Bank of England*, 9 Q. B. 414.

Stock is a chose in action: it has no locality except for the purpose of probate and administration: it does not fall under the head of goods and chattels, so as to pass by a grant of *bona et catalla felonum*. *R. v. Capper*, 5 Price, 217. It has been said neither to be a chattel, nor to have any resemblance to a personal chattel. *Wildman v. Wildman*, 9 Ves. 119. *See* 5 Price, 262, 263. But it is "goods and chattels" within the reputed ownership clause, 12 & 13 Vic. c. 106, s. 125. *Brown v. Bellasis*, 5 Mad. 53. *Ex-parte Richardson*, Buck, 480. *Semble*, it is not "goods or commodities" within the Bankrupt Act, 12 & 13 Vic. c. 106, s. 65. See *Colt v. Netterville*, 2 P. Wms. 308. Stock cannot be sued for as money. *Nightingale v. Devisme*, 2 W. Black. 684. Nor is "money" in a contract convertible with "stock." *Jones v. Brinley*, 1 East, 1. *See* 5 H. L. C. 268. It does not pass under the term "money" in a will. *Ex-parte Simpson*, De G., Bank. R. 9. *Gordon v. Dotterill*, 1 Mylne, 56; 21 L. J. Ch. 843. *Willis v. Plaskett*, 4 Beav. 208. *Douglas v. Congreve*, 1 Keen, 410. *Hotham v. Sutton*, 15 Ves. 319. See *Rogers v. Thomas*, 2 Keen, 8, *contra*. But it does pass under the term "securities for money," unless the expression be controlled by the context. It is doubtful, it seems, whether the same is true of Bank-of-England stock. *Bescoby v. Pack*, 1 Sim. & Stu. 500; 2 Dr. & War. 548. However, stock in the funds has been said to pass or not under the word "monies," or the word "goods," or the word "chattels," according to the whole context of the will; and either "goods" or "chattels," used simply and without qualification, will pass it in a will. *Kendall v. Kendall*, 4 Russ. 360; and where the testator did not bank with the Bank of England, a bequest of "all my money in the Bank of England" passed stock in the funds. *Gallini v. Noble*, 3 Mer. 691. See *Howell v. Gayler*, 5 Beav. 157. See *Johnson*

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I. Duties and Liabilities of as to Public Funds.

(A) *As to keeping Accounts of.*[1]

v. Digby, 8 L. J. Ch. 38. *Sheffield v. Earl of Coventry*, 2 Russ. & Mylne, 317. *Law v. Carter*, 1 Beav. 426. *Parker v. Marchant*, 1 You. & C. Ch. C. 290; and 2 id. 297; 1 Phil. 356. As a bequest of bank stock, see *Lindgren v. Lindgren*, 9 Beav. 351; 25 L. J. Ch. 573. Grant's Banking, 353.

[1] In *Sloman v. Bank of England*, 14 Sim. 475, *Shadwell, V. C.*, thus states the law:—

"By the act of the 11 Geo. 4, and 1 Wm. 4, c. 13, the four per cents were converted into three-and-half per cents. First of all, certain enactments were made, which had the effect of giving an option to the different proprietors of the four per cents either to accept the same amount of stock in three-and-half per cents, or to be paid off. The act then provided that the dividends of the newly-created stock should be payable at the Bank of England, and that the sums for payment of them should be issued and paid out of the Consolidated Fund. I notice this with reference only to that singular ground on which the Court of King's Bench rested their judgment in the case of *Davis v. Bank of England* (2 Bing. 293, and 5 B. & C. 185), when it was heard in error; namely, that inasmuch as the declaration did not allege that the requisite funds for payment of the dividends had been supplied to the bank by the government, there was no liability on the part of the bank. Now it seems to me that every court of law ought to take it for granted that that which the legislature says shall be done, has been done; but, however, the Court of Error was satisfied to get rid of any difficulty in that case by making that objection. The 10th section of the act provides that books shall be kept by the bank, in which the names of the proprietors of the new stock shall appear. Then the 13th section, as I understand it, has made it the duty of the Governor and Company of the Bank of England to keep an account in a book to be provided for that purpose, which shall show every transfer and assignment which is made by parties appearing to be interested in the stock question. They are made, if I may use the expression, the parliamentary book-keepers of this fund, and it is a duty which they owe to all the persons who may be interested in the fund so to keep the account as that it may distinctly appear at all times what transfers and assignments have been made. And my opinion is, that if at any time there had been stock standing in the name of A., and afterwards that stock did not appear (no matter from what cause) to be standing in his name, A. would *primâ facie* have a right to say, 'Let the account stand as it did on a given day.' If it can be shown that A. himself has transferred the stock that is an answer, but the bank account ought to be kept with regard to every individual who ever appeared as stock proprietor, in such a manner as to show what the account really is.

(B) *As to Transfers of.*

The King v. the Bank of England, 2 Dougl. 524.

As an action is sustainable against the Bank of England for refusing to tranfer stock, a *mandamus* cannot be obtained to compel the transfer.[1]

This was an application for a *mandamus* to be directed to the defendants, commanding them to permit the prosecutors to transfer 1000*l.* bank stock, as having been the property of their testator. The testator had by his will bequeathed to his kinswoman Lydia F., if living at the time of his decease, 1000*l.* bank stock. Upon the testator's death the prosecutor proved his will, and applied to the bank for leave to transfer the 1000*l.*, which was refused, unless they should produce a certificate of the death of Lydia Fennymore, who had been placed in the Foundling Hospital, and where they found, by the books and registers, strong evidence of her death, and that she died before the testator; which certificate the governors of the hospital refused to grant. For

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"If that be so, it follows as a matter of course that relief may be had in equity, because the plaintiff in equity has to allege against the bank,—'You are bound by law to be my book-keeper in respect of my stock, and to show me the true account of it, and if I can show that upon a given day stock stood in my name, and now show that it does not stand in my name, and I have not authorised the transfer of it, you are responsible to me; that is to say, you must make the account stand as it ought to have stood.'

"This appears to me to be the true view of the case, and according to that view there would be a direct right in every person who was interested in the stock in question to file a bill against the Bank of England to have any error occasioned by the bank corrected. It is observable that an action gives a remedy, circuitously only, because all that can be recovered by an action is a certain sum of money, which may or may not be sufficient to buy a fund to replace the stock, and it seems to me that the true view of the case is that which I have taken, and which is formed from the provisions of the act of parliament."

[1] Nor will the Court of Q. B. command the Bank of England, at the instance of one of its members, to produce an account of the income and profits of a certain period, with an account of the charges of management, for the purpose of enabling the next general court to consider the state and condition of the company, and to declare a dividend in the absence of any parliamentary direction that such accounts should be produced. For such an application is in effect made by one on behalf of several partners, to compel his co-partners to produce their accounts of profit and loss, and to divide those profits, if any there be; a subject over which the Court of Chancery has alone jurisdiction. *R. v. England* (*Bank*), 2 B. & A. 622. *See* R. Webb's Canal, 3 Ad. & E. 482.

It is an incumbent duty on the part of the bank not to permit a transfer of stock until they are satisfied of the party's authority to transfer: hence, if stock be transferred under a forged power of attorney, the real proprietor is entitled to have it replaced by the bank, and the dividends due thereon; nor will the right of the proprietor be affected by his knowledge and concealment of such forgery, provided he did not expressly assent to or adopt such forgery. *Davis v. The Bank of England*, 2 Bing. 393. But such action is not maintainable unless it be averred that the money has been actually issued by the government to the bank to pay the dividends. Id. in Error, 7 D. & R. 828; S. C. 5 B. & C. 185. *See* 10 Ad. & E. 439, 449; 8 Q. B. 690; 3 H. L. R. (N. S.) 314.

If the Bank of England be guilty of an unreasonable delay in passing a power of attorney for transfer of stock, they are liable in damages for any loss sustained in consequence; they are to have time to take all reasonable means for clearing up any doubt as to the authenticity of the power of attorney, which they may reasonably entertain: but it is for the jury to say whether there was reasonable cause of doubt, and whether reasonable means were taken to ascertain the truth; and if they negative these propositions, there must be a verdict for the owner of the stock which the bank have unreasonably delayed the transfer of. *Sutton v. Bank of England*, 1 Car. & P. 193; S. C. R. & M. 52. *See* 9 Moore, 771.

On the other hand, it is obvious that a reasonable time, according to the circumstances of each case, must be allowed to the Bank of England in order to investigate the claim, because the property in stock is not transferred by means of a forged power of attorney to the name of another person in the books of the Bank of England; and they are responsible in the full value, or to replace the stock, if they obey a forged power of attorney (2 Bing. 393; S. C. 9 Moore, 747, 774. *See* 6 Bing. 772), though the holder may disable himself by negligence from recovering. *Coles v. Bank of England*, 10 Ad. & E. 437, 449.

The Bank of England, however, is not bound to permit the transfer of the stock, or the receipt of dividends, by the executors or administrators, until the probate of the will, in the first case, or the letters of administration in the other, shall have been left at the Bank of England for inspection. Even though there be a specific devise, the bank

the Foundling Hospital, it was said, that, as the legacy to Lydia Fennymore was lapsed, and there was reason to believe the testator was a bastard (which, however, was not sworn to), or at least that no next of kin could be found, and as the executors, having legacies, could take no beneficial interest, and it was not pretended there would be any debts to be paid, they were advised that the money belonged to the Crown; that upon this they had applied to the Treasury for a grant of it for the benefit of the hospital, which application they had reason to think would be successful; that, under these circumstances, they had not chosen to facilitate the transfer of the stock, thinking it safest in the hands and under the protection of the bank.

Per Cur. When there is no specific remedy the court will grant a *mandamus*, that justice may be done; but where (as in this case) an action will lie for complete satisfaction, equivalent to a specific relief, the court will not interfere by granting the prerogative writ now sought to be obtained.

(C) *Duties and Liabilities of as to Dividends.*[1]

The King v. the Bank of England, 2 B. & A. 620.

Nor can a *mandamus* be obtained by a proprietor of bank stock to compel the corporation to produce their accounts for the purpose of declaring a dividend.

This was an application, at the instance of one of the members of the Bank of England, for a *mandamus* to compel that corporation to produce an account of the income and profits for the last half-year, for the purpose of declaring a dividend; but the court refused to grant even a rule to show cause; observing, that that writ could only be granted to compel the accomplishment of public purposes, and the performance of public duties; and if they were to grant a *mandamus* for the end now sought to be accomplished, they would be making themselves auditors to all the trading corporations in England, and would be, in effect, interfering on the behalf of several partners to compel his co-partners

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are bound to permit the executor to transfer, unless it can be shown that he has assented to the legacy (*Franklin v. Bank of England*, 9 B. & C. 156; S. C. 1 Russ. 575; S. C. 4 L. J. Chanc. 214). The bank may also insist upon all the executors who shall have proved the will joining and concurring in every transfer of the stocks or any part of them. By the usage of the bank a power of attorney to transfer stock is revocable (*R. v. Waite*, 11 Price, 518), unless when part of a security for money. *Abbott v. Stratton*, 3 J. & L. 603. *See* 8 Rep. 82. *Gousson v. Martin*, 10 C. & B. 731.

[1] As the bank can only recognise the legal title to the stock, they cannot pay the dividends to any but the person having the legal right. Hence where a testator dies possessed of a large sum in the funds, a sum of 5000*l.* of which he bequeaths to A., this stock to stand in the name of the executors; then a judgment is obtained against A., and the creditors take out a judge's order under the 1 & 2 Vic. c. 110, ss. 14 & 15, charging with the judgment-debt so much of the dividends only as was payable to the sole use and benefit of A. Accordingly the bank refused to pay the dividends upon the sum of which the testator died possessed to the executors; they therefore brought an action against the bank to recover one half year's dividend then due, and the bank applied for a stay of proceedings on payment of such portion of the dividends as the court should direct: but the court considered the application to be unnecessary, because the bank was not affected by the judge's order, which bound the executors, not the bank: their duty in such case is to pay their dividends to the executors, the legal owners of the stock, who are answerable in equity for the proper application of the dividends. *Fowler v. Churchill*, 11 Mee. & W. 57, 323; S. C. 2 Dowl. N. S. 767. *Bristed v. Wilkins*, 3 Hare, 235. *Smith v. Ward*, 15 Sim. 56. *See* 1 Beav. 605; De G., M. & G. 374. *See* 2 Dowl. N. S. 565; 2 Ex. 744; and see *Rogers v. Holloway*, 5 Man. & G. 292. *Robinson v. Burbidge*, 6 C. B. 289.

By the 56 Geo. 3, c. 60, all stock in the public funds, upon which dividends have remained unclaimed for ten years, is authorised to be transferred to the account of the Commissioners for the Reduction of the National Debt in the books of the Bank of England; the statute also authorises the Bank of England to re-transfer such stock to any person who shall show to the satisfaction of the Governor of the Bank of England his right or title thereto; but if the governor shall not be satisfied of the legality of such claim, the courts of Chancery or Exchequer may, upon petition of such claimant, &c., make order for the re-transfer, &c.

Under this statute it is not necessary for the claimant to show himself to be beneficially interested in the stock: to prove a legal claim to it is sufficient (in *Re Bigg*, 1 You. & J. Ex. 245). See *Ex-parte Holland*, 8 Jur. 253;

to produce their accounts of profit and loss, and to divide their profits. 2 Selw. N. P. 1048, 5th edit.; 1 Davy, 524; 6 Ad. & E. 364.

II. Duties and Liabilities of as to Bank Stock.[1]

III. Duties and Liabilities as Bankers.[2]

IV. Books of; when and how Inspected, and Evidence of Contents.[3]

VI. Notes of.

(A) *Origin;*[4] *Definition of;*[5] *and for what Sum.*[6]

(B) *Are exempt from being Stamped.*[7]

(C) *Pass, by what Bequests.*[8]

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1 Phill. Ch. R. 379, as to costs; see *Ex-parte Martin*, Jacob, 55. *Hunt v. Peacock*, 6 Hare, 61.

It is the legal owner of the stock—the person or his representatives in whom is the legal title—that is to have the re-transfer; the *cestui que trust* has no right to it. 3 Madd. 33. *See* 8 & 9 Vic. c. 62.

[1] An investment by trustees of trust-money in Bank-of-England stock, though it be practically as safe as any government funds, is not regarded by the courts of equity as a proper disposition of trust-monies, and upon knowledge of the existence of the fact that such investment has been made they will order the stock to be sold, and the proceeds invested in the three per cents. If, therefore, any loss should be occasioned to the trust estate by the fluctuation of the bank stock, or of the government stock, between the dates when the investment was made by the trustee and the re-investing in the three per cents, the trustee must make good the difference. *Hancon v. Allen*, 2 Dick, 498. *Clough v. Bond*, 3 Mylne & C. 496. *See* 7 Ves. 137, 150.

But upon a loss sustained by the result of depreciation in the three per cents, the trustee, upon a proper investment, is not liable for the difference. *Peat v. Crane*, 2 Dick, 499 n. *See* 3 Mylne & C. 496.

[2] The bank is extensively engaged as a bank of deposit. The rules applicable to ordinary bankers apply to the national institution. Where a customer of the Bank of England was in the habit of making his acceptances payable at the bank, and one of such acceptances being presented for payment at eleven o'clock in the morning, it was dishonoured for want of assets, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose, it was held that the bank, although they had before six o'clock received assets, were not bound to pay the bill, it being after the usual hours of business. *Semble*, that it was the duty of the bank to have informed the notary that they had received assets, and that the bill would be paid the following day. *Whitaker v. Bank of England*, 16 M. & R. 744. The engraved form of cheque issued by the bank must be used (6 C. & P. 730); and where the bank is payee, it rejects all payments by cheques not drawn on itself. *Bellamy v. Marjoribanks*, 7 Ex. 389.

[3] Fundholders are entitled to inspect and take copies of such entries in the deposit and transfer books of the Bank of England as relate to the stock in which they claim to be interested. *Foster v. Bank of England*, 15 L. J. Q. B. 212. *See* 2 Ld. Raym. 851; S. C. 7 Mod. 129. Examined copies of entries are receivable in evidence, without producing the originals (*Bretin v. Cope*, 1 Peake, 30. *Marsh v. Collnett*, 2 Esp. 665. *Mortimer v. M'Cullum*, 6 Mee. & W. 58); or a clerk from the bank may prove signature of transfers. Id.

[4] These instruments were first introduced and sanctioned by 5 Wm. & M. c. 20, ss. 19, 20, 29; and 8 & 9 Wm. 3, c. 20, s. 30.

[5] Bank-notes, when viewed without reference to the enactments of the legislature concerning them, resemble a common promissory note in all its parts and requisites, with the exception of the stamp, which is dispensed with in consequence of the bank having compounded with the Government.

[6] As bank-notes are payable to bearer on demand, they cannot be issued for less than 5*l*. *See* 7 Geo. 4, c. 6, s. 9; id. c. 65, s. 1; 17 & 18 Vic. c. 83, s. 99.

[7] All notes, bills of exchange, or bank-post bills, issued by the bank, are exempt from stamp. 7 & 8 Vic. c. 32, s. 7; 9 Geo. 4, c. 23, s. 1.

[8] They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. *Miller v. Rose*, 1 Burr. 452. *Fleming v. Brooke*, 1 Sch. & Lef. 318; 11 Ves. 662; 3 P. W. 356; Amb. 68.

There is a distinction between Bank-of-England notes and country bank-notes, in respect of bequests, &c. The former have always been held to pass in a will by a bequest of "all the testator should have in his house at his death" (*Popham v. Lady Aylesbury*, Amb. 68. *Brook v. Turner*, 7 Sim. 671. *See* 11 Ves. 662; 7 Beav. 4, 9), or equivalent terms. But it is not so in case of country bank-notes; they would not pass under such words. *Brook v.*

(D) *May be a* Donatio Mortis causâ.[1]

(E) *Are a good Tender.*

Notes of the Bank of England are a legal tender.[2]

3 & 4 Wm. 4, c. 98, s. 6. "A tender of a note or notes of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: Provided always, that no such note or notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the said Governor and Company, but the said Governor and Company are not to become liable, or to be required to pay and satisfy at any branch bank of the said Governor any note or notes of the said Governor and Company not made specially payable at such branch bank; but the said Governor and Company shall be liable to pay and satisfy at the Bank of England in London all notes of the said Governor and Company, or of any branch thereof."

(F) *Transmitters of Halves of Notes may, if Contract not carried out, Recover them back.*[3]

(G) *Transfer of, and Rights and Liabilities of Transferee.*[4]

MILLER v. RACE, 1 Burr. 452.

The *bonâ fide* holder of a bank-note is entitled to payment, though it may have been stolen from a former proprietor,

A., being possessed of a note, sent it by the general post, under cover to B., in Oxfordshire. The mail was robbed, and the note stolen. The note in question afterwards came into the hands of the plaintiff, for a valuable consideration, in the course of his business, and without notice that it had been stolen. The plaintiff, having delivered the note to defendant, who was a clerk in the bank, for payment, he refused either to pay the money or re-deliver the note, whereupon this action was brought. On a case reserved, the court were of opinion that plaintiff had sufficient property in the note to maintain this action; that a contrary determination would be attended with injurious consequences to commerce, since bank-notes were constantly treated and viewed as money, and paid and received as cash, and it was necessary that their currency should be established and secured. And *Lord Mansfield* emphatically observed, that these notes are not, like bills of exchange, mere securities or documents for debts, nor are they so esteemed, but are treated as money in the ordinary course and transactions of business, by the general consent of mankind, and on payment of them, whenever a receipt is required, the receipts are always given as for money, not as securities for money.

and in the ordinary course of business are always treated as cash.

Turner, 7 Sim. 671. Cash in a will is a stricter term than money. *Beales v. Crisford*, 13 Sim. 592.

[1] A bank-note may be the subject of a *donatio mortis causâ*. *Drury v. Smith*, 1 P. W. 405. *Miller v. Miller*, 3 id. 356.

[2] Even at common law a tender in Bank-of-England notes is valid. *Grigby v. Osher*, 2 B. & P. 526. *Wright v. Reed*, 3 T. R. 554. *See* 26 L. J. 15; 8 Dowl. P. C. 442.

[3] The plaintiff agreed to enter into partnership with W., who owed money to the defendant. The plaintiff, with the sanction and authority of W., wrote to the defendant, inclosing the halves of two bank-notes, and asking for a statement for the full amount due from W. The defendant wrote, acknowledging the receipt of the half notes, and stating that, on receipt of the second halves, he would send a stamped acknowledgment. The agreement of the partnership between the plaintiff and W. went off, and the plaintiff required the defendant to return the half notes. On his refusal to do so he brought an action for their recovery:—*Held*, that he was entitled to recover. *Smith v. Mundy*, 29 L. J. Q. B. 172; 6 Jur. N. S. 977.

[4] The rights of the transferee might formerly be affected by the degree of caution he used in taking the note (*Snow v. Saddler*, 3 Bing. 610. *Snow v. Peacock*, id. 406. *Beckwith v. Corral*, id. 444); but it is now settled that even gross negligence would not be of itself a reason why a taker for value should suffer. *Raphael v. Bank of England*, 25 L. J. C. P. 33. Grant's Banking, 428.

LOWNDES v. ANDERSON, 13 East, 131; S. P. SOLOMONS v. THE BANK OF ENGLAND, id. 135; S. P. GLADSTONE v. HADWEN, 1 M. & S. 517.

A trader, after a commission of bankruptcy issued against him, wishing to redeem a bill of exchange, which he had before remitted to his bankers, to whom he was indebted much beyond the amount, secretly employed an unknown agent, in whose hands he placed, for that purpose, four other bills of about the same value; and such agent, after endeavouring in vain to prevail upon the bankers to take in exchange such four bills for the one (which application was made as from and in the names of third persons, though seconded by a letter from the trader to the bankers, received by them about the same time), passed off the four bills in the market, and obtained bank-notes for the same, with which bank-notes he took up the first bill out of the banker's hands in the usual way. At the time of the first application for taking up the bill defendants knew of the trader's bankruptcy, and at the time of payment were aware that a commission had been issued.

And therefore they cannot be followed by the legal owner into the hands of a *bonâ fide* holder for a valuable consideration, without notice.

The court held, upon a point reserved at the trial of a cause instituted by the assignees of the bankrupt traders to recover from the bankers the amount of such bank-notes, the produce of the four bills, part of the bankrupt's estate, and for whom a verdict had been given, that a *nonsuit* must be entered, though the bills had been disposed of after the bankruptcy of the trader, the bankers having *bonâ fide*, for a valuable consideration, and without notice of the true owners, received such bank-notes.

SOLOMONS v. THE BANK OF ENGLAND, 13 East, 1810.

Trover for a bank-note for 500*l*. It appeared that the note had been fraudulently obtained by means of a forged draft; and therefore, when presented for payment some time afterwards, information was given of the fraud, and payment was stopped at the bank, who informed the plaintiff of the circumstance. The plaintiff had received it from his correspondents at Middleburgh, and, by desire of the bank, wrote to them to learn how they came by it. In answer, they wrote that they had received it in payment of goods, from a man dressed in such a way, of whom they knew nothing. The note was three years old, and was stated by the plaintiff to have been taken by him in reduction of a balance due to him from his correspondents; but whether the balance had accrued at the time the note was first received by the plaintiff, or in the course of a transaction, after notice of all the circumstances, did not appear. Bank-notes of this value were not usually current at Middleburgh. *Lord Kenyon* said, that as it did not appear that the plaintiff had given a valuable consideration for the note before notice, he should consider him as agent to his correspondents; and he thought that he had not satisfactorily accounted for their possession of the note. The plaintiff consented to a nonsuit; and on a rule *nisi* to set it aside, and cause shown, the court refused to interfere, observing, that there was no doubt but the holder of a bank-note was *primâ facie* entitled to prompt payment, but that if another party had been plundered of it before, and applied to the

But the right of the latter will be affected by the previous fraud of a former holder, if evidence be adduced to bring it home to the then possessor.[1]

[1] The question is not whether there has been neglect, but whether *malâ fide* or fraud be shown. *Raphael v. The Bank*, 17 C. B. 161. *Carlon v. Ireland*, 5 E. & B. 765. *Lord Denman*, in *Goodman v. Harvey*, 4 Ad. & E. 870; 6 M. & M. 372: "I believe," says his lordship, "we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff had given consideration for the bill. Gross negligence may be evidence of *malâ fide*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." *Usher v. Rich*, 10 Ad. & E. 784; 2 P. & D. 579, S. C. In *Goodman v. Harvey* the bill bore on it, when discounted, the notarial mark of non-acceptance. In the words of the Lord Chief Justice, "the plaintiff received the bill with a death-wound on it." See also *Buckhouse v. Harrison*, 5 B. & Ad. 1098; 3 N. & M. 188. *Crook v. Judis*, 5 B. & Ad. 909; 3 N. & M. 257, S. C. *Foster v. Pearson*, 1 C., M. & R. 855; 5 Tyr. 255, S. C. *Willis v. Bank of England*, 4 Ad. & E. 21. *Raphael v. Bank of England*, 17 C. B. 161. *Carlon v. Ireland*, 5 E. & B. 765.

bank, no impropriety could be imputed to them for suspending the payment until it was ascertained that the party tendering it for payment was not contaminated with guilt. *See* Burr. 152; 3 id. 1516; Dougl. 633.

KING, ESQ. v. MILSOM, 2 Camp. 6.

Possession is *primâ facie* evidence of property in a bank-note.

Trover for a 50*l.* Bank-of-England note, lost by the plaintiff. It appeared that the note was traced to the defendant's person, who, when questioned as to the way in which he came possessed of it, first said he could not recollect; then, that he gave change for it in the course of business. He could neither read nor write; yet he said he was accustomed to receive notes of that amount in his business. The plaintiff's counsel contended, that the evidence rendered it incumbent on defendant to show what consideration he gave for the note, or, in the absence of it, the court would infer he got possession of it *malâ fide*. To support the action of trover, it is enough for plaintiff to show possession in himself, or conversion on the part of the defendant. *Lord Ellenborough* said, the court would presume the defendant was a *bonâ fide* holder for a valuable consideration, until plaintiff could cast some suspicion on the defendant's conduct, so as to render such proof necessary. The evidence at present was insufficient. Those suspicious circumstances were explained away in a great degree by the defendant's ignorance; in fact, it would endanger the paper credit of the country if, on such slight evidence as the present, a prior holder of a note could call upon a subsequent one to prove the way he came possessed of the note. Plaintiff nonsuited.

(H) *Lost Notes.*[1]

(I) *May be taken in Execution.*[2]

BANK-Post Bill.[3]

[1] By the 17 & 18 Vic. c. 125, s. 17, it is enacted, with respect to all negotiable securities, it shall be lawful for the court or a judge, in actions founded thereon, to order that the loss shall not be set up, provided an indemnity is given against the claims of any other person upon it.

If part of a note was lost, it was the rule apparently not to allow the owner of the other half to recover if he could not either produce an entire bank-note, or prove that the other half had been actually destroyed. *Mayor v. Johnson*, 3 Camp. 324. But the new statute will be equally applicable in this case, if, indeed, it would not now independently altogether be a good defence, for the bankers to show that they had paid the amount once to the original owner of the whole note upon his presentment of his half, for although the owner of the lost half might show that it came into his possession *bonâ fide*, still it is said that the taker of a half-note necessarily takes under suspicious circumstances, and he is not bound to take the half-note at all; he ought to bear the loss, it seems. *See* Byles on Bills, 379, 6th edit. *Willes, J.*, has held that he is bound to pay half-notes with or without an indemnity. 2 L. T. (N. S.) 224. *See* 9 Ir. C. L. R. 495.

[2] At common law, neither money nor securities for money could be taken in execution at the suit of a subject. But now, by the 1 & 2 Vic. c. 110, s. 12, money, bank-notes, checks, bills, promissory-notes, and other securities for money, may be taken in execution. The money and bank-notes are to be handed over by the sheriff to the execution-creditor. Although under this provision bank-notes are placed as to seizure on the same footing as *goods*, yet notes so seized (unless specifically appropriated by the officer) do not, any more than goods, become the property of the execution-creditor, so as to be seized under a writ got by him at the suit of a third party while in the hands of the sheriff. *Wood v. Wood*, 4 Q. B. 397. *Collinridge v. Proctors*, 11 C. B. 683. *France v. Campbell*, 9 Dowl. P. C. 914.

[3] There is considerable uncertainty as to the precise legal character of these securities. In *Forbes v. Marshall*, 24 L. J. Ex. 305, 308, they were considered by *Pollock, C. B.*, and *Alderson, B.*, to be bills of exchange; by *Martin, B.*, to be promissory-notes. *See* Form, id. and *Willis v. Bank of England*, 4 B. & E. 22 n. Bank-post bills issued in London are not payable at the branch banks in the country. Id. *See* 7 Geo. 4, c. 46, s. 15. They are exempt from stamp-duty. As to remitting, see *Brandon v. Barnett*, 12 Clark & Fin. 802. *Jorntort v. Woollet*, 2 Mylne & C. 389. *Ex-parte Arthur*, 3 M. D. & D. G. 103, 108. It seems clear that giving cash for a bank-post bill is "a payment" within the protection of the Bank Act, 12 & 13 Vic. c. 106, s. 133 (*Willis v. Bank of England*, 4 Ad. & E. 410). A bank-post bill would, it seems, be a good tender, if not objected to at the time. *Richardson v. Jackson*, 8 Mee. & W. 298. *See* 2 C. & J. 16.

BANKRUPTCY and INSOLVENCY.

[*See General Orders at end of this Title, with References to each division and page in Text and Notes.*]

I. The Law of, is created and Regulated by Statute.[1]

[1] The system of law relative to bankrupts and insolvents is entirely an innovation on the common law.

In the ordinary course of procedure, creditors may seize either the person or the effects of their debtor, but they cannot take both at the same time. Each individual creditor goes through the same process to recover his debt; there is no participation of the expense or benefit of one with those of another, or for the common advantage of the whole: but whatever effects each obtains, he obtains for his own benefit, exclusive of the rest. No provision is made for examining the debtor, or other persons, to obtain or to compel a discovery of his effects, in order to have them applied in satisfaction of his liabilities, nor on behalf of the debtor for his release, or discharge upon condition of surrendering all his property, or when the whole having been actually seized by his creditors, there is no possibility of obtaining any further satisfaction.

By the bankrupt and insolvent law, on the contrary, a form of proceeding was instituted upon principles equally rational and humane. It allows by the debtor's own act, or at the suit of one or more of his creditors, at the common expense, and for the common benefit of all, a seizure of the debtor's estate. He is at once, by operation of law, divested of all his property, real and personal, which is transferred to official trustees or persons chosen by the creditors. Large powers are given of inquiry and examination of persons, of taking possession, and recovery of effects. And when the debtor makes a full discovery, and appears to have acted without fraud, he becomes entitled to a complete discharge, both of his person and of any effects he may afterwards acquire.

From the earliest use of the word "bankrupt" in the title of the stat. 34 & 35 Hen. 8, c. 4, "against such persons as do make bankrupt" (a literal translation of the French idiom, *qui font banque route*), it has acquired a specific and determinate meaning, being applied exclusively to *merchants* and *traders*, or those who get their livelihood by buying and selling for gain (2 Steph. Com. 193–195; 2 Kent's Com. 389); and it is still further narrowed by being restricted to those traders who do certain acts defined by law tending to the injury of their creditors: these, and these only, being, prior to 24 & 25 Vic. c. 131, the proper objects of the bankrupts' laws.

The distinction between "bankrupt" and "insolvent" has hitherto been scrupulously maintained. All the numerous statutes relating to the former, from the reign of Hen. 8 to 11th Oct. 1861, were confined exclusively to "traders." Countless decisions have been pronounced as to what was and what was not trading. In America, the same distinction was observed till 1841, when Congress expressly united the provisions of both descriptions of laws.

The statute 13 Eliz. c. 7, specifically limited the term bankrupt to *traders*, declaring "any one exercising the trade of merchandise in gross or by retail, or seeking his living by buying and selling, being a subject or denizen," who did certain acts "to defraud his creditors, shall be reputed and deemed a bankrupt."

The stat. 1 Jac. c. 15, defined the acts of bankruptcy to be:—1. Departing the realm; 2. Keeping house, or otherwise absenting himself from business, or taking sanctuary; 3. Suffering himself to be arrested for a debt without good consideration; 4. Being outlawed, or yielding to prison; 5. Fraudulently procuring his own arrest, or his goods or money to be attached; 6. Departing from his dwelling-house; 7. Fraudulently transferring his goods; 8. Suddenly escaping out of the realm without settlement with his creditors; 9. Or being arrested, and lying in prison six months. Commissioners were appointed and empowered to examine the bankrupt, and issue a warrant for his apprehension. The penalty of death was enacted by 5 Geo. 2, c. 30, against bankrupts for omitting to surrender, or not disclosing their estates, or concealing effects to the amount of 20*l*. After several intermediate acts, especially 6 Geo. 4, c. 16 (1825), and 12 & 13 Vic. c. 106 (1849), which repealed the antecedent statutes, and which has since been to a considerable extent itself repealed by the act of 1861, *see infra*, n.

The earliest act for the relief of *non-trading debtors* was 43 Eliz. c. 2 (1601), by which the justices were directed to raise a competent sum by rate within their jurisdiction for the relief of poor prisoners throughout the country. The next was 32 Geo. 2, c. 28 (1758), known as the Lords' Act. This was restricted to debtors owing in the whole not more than 100*l*. (extended to 300*l*. in 1793, by 33 Geo. 3, c. 5). Debtors within this amount might petition the court from which the process issued on which they were confined to inquire into the facts. Creditors might petition also against their imprisoned debtors, and appoint assignees, as in cases of bankruptcy.

In 1811 (52 Geo. 3, c. 165), barristers were appointed to inquire into petitions of prisoners; and by 53 Geo. 3, c. 102, the court for the relief of insolvents was established; but the prisoner presenting a petition must have been in prison for three months.

In 1826 (7 Geo. 4, c. 57) the laws were amended and consolidated, other commissioners being added to the court, empowered to sit separately, and to travel on circuit periodically, to hear petitions, instead of the justices to whom they had been previously remitted.

Acts and parts of acts in Sched. (G.) repealed.[1]

(A) *Principal Statutes relating to wholly or partly Repealed by* 24 *&* 25 *Vic. c.* 134.

By sect. 230, "the acts and parts of acts set forth in Schedule (G.) to this act to the extent to which they are therein expressed to be repealed, and all other

By the 1 & 2 Vic. c. 110, the Court, with its commissioners, &c., was made a permanent institution, the circuits being continued as before. It allowed prisoners for debt, on presenting a petition for relief, to be discharged on bail until the day of hearing; and by the same act arrest on mesne process is prohibited, unless the creditor can satisfy one of the superior judges at Westminster, or by 14 & 15 Vic. c. 56, a district court of bankruptcy, or the judge of a county court not in Middlesex or Surrey, that his debtor owes 20*l.* or upwards, and is about to leave England. *See* vol. i. Absconding Debtor; Affidavit to hold to Bail, id. p. 250; Arrest, id. p. 519.

The 5 & 6 Vic. c. 96, enabled a non-trader who owed less than 300*l.* to obtain temporary protection; and by 10 & 11 Vic. c. 102, the jurisdiction as to granting protection was transferred in London to the Insolvent Court, and in the country to the judge of the county courts. *See* 7 & 8 Vic. c. 70.

Such of the provisions of the various statutes as it has been thought desirable to retain are incorporated in the new act, and are given in the text and notes.

The original design was to have passed one comprehensive bill, embracing and consolidating the whole bankruptcy and insolvency law, and substantially repealing all the prior enactments. Lord Westbury, for this purpose, brought before the legislature an elaborate, logical, and systematic consolidation of every useful provision and clause in the various acts which had been passed, and were in operation in 1860. This highly beneficial and masterly attempt had to be reluctantly abandoned, and the more limited fragmentary measure of an amendment of the existing statutory law adopted.

[1] Schedule (G.)—Acts and Parts of Acts repealed.

Date of Act.	Title.	Extent of Repeal.
1 & 2 Vic. c. 110.	An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases, for extending the remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England.	The whole, except ss. 1 to 22, both inclusive.
5 & 6 Vic. c. 116.	An Act for the Relief of Insolvent Debtors.	The whole.
7 & 8 Vic. c. 96.	An Act to amend the Laws of Bankruptcy, Insolvency, and Execution.	Sections 1 to 44, both inclusive, and sections 49 to 53, both inclusive.
10 & 11 Vic. c. 102.	An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Court of Bankruptcy and Court for Relief of Insolvent Debtors.	The whole, except s. 4.
12 & 13 Vic. c. 106.	An Act to amend and Consolidate the Laws relating to Bankrupts.	Sections 7, 8, 10, 14, 15, 16, 18, 20, 25, 26, 28, 36, 37, 39, 44, 45, 46, 48, 52, 54, 58, 59, 60, 61, 62, 69, 70, 72, 73, 75, 90, 91, 92, 93, 94, 96, 160, 183, 185, 187, 188, 189, 193, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 209, 211 to 231, both inclusive. Sections 237, 239, 243, 244, 245, 246, 247, 249, 251, 252, 253, 255, 256, 257, 258, 259, 261, 266, 270, 271, 276, and 278, and such other parts of the said act as may be inconsistent with this present act.
15 & 16 Vic. c. 77.	An Act to abolish the Office of Lord Chancellor's Chief Secretary of Bankrupts, and to regulate the Office of Chief Registrar of the Court of Bankruptcy.	Section 10.
17 & 18 Vic. c. 119.	An Act for regulating Appointments to Offices in the Court of Bankruptcy, and for amending the Laws relating to Bankrupts.	Sections 3, 11, 12, 13, 14, 15, 20, 21, 22, 25, 26, 27.

acts or parts of acts *which are inconsistent* with this act, are repealed; but such repeal shall *not affect any proceeding pending*, or any right that has arisen or may arise, or any penalty incurred or that may be incurred, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of this act, under or by virtue of any of the acts or parts of acts repealed." Repeal not to affect pending proceedings, or anything done or existing prior to act.

(B) *Principal Statutes relating to wholly or partly in force.*[1]

(C) *Commencement of the Act 24 & 25 Vic. c. 134.*

(*a*) *Generally.*

By sect. 232, "this act shall commence and take effect from and after the passing thereof, as to the appointment of the officers hereby authorised to be appointed, and as to all other matters and things, from and after the 11th day of October, 1861." Commencement of act, 11 Oct. 1861.

(*b*) *As to Non-traders in Particular.*

By sect. 70, 24 & 25 Vict. c. 134, as to the act of bankruptcy by remaining abroad, it is "provided that no non-trader, who shall be abroad at the time of the passing of this act, shall be deemed to remain abroad with intent to defeat or delay his creditors until the expiration of six months after the passing of this act." Except as to non-traders abroad at time of passing act.

[1] Date of Act.	Title.	In Force.
1 & 2 Wm. 4, c. 56.	An Act to establish a Court in Bankruptcy.	In part.
2 & 3 Wm. 4, c. 114.	An Act to amend the Laws relating to Bankrupts.	
1 & 2 Vic. c. 110.	An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England.	From s. 22 to end, inclusive.
5 & 6 Vic. c. 122.	An Act for the Amendment of the Law of Bankruptcy.	
7 & 8 Vic. c. 70.	An Act for facilitating Arrangements between Debtors and Creditors.	
7 & 8 Vic. c. 96.	An Act to amend the Law of Bankruptcy, Insolvency, and Execution.	Sections 45 to 48, and 50 to 53 to end, inclusive.
8 & 9 Vic. c. 127.	An Act for the better securing of the Payment of Small Debts.	
10 & 11 Vic. c. 102.	An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Courts of Bankruptcy and Court for Relief of Insolvent Debtors.	Section 4.
12 & 13 Vic. c. 106.	An Act to amend and consolidate the Laws relating to Bankrupts.	Except sections repealed by 24 & 25 Vic. c. 134, *ante*, p. 142 n.
15 & 16 Vic. c. 77.	An Act to abolish the Office of Lord Chancellor's Secretary of Bankrupts, and to regulate the Office of Chief Registrar of the Court of Bankruptcy.	All, except s. 10.
16 & 17 Vic. c. 81.	An Act to reduce the Salary and Emoluments of the Registrar Meetings of the Court of Bankruptcy.	
17 & 18 Vic. c. 119.	An Act for regulating Appointments to Offices in the Court of Bankruptcy, and for amending the Laws relating to Bankrupts.	Excepting sections repealed by 24 & 25 Vic. c. 134, *ante*, p. 142 n.

(D) *Title of the Act* 24 *&* 25 *Vic. c.* 134, *and how to be construed together with Unrepealed Acts and Clauses.*

Construed together with acts of 1849 and 1854. Short title.

By sect. 232, this act "shall be construed, together with so much of the Bankrupt Law Consolidation Act, 1849, and the Bankruptcy Act, 1854, as remain unrepealed, as one act, and may be cited for all purposes as the Bankruptcy Act, 1861."

(E) *Limits of Act.*

Limit of act.

By sect. 231, "this act shall not extend to Scotland or Ireland, unless where otherwise expressly provided."

(F) *Definition and Explanation of Terms.*

Definition of terms, &c.

By sect. 229, 24 & 25 Vic. c. 134, "the terms and words hereinafter enumerated or explained, wheresoever occurring in this act, shall be understood as hereinafter defined or explained, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such definition or explanation; that is to say,

Annulling: 'Annulling,' shall mean also 'superseding:'

Assignees: 'Assignee' shall mean the assignee of the estate and effects of the bankrupt or petitioner, chosen by the creditors; and until such assignee shall be chosen, or where no such assignee shall exist, shall mean the official assignee:

Bank of England: 'Bank of England' shall mean also all branches or agents thereof:

Bankrupt: 'Bankrupt' shall mean any person who shall have been under any former acts, or who shall be by any court under the provisions of this act, adjudicated bankrupt:

Commissioner, &c.: 'Commissioner,' and 'Commissioner of the Court of Bankruptcy,' shall include the judge of any county court entitled to act in bankruptcy under this act:

Court: 'Court,' 'the court,' 'the courts,' shall mean the court in London, or any country district court, or any county court, acting under this act, according as such several constructions shall be consistent with the context:

Court of Bankruptcy: 'Court of Bankruptcy' shall mean her Majesty's Court of Bankruptcy constituted under this act, and the commissioners thereof:

Creditor: 'Creditor' shall mean also any two or more persons being partners, and incorporated and joint-stock companies:

Creditors present at any meeting: 'Creditors present at any meeting' shall include creditors who are represented by some person duly authorised by any such creditor in writing, and such authority shall not require a stamp:

Gaoler: 'Gaoler' shall include the keeper or governor of any gaol or prison:

Messenger: 'Messenger' shall mean also and include his assistant or assistants, duly authorised by him to act as his deputy or deputies, when acting under order of the court:

Metropolitan district: 'Metropolitan district' shall mean and include every parish the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, shall not exceed twenty miles:

Oath: Affidavit: 'Oath,' 'affidavit,' shall mean and include the declaration or affirmation of any person whom any act of parliament shall have authorised to make such declaration or affirmation in lieu of an oath:

Petition for adjudication of bankruptcy: 'Petition for adjudication' or 'petition in bankruptcy' shall mean any petition by or against a debtor for adjudication of bankruptcy; and where in any act of parliament, instrument, document, or other proceeding granted, executed, or made before the commencement of this act, mention shall have been or shall be made of any fiat in bankruptcy or commission in bankruptcy, such act, instrument, document, or pro-

ceeding shall be construed as though such fiat or commission had been a petition in bankruptcy under this act, so far as the circumstances will admit:

'Petitioning creditor' shall mean the creditor who filed the petition for adjudication: Petitioning creditor:

'Property' shall mean and include all the real and personal estate and effects of the petitioner or bankrupt within this realm and abroad (except as herein provided), and all the future estate, right, title, interest, and trust of such petitioner or bankrupt in or to any real or personal estate and effects, within this realm or abroad, which may revert, descend, be devised, or bequeathed, or come, and all debts due or to be due to him, before he shall have obtained his discharge: Property:

'Prisoner' shall mean any person in actual custody within the walls, rules, or liberties of any prison in England for any debt, damages, costs, sum or sums of money, or for any contempt by reason of non-payment of any sum or sums of money or costs: Prisoner:

'Proper county court,' shall mean the county court within the district of which the debtor has resided or carried on business during the six months next immediately preceding the time of filing a petition under this act by or against him, or for the longest period during such six months: Proper county court:

'Sheriff' shall include sheriff substitute: Sheriff:

'Suit' shall include action at law and suit at equity or other proceeding: Suit:

For the purposes of this act, all persons shall be deemed traders who prior to the commencement of this act would have been liable to be adjudicated bankrupt under the laws of bankruptcy then in force: Trader:

'United Kingdom' shall mean the United Kingdom of Great Britain and Ireland: United Kingdom:

In all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, Monday and Tuesday in Easter week, or a day appointed for a Public Fast or Thanksgiving, in which case the time shall be reckoned exclusive of that day also." Computation of time.

II. Of the several Courts for Administering the Law.

Firstly. Of those of Primary Jurisdiction.

(A) *The Court for Relief of Insolvent Debtors and Jurisdiction of County Courts relating to them Abolished.*

By sect. 19, 24 & 25 Vic. c. 134, "the jurisdiction, authorities, and functions of the Chief Commissioner and Commissioner of the Court for Relief of Insolvent Debtors in England shall cease and be discontinued, and the said chief commissioner and commissioner shall be released from their duties as such, subject nevertheless to the obligation of performing such duties and services as are hereinafter provided." Commissioners of Insolvent Debtors' Court released.

By sect. 20, id. "the jurisdiction of the county courts in the relief of insolvent debtors shall cease; provided that all matters of insolvency pending at the commencement of this act in any of the said courts shall proceed and be completed therein as if this act had not been passed." Insolvent jurisdiction of county courts discontinued.

By sect. 21, id. "the person now exercising the office of provisional assignee of the Court for the Relief of Insolvent Debtors in England shall be an official assignee of the Court of Bankruptcy, and shall act as such official assignee in the court in London, and shall hold office during good behaviour, subject to dismissal by the Lord Chancellor by order, for some sufficient reason to be set Provisional assignee to be an official assignee in court of bankruptcy.

forth in such order, and he shall perform the same duties, and receive the same salary, remuneration, and allowances, as the other official assignees."

As to duties of other officers of the Insolvent Debtors' Court.

By sect. 22, 24 & 25 Vic. c. 134, "the persons now discharging the duties of chief clerk, clerks, and taxing-officer of the Court for the Relief of Insolvent Debtors in England shall be transferred to, and shall act in such manner as general orders shall direct, in the London court. They shall hold office during good behaviour, subject to dismissal by the Lord Chancellor by order, for some sufficient reason to be set forth in such order. No vacancy in such offices shall be filled up. Provided that nothing herein contained shall be deemed to deprive any person now holding office in the Insolvent Debtors' Court of any benefit to which he may now be or may hereafter become entitled by virtue of the acts passed in the fourth and fifth years of King William the Fourth, chapter twenty-four, and the fifth and sixth years of King William the Fourth, chapter forty-two, relative to superannuation allowances; and service by any such persons in the Court of Bankruptcy shall for the purpose of the said acts be deemed to be equivalent to service in the Insolvent Debtors' Court."

Nothing to deprive officers of superannuation allowances under 4 & 5 Wm. 4, c. 24, and 5 & 6 Wm. 4, c. 42.

Chief clerk of court to make returns of pending business to Lord Chancellor.

By sect. 23, id. "the chief clerk of the Court for the Relief of Insolvent Debtors in England shall, on such day before the time appointed for the commencement of this act as the Lord Chancellor shall direct, make a return to the Lord Chancellor of all business then pending or remaining incomplete in such court; and the Lord Chancellor may, if he shall think fit, direct such unfinished matters to be proceeded with and completed before and by the commissioners of such court, who for such purposes shall retain and exercise all the jurisdiction, powers, and authorities now possessed by them respectively."

Power of courts to proceed summarily in winding up matters depending.

By sect. 24, id. "for the purpose of winding up as expeditiously and conveniently as may be all petitions, matters, and things which shall have been presented to or be depending in the said Court for the Relief of Insolvent Debtors, or any of the county courts, by virtue of any act for the relief of insolvent debtors, it shall be lawful for the commissioners or judges of such courts respectively, at any time after the passing of this act, to summon, as they shall deem fit, all or any of the parties to such petitions, matters, or things, or their solicitors, and thereupon to give such directions and make such orders as may be necessary for the purpose of settling and winding up the same, and to proceed for the purposes aforesaid in the absence of the parties or solicitors neglecting or refusing to attend such summons."

Recognisances of sureties entered into, under 1 & 2 Vic. c. 110, for enforcing attendance of insolvents, extended.

By sect. 25, id. "every recognisance which may at the time of the passing of this act have been entered into by any person as surety to the provisional assignee of the Court for the Relief of Insolvent Debtors, with condition that the insolvent therein mentioned shall duly appear at the time and place therein mentioned, shall extend to bind the person who may have entered into the same, in case the insolvent debtor therein mentioned shall not at the time appointed in such recognisance duly appear before the court by which the petition or matter of such insolvent is heard in pursuance of this act, and on every adjourned hearing, or shall not abide by the final judgment of such court."

Insolvency fund.

By sect. 26, id. "all monies and government securities which shall at the commencement of this act stand in the Bank of England to the credit of the account of the Commissioners of the Court for the Relief of Insolvent Debtors in England, shall be carried by the Bank of England, in such manner as general orders shall direct, to the account of the Accountant in Bankruptcy; and, subject to the orders of the court for the payment thereout of any dividend, or for the distribution of any part thereof, in the matter to which the same originally belonged, shall be applicable in like manner as at present, or in such manner as the Lord Chancellor shall by order direct, towards defraying the salaries of the clerks and other persons hereby transferred from the Insolvent Debtors' Court to the Court of Bankruptcy, and towards defraying the expenses of and incidental to the discharge of pauper prisoners hereinafter provided, and also for indemnifying the provisional assignee of the Insolvent

Debtors' Court against all costs and expenses incurred or to be incurred by him in any suit, action, or other proceeding."

By sect. 27, id. "the records and proceedings of every kind in the Insolvent Debtors' Court shall be records and proceedings of the Court of Bankruptcy, and shall be kept in such manner as they now are, subject to alteration by any general orders." Records of Court of Insolvency.

(B) *Bankruptcy Court in London.*

(*a*) *How Constituted.*[1]

(*b*) *Local Limits of.*[2]

(*c*) *Powers and Jurisdiction under* 12 *&* 13 *Vic. c.* 106, *s.* 64,[3] *and* 24 *&* 25 *Vic. c.* 134, *s.* 1.[4]

(C) *Commissioners in London.*[5]

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[1] By 1 & 2 Wm. 4, c. 56, s. 1, power was given by letters patent to erect and establish a court of judicature, which shall be called "The Court of Bankruptcy;" and by commission under the Great Seal the Crown may appoint one person, being a serjeant, or a barrister-at-law of not less than ten years' standing, to be the chief judge of the said court, and three persons, being serjeants, or barristers-at-law of not less than ten years' standing at the bar, or of five years' standing at the bar, having previously practised five years as a special pleader below the bar, to be other judges of the said court, and six persons, being barristers-at-law of not less than seven years' standing at the bar, or of four years' standing at the bar, having previously practised as a special pleader for three years below the bar, to be called commissioners of the said court; and the same court shall be and constitute a court of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a court of record, or judge of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's courts of law or judges at Westminster." By s. 2, the judges appointed were to form a court of review.

By 1 & 2 Wm. 4, c. 56, ss. 51, 60, no judge or commissioner can practise as a barrister, or be an attorney or solicitor, or sit in the House of Commons.

By 10 & 11 Vic. c. 102, s. 1, such court of review was abolished. *See post*, p. 153. The Court of Bankruptcy now consists of the five London and the district commissioners.

[2] By s. 9, 12 & 13 Vic. c. 106, the limit and extent of the district of the Court of Bankruptcy acting in London shall be and remain the limit and extent of such district at the time of the passing of the act.

The London District is as follows:

Middlesex,	Wilts (Southern
Herts,	Division),
Kent,	Dorset,—All within
Surrey,	100 miles from Lon-
Sussex,	don, and including
Hampshire,	the towns of Poole,
Wimborn - Minster,	Northampton,
Blandford, Sturmin-	Huntingdon,
ster, and Shaftes-	Rutland,
bury,	Cambridge,
Oxfordshire,	Norfolk,
Berks,	Suffolk,
Buckingham,	Essex.
Bedford,	

[3] "The Court of Bankruptcy shall continue to be a court of law and equity for the purposes of this act, and shall continue to be a court of record, and the records and proceedings of every kind at the commencement of this act in the said court in London, and in the several districts in the country, shall be kept as such records and proceedings in like manner in the court so continued; and the said court and every commissioner thereof shall have and use all the powers, rights, incidents, and privileges of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used and enjoyed by any of her Majesty's courts of law or judges at Westminster; and each and every of the commissioners for the time being acting in London and in the several districts in the country shall, singly and simultaneously, or otherwise as occasion may require, be and form the court for every purpose under this act, or in execution of any duty which may hereafter be imposed on the court, except where otherwise in this act specially provided."

[4] "The Court of Bankruptcy shall have and exercise, for the purposes of this act, all the powers and authorities of the superior courts of law and equity, and all the jurisdiction, powers, and authorities now possessed by the Court for the Relief of Insolvent Debtors in England."

[5] Under the powers conferred by 1 & 2 Wm. 4, c. 56, ss. 1–6, commissioners were appointed to act in London.

By 12 & 13 Vic. c. 106, s. 17, "upon the next two occasions of a vacancy, the number of commissioners acting in London to be reduced to four."

By s. 2, 24 & 25 Vic. c. 134, "the present commissioners of the Court of Bankruptcy shall continue to be commissioners of the court. Upon any vacancy in the office of commissioner of the Court of Bankruptcy

in London, such vacancy shall not be filled up until the number of commissioners of the Court of Bankruptcy in London shall, by reason of such vacancy, be reduced to less than three, whereupon it shall be lawful for her Majesty, by commission under the Great Seal of the United Kingdom, to appoint a person, being a serjeant-at-law, or barrister-at-law of not less than twelve years' standing at the bar in England, to fill such vacancy."

By s. 18, 24 & 25 Vic. c. 134, "upon any future vacancy in the office of commissioner or registrar (other than of chief registrar), or in any other office in the Court of Bankruptcy, the Lord Chancellor may, if, having regard to the then state of the business of the court, he shall so think fit, by order declare that such vacancy shall not be filled up until further order, and thereupon the same shall not be filled up, unless and until the Lord Chancellor shall by order declare that, having regard to the then state of business of the court, he is of opinion that such vacancy ought to be then filled up, and thereupon the same may be filled up as if such first-mentioned order had not been made."

By s. 6, 17 & 18 Vic. c. 119, "where a commissioner, acting either in London or in a country district, is temporarily hindered from discharging his duty by illness or unavoidable absence, the Lord Chancellor may, if he shall so think fit, appoint a fit person, who, in the case of a commissioner, shall be a serjeant, or a barrister-at-law of at the least seven years' standing at the bar, to act in the stead of such commissioner as aforesaid during his illness or unavoidable absence."

[1] The yearly salaries of the commissioners acting in the city of London are 2000*l.* each, and of the commissioners in the country 1800*l.* each. (5 & 6 Vic. c. 122, s. 76.)

The Lord Chancellor may, on petition presented to him for that purpose, order an annuity not exceeding 1200*l.* to any commissioner of the Court of Bankruptcy appointed under 1 & 2 Wm. 4, c. 56, in London, and an annuity not exceeding 1000*l.* to any commissioner appointed under 5 & 6 Vic. c. 122, if and when any such commissioner shall be afflicted with some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same. (5 & 6 Vic. c. 122, s. 77.)

[2] By s. 59, 5 & 6 Vic. c. 122, "it shall be lawful for her Majesty, under the Great Seal, to appoint as many persons as her Majesty shall think fit, not exceeding twelve persons, being serjeants, or barristers-at-law of not less than seven years' standing at the bar, to be Commissioners of the Court of Bankruptcy, in addition to the present commissioners of the said court, to act in the prosecution of fiats in bankruptcy in the country, and that they and their successors shall take the like oath before the Lord Chancellor as is at present administered to commissioners of the said court; and having once taken the said oath, shall not be again required to take the same; and that any one or more of such additional commissioners shall, and may, form a District Court of Bankruptcy for the purpose of this act, and that every such court shall be authorised to act in the prosecution of fiats in bankruptcy in the country, at such place and in and for such district as her Majesty, with the advice of her privy council, shall be pleased to direct. And that it shall be lawful for her Majesty, with the advice aforesaid, to describe, and from time to time to alter, the limit and extent of every such district as to her Majesty shall seem fit: Provided always, that nothing herein contained shall prevent the Lord Chancellor, when he shall deem it expedient, from directing any fiat in bankruptcy to the Court of Bankruptcy."

By s. 60, "upon the death, resignation, or removal from office of any of the said additional commissioners, or of any of their successors, it shall be lawful for her Majesty, from time to time, by a commission under the Great Seal, to supply such vacancy."

By s. 9, 12 & 13 Vic. c. 106, "the limit and extent of the districts of the courts acting in the country respectively shall be the limit and extent of such districts respectively as the same are settled and determined at the time of the passing of this act, unless and until such last-mentioned districts shall be altered as hereinafter provided: Provided always, that it shall be lawful for her Majesty, with the advice of her privy council, from time to time to alter the limit and extent of such last-mentioned districts, or any of them, or to increase the number of the same, as to her Majesty, with the advice aforesaid, shall seem fit."

By an order in council made in pursuance of the 5 & 6 Vic. c. 122, and gazetted 4th Nov. 1842, it was ordered, that for the purposes of that act there shall be seven districts in the country, to be called respectively by the names after mentioned; the district courts of bankruptcy are authorised to act in and for such several districts at the places after mentioned, viz.:—

The Manchester district, the court for which is to act at Manchester.
The Leeds district, at Leeds.
The Liverpool district, at Liverpool.
The Birmingham district, at Birmingham.
The Bristol district, at Bristol.
The Exeter district, at Exeter. And
The Newcastle-upon-Tyne district, at Newcastle-upon-Tyne.

The limit and extent of such several districts were ordered to be as follows, viz.:—

*Manchester District.**

The Manchester district shall comprehend all places included within, or to be considered as forming parts of the northern division of the county of Chester, as the same is settled and described by statute 2 & 3 Wm. 4, c. 64, for settling and describing the divisions of counties, and the limits of cities and boroughs, in England and Wales, respecting the election of members of Parliament; and all places included within, or to be considered as forming parts of, the northern division of the county of Derby, as the same is settled and described by the said last-mentioned act; and the following places in the county of Lancaster, that is to say,—

Blackburn,	Manchester,
Clitheroe,	Oldham,
Lancaster,	Rochdale,
Preston,	Salford,
Ashton-under-Line,	Warrington,
Bolton-le-Moors,	and
Bury,	Wigan;

and also all other places locally situate in the said county of Lancaster, and which are on the eastern side of any of the several railways hereinafter mentioned, and commonly understood by the following names, that is to say—

The Grand Junction Railway,
The North Union Railway, and
The Lancaster and Preston Junction Railway;

or which are northward, eastward, or westward of Lancaster aforesaid, or westward or northward of the river Lune. And it is hereby further ordered and directed, that the several places in the said county of Lancaster hereinbefore expressly named, shall include the place or places respectively which are comprehended within the boundaries of every such place, as such boundaries are settled and described by the last-mentioned act.

Leeds District.†

The Leeds district shall comprehend all places locally situated in the county of York; and all places included within, or to be considered as forming part of, the northern division of the county of Nottingham, as the same is settled and described by the said act, 2 & 3 Wm. 4, c. 64; and all places locally situated in the parts of Lindsay, in the county of Lincoln.

Liverpool District.‡

The Liverpool district shall comprehend all places included within, or to be considered as forming parts of, the southern division of the county of Chester, as the same is settled and described by the said act, 2 & 3 Wm. 4, c. 64; and all such places locally situated in the county of Lancaster as will not be included in the Manchester district hereinbefore described; and all places locally situated in any of the several counties

Of Anglesea,	Merioneth,
Carnarvon,	and
Denbigh,	Montgomery, in
Flint,	Wales.

Birmingham District.

The Birmingham district shall comprehend all places locally situated in any of the several counties

Of Warwick,	Salop,
Worcester,	Stafford, and
Hereford,	Leicester;

and all places locally situated in the parts of Kesteven and Holland, in the county of Lincoln; and all places included within or to be considered as forming parts of, the southern division of the county of Nottingham, as the same is settled and described by the said act, 2 & 3 Wm. 4, c. 64; and the town and county of the town of Nottingham; and all places included within, or to be considered as forming parts of, the southern division of the county of Derby, as the same is settled and described by the same act.

Bristol District.

The Bristol district shall comprehend all places locally situated in the county of Gloucester, and all places locally situated in the county of Monmouth, and all places included within or to be considered as forming parts of the northern division of the county of Wilts, as the same is settled and described by the said last-mentioned act; and all places included within, or to be considered as forming parts of, the eastern division of the county of Somerset, as the same is settled and described by the same act; and the county of the city of Bristol, and all places within the limits of the city of Bristol, as the same are described in the said last-mentioned act, and all places locally situated in any of the several counties in Wales hereinafter next mentioned, that is to say,—

The county of Brecon,
The county of Cardigan,
The county of Carmarthen,
The county of Glamorgan,
The county of Pembroke, and
The county of Radnor.

Exeter District.

The Exeter district shall comprehend all places locally situated in the county of Devon; and all places locally situated in the county of Cornwall; and all places included within

* Upon any future vacancy of the office of commissioner, whereby there shall be only one acting commissioner in the Birmingham, Bristol, Leeds, Liverpool or Manchester district, and upon any future vacancy in the office of registrar for any of the same districts, such vacancies are not to be filled up, except upon the Lord Chancellor's special order. (17 & 18 Vic. c. 119, s. 2.)

† See note, *ante*.

‡ Ib.

(*a*) *County Courts.*[1] *See* also this title, *post.*

(1) *Jurisdiction of, in Bankruptcy and Insolvency.*

Jurisdiction of county courts under this act.

By sect. 3, 24 & 25 Vic. c. 134, "the judge of every county court (except of the metropolitan county courts) shall have and exercise within his respective district the like jurisdiction, powers, and authorities, and perform the same duties for and in respect of all matters and things coming before such county court by virtue of this act, as are vested in the commissioners of the district courts of bankruptcy."

(2) *Power to Transfer from Commissioners in Bankruptcy to County Courts.*

Power to transfer jurisdiction, &c. of commissioners to county courts in case of vacancies.

By sect. 4, id. "if upon any vacancy in the office of commissioner of any country district court there shall no longer be a commissioner for such district, her Majesty shall have power, by order in council, to transfer all the jurisdiction, powers, and authorities held by the commissioner to the judges of the county courts, or any of them, exercising jurisdiction within such district or any part thereof, and the Lord Chancellor shall have power and authority, by order, from time to time to provide in all respects for the exercise of jurisdiction in bankruptcy by such county-court judges or judge, and for the continuance of the exercise of their respective duties in the whole or any part of the district by the official assignees, registrar, and other officers attached to the court of the commissioner making such vacancy."

(3) *Power to Create additional County Courts.*

Power to create additional county courts, and to invest the judges thereof

By sect. 5, id. "in case it shall on any occasion appear to her Majesty in council to be expedient to establish an additional county court or courts within any one or more of the country districts, and to invest the judge or judges thereof with the jurisdiction, powers, and authorities of a commissioner in bankruptcy within the district or districts that may be assigned to such court or courts, it shall be

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or to be considered as forming parts of the western division of the county of Somerset, as the same is settled and described by the said last-mentioned act; and all places locally situated in the county of Dorset, excepting the several places in the same county hereinafter next mentioned, that is to say,—

Poole,	Sturminster,
Wimborn-Minster,	and
Blandford,	Shaftesbury;

and excepting also all other places locally situated in the said county of Dorset, which are situated within the distance of 100 miles from the General Post Office in the city of London; and the several places hereinbefore and hereinafter next mentioned, that is to say, Poole and Shaftesbury, shall include such place or places respectively which are comprehended within the boundaries of each such place, as such boundaries are settled and described by the last-mentioned act.

Newcastle-upon-Tyne District.

And the Newcastle-upon-Tyne district shall comprehend all places locally situated in any of the several counties hereinafter mentioned, that is to say,—

The county of Northumberland,
The county of Durham,
The county of Cumberland,
The county of Westmoreland,
And also the town of Berwick-upon-Tweed.

Provided always, and it is hereby further ordered and directed, that if any part of any county hereinbefore mentioned, which is detached from the main body of such county, but for which no sufficient provision is hereinbefore made, shall be surrounded by two or more counties or divisions, or ridings, or parts, then every such detached part shall be considered as forming part of the county or division, riding, or parts, with which such detached part shall have the longest common boundary.

By s. 11, 12 & 13 Vic. c. 106, "the Lord Chancellor may attach the commissioners, &c. acting in the country to such districts as he shall think fit; and, whenever it shall appear to him to be expedient, may order any commissioner acting for any district, whether in town or country, to hold sittings at such places within his district as the Lord Chancellor may think fit, and may give all necessary directions in that behalf."

[1] By 10 & 11 Vic. c. 102, s. 10, the jurisdiction of the Court for Relief of Insolvent Debtors, on circuit, was transferred to county courts, and the proceedings were directed to be returned to the Insolvent Court, and power was given for bringing up prisoners. *See* Broom's County Court, 300.

lawful for her Majesty, by order in council, so to do, and also to make a new arrangement of the districts of the bankruptcy and county courts respectively, so as to assign a convenient district or districts to such new court or courts, and to give from time to time all necessary directions for the establishment thereof, and such order shall be laid before Parliament, and shall not come into operation until three months afterwards."

With jurisdiction in bankruptcy, and to make new arrangement of districts.

(4) *Appointment, Qualifications, and Jurisdiction of Judges.*

By sect. 6, 24 & 25 Vic. c. 134, "the judge of any such new court shall be appointed by the Lord Chancellor, and shall be either a serjeant-at-law, or a barrister-at-law who shall be of seven years' standing at the bar in England, or who shall have practised as a barrister and special pleader for at least seven years; and every such judge, in addition to the jurisdiction of a county-court judge, shall have and exercise within the district assigned to him all the jurisdiction, powers, and authorities of the commissioners of the country district courts of bankruptcy."

Appointment, qualifications, and jurisdiction of judges of such courts.

(5) *Oath to be taken by the Judges.*

By sect. 7, id. "every judge of a county court shall, before acting in bankruptcy, take at any quarter sessions the following oath:

'I, *A. B.*, do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of county-court judge acting in bankruptcy. So help me God.'

And such oath shall be recorded in the court of the judge taking the same."

Oath to be taken by county-court judges before acting in bankruptcy.

(E) *Sittings of the Courts.*[1]

(F) *Courts to be Auxiliary to each other; and of the Courts of Scotland and elsewhere.*

By sect. 216, 24 & 25 Vic. c. 134, "the court may direct the examination in Scotland of any person for the time being in Scotland, being a person believed to be capable of giving information in any matter in regard to the acts, estate, or dealings of any bankrupt or petitioner within the provisions of this act, and the order for such examination may be directed in Scotland to the sheriff of the county in which the person to be examined is residing or happens to be for the time; and such sheriff may, in like manner as in examinations in any matter in bankruptcy before such sheriff, summon such person to appear before him, at a time and place to be specified in the summons, for examination upon oath, as witness or haver, and to produce any books, papers, deeds, or documents called for which may be in his possession or power; and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the court, and shall transmit with such report either the original books, papers, deeds, or documents produced, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as he shall think fit or deem necessary; and in case any person so summoned shall fail to appear at the time and place specified, or appearing

Courts in Scotland to be auxiliary to the court in England in the examination of witnesses, &c.

Proceedings for that purpose.

[1] By s. 48, 24 & 25 Vic. c. 134, "the London and districts courts of bankruptcy shall sit for the despatch of business daily throughout the year, Sunday, Christmas-day, Good Friday, Monday and Tuesday in Easter week, and days appointed for public fast or thanksgiving excepted."

By sect. 49, *Lord Chancellor to regulate Sittings in Vacation.*—"During the time appointed by order for vacations in the High Court of Chancery the Lord Chancellor shall have full power and authority to regulate the sittings of the court, and appoint the attendance of such commissioner or commissioners as shall appear necessary for the due administration of justice in the said court."

By sect. 51, *Judges may sit at Chambers.*—"The commissioners may sit at chambers for the despatch of such part of the business of their courts as can, without detriment to the public advantage arising from the discussion of questions in open court, be heard in chambers; and when sitting at chambers they shall have in all respects like power and jurisdiction as when sitting in court."

shall refuse to be examined or to make the production required, the sheriff shall proceed against such person, as a witness or haver duly cited, and failing to appear or refusing to give evidence, or make production, may be proceeded against by the law of Scotland; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as are allowed to commissioners under appointment from the Court of Session, and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland. If any objection be stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may dispose of such objection, or, if he think fit, report such objection to the court, and suspend the examination of such witness until such objection has been disposed of by the court."

Courts in Ireland to be auxiliary in like manner.

Sect. 217, 24 & 25 Vic. c. 134. "The court may, in like manner, direct any such examination, in Ireland, of any person for the time being in Ireland, being a person believed to be capable of giving such information in any such matter under this act; and such examination in Ireland may be directed to the Court of Bankruptcy in Ireland, which, for the purpose of such examination, and for the production of books, papers, deeds, or documents, shall have the like powers and authorities in all respects as relates to matters within this act as are in the next preceding section given to sheriffs in Scotland, or as might be exercised by such court in the case of a matter within its own jurisdiction."

Where debtor who has been adjudged bankrupt, &c. in India or the colonies resides, or has property in England, &c., power to obtain adjudication in England, &c., and proceedings thereupon.

Sect. 218, id. "If any person who shall have been duly adjudged or declared bankrupt or insolvent in India, or any of the foreign dominions, plantations, or colonies of her Majesty, shall be resident or shall be possessed of property in England, Ireland, or Scotland, or in any colony, plantation, or foreign possession of the Crown, it shall be lawful for the assignee, trustee, or other representative of the creditors of such bankrupt or insolvent to apply for and obtain an adjudication of bankruptcy, sequestration, or insolvency against such person in the Court of Bankruptcy in England, and in the proper court in Scotland, Ireland, and such colony, plantation, or foreign possession of the Crown respectively, and by virtue thereof the same order and disposition shall be had and taken with respect to the person and property of the bankrupt or insolvent, as would have been if he had been originally adjudged bankrupt or insolvent by the court or tribunal so applied to. Upon such application it shall not be necessary for the assignee, trustee, or other representative of the creditors of the person so declared bankrupt or insolvent as aforesaid to give proof of any act of bankruptcy or petitioning creditor's debt, or to produce any other evidence than a duly certified copy, under the seal of the court, of the order or adjudication by which such person was found or adjudged bankrupt or insolvent."

Orders in England to be enforced in Scotland and Ireland;

and conversely.

Sect. 219, id. "Any order made by the court, or by any court in England acting under this act, in the course of the prosecution of any matter under this act, shall be enforced in Scotland and Ireland in the courts that would respectively have had jurisdiction in respect of such matter if the residence or place of business of the debtor had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by any court in Scotland for or in the course of any bankruptcy or insolvency shall be enforced in England and Ireland; and orders made by the court in Ireland for or in the course of any such proceedings shall be enforced in England and Scotland by the courts of bankruptcy which would respectively have had jurisdiction in any such matter, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a matter within its own jurisdiction."

Courts in England to be in like manner auxiliary to

Sect. 220, id. "The court and the district court in London, and the district courts in the country, shall in like manner be auxiliary, for all purposes of proof of debt, and for the examination of persons and witnesses upon oath, or for other

like purposes, to the courts acting in matters of bankruptcy or insolvency in Scotland and in Ireland, and also to any court acting in such matters in any colony, island, plantation, or place under the dominion of her Majesty, or to any British judge elsewhere so acting." courts in Scotland, Ireland, and elsewhere.

(G) *Power of Court to determine all Differences between Assignees, Creditors, &c.*

By sect. 136, 24 & 25 Vic. c. 134, "in case of any claim, dispute, or difference between the official assignee, the creditors' assignee, and the creditors, or any of such persons, or between any persons claiming under a trust deed, deed of composition or arrangement, relating to any bankrupt's or debtor's estate, or to any money or property claimed as part of the estate of any bankrupt or debtor, either party may apply to the court having jurisdiction in the bankruptcy, and in other cases to the court in London; and it shall be lawful for the court to determine the same, and to summon and examine upon oath the official or creditors' assignee, trustee, or any other person whomsoever, as to any matters and things concerning the bankruptcy or trust estate, and to direct such inquiries, and to give such directions, and make such orders relative thereto, as shall to the court seem just and expedient, and to award costs, personally or in any other manner, against the official or creditors' assignee, trustee, or any other person: Provided that in all cases in which a resolution has been come to by a majority in number and value of the creditors assembled in a meeting, regard shall be had by the court to such resolution, and the same shall not be varied or set aside by the court, unless such resolution shall, in the opinion of the court, be unjust or inequitable, and not fit to be binding and conclusive under this act." Court may determine on all differences between assignees and creditors, or between parties claiming under trust deeds.

Secondly, Courts of Appellate Jurisdiction.[1]

III. Of the Officers of the Courts.

(A) *Registrars.*[2]

By sect. 8, 24 & 25 Vict. c. 134, "the persons now discharging the duties of chief registrar, registrars, taxing-master, and official assignees of the Court of Bankruptcy in London, and in the several district courts of bankruptcy, shall Chief registrar, &c. to hold office during good

[1] By the 12 & 13 Vic. c. 106, there was an appeal from the decision of the Court of Bankruptcy to the Vice-Chancellor sitting in bankruptcy, and from his decision to the Lord Chancellor. and in certain cases from the Lord Chancellor to the House of Lords; but this is materially altered by 14 & 15 Vic. c. 83, by which the appeal from the Court of Bankruptcy is now to the Lords Justices of Appeal in Chancery, and from their decision to the House of Lords (*see* ss. 7 and 10). They have no primary jurisdiction; for instance, they cannot order the payment of money out of court (*Re Cheetham*, 21 L. J. Bank. 5; *see* 12 and 13 Vic. c. 106); nor set aside a purchase made by a stranger to the commission who obtained an assessment of creditor's proofs, and therewith purchased most of the bankrupt's estates from the assignees (*Ex-parte Holder*, 1 Mont. & Ayr. 518); or order a specific performance of a contract against a purchaser under a sale on the petition of the equitable mortgagee (*Ex-parte Cutts*, 3 Deac. 242); or order the distribution of a fund in court amongst the creditors of a testator to whose estate the fund belonged. *Ex-parte Williams*, id. 378.

[2] These officers are chiefly employed in the court to record its proceedings. They must examine the petitions for adjudication and affidavits in support, and enter in their respective docket-books every petition for adjudication when filed; and they superintend the allotment of petitions. The country registrars must transmit daily by post to the chief registrar copies of such entries, and of all adjudications, or any orders for superseding, dismissal, annulment, or enlargement of the time (s. 95, 12 & 13 Vic. c. 101). The chief registrar in London, and the registrar in the country, is to keep a book, in which the names of attornies and solicitors practising in the court are to be entered. Declarations of insolvency and minutes of resolutions formerly required to be filed in the office of the secretary of bankrupts, are now to be filed in the chief registrar's office (15 & 16 Vict. c. 77, s. 6). The registrars are expressly authorised to act as deputies for the commissioners of their respective courts; but in such case they will not have the power of commitment, or be competent to hear any disputed adjudication, or any question as to the allowance or suspension of the certifi-

behaviour, and vacancies to be filled up by Lord Chancellor.

retain and hold office during good behaviour, subject to dismissal by the Lord Chancellor, by order, for some sufficient reason to be set forth in such order. Upon any vacancy in the office of registrar, such vacancy shall be filled up by the Lord Chancellor."

Power to appoint additional registrars.

By sect. 9, 24 & 25 Vic. c. 134, "if the Lord Chancellor shall at any time, by order, declare that, having regard to the state of the business of the Court of Bankruptcy and the duties of the registrars, he is of opinion that additional registrars ought to be appointed, either in London or in any country district, it shall be lawful for the Lord Chancellor to appoint such additional registrars."

As to duties of county-court registrars.

By sect. 10, id. "the registrars of the several county courts exercising jurisdiction under this act shall discharge the duties of registrar and official assignee in all matters under this act within their several districts in such manner, and shall give such security in respect of such office of official assignee, and shall receive such remuneration in respect of such services, as general orders shall direct; and all the enactments herein contained with respect to official assignees shall apply to the registrars of the county courts as to all matters under this act prosecuted therein."

Registrars, their powers and jurisdiction.

By sect. 52, id. "the registrars of the Court of Bankruptcy shall have power to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to grant protection, to pass the last examination of any bankrupt in cases wherein the assignees and creditors do not oppose, to hold and preside at meetings of creditors, to audit and pass accounts of assignees, and to sit in chambers, and despatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general orders, or as the commissioner in any particular matter shall direct; but nothing herein contained shall empower a registrar to commit, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge. The registrar may adjourn any matter coming before him for the consideration of the commissioner. The Lord Chancellor may, by order, from time to time authorise the registrar of any county court to exercise any of the powers hereby given to the registrars of the Court of Bankruptcy."

Registrars to sit in chambers.

County-court registrars.

Courts may direct registrar to hold meetings, &c.

Expenses of such registrar, &c.

By sect. 58, id. "the courts of bankruptcy may direct a registrar to attend at any place within the district of the court to which he is attached, for the purpose of holding any meeting of creditors, of receiving proof of debts, and generally for the prosecution of any bankruptcy or other proceeding under this act; and the travelling and incidental expenses of such registrar, and of any clerk or other officer attending him, incurred in so acting, shall be settled by such court, and paid out of the assets of the estate in respect of which such registrar has so acted, or if there be no such assets, or if the assets be

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cate. Any registrar may also act for taking proof of debts or examination of witnesses, when he will have all the powers of the court for those purposes, except that of commitment (sect. 28, 12 & 13 Vict. c. 101). Summonses issued by the registrar in the absence of the commissioner must be in his handwriting and under the seal of the court (sect. 24). In the country districts the costs are usually taxed by the registrar (52). Provision is made by sect. 30 for registrars to act for each other. One of the registrars must attend at the hearing of every appeal by the Lords Justices, and all documents relating to such appeal must be filed in the chief registrar's office (sect. 17); and to the chief registrars in London such of the proceedings in the district courts, or copies thereof, as may be required by the general rules (*see* r. 40), are to be transmitted.

The chief registrar is to enter the time and nature of every appeal under sect. 206, and the date and substance of any order in such appeal produced before him. He is also to enter *præcipes* for and issue writs of execution, and to file returns thereto, which rules are given at length (*infra*). The monthly returns are also to be entered by them in the supplemental docket-book.

An account is to be kept at the Bank of England, entitled "The Chief Registrar's Account," in lieu of "The Secretary of Bankrupts' Account," "The Secretary of Bankrupts' Compensation Account," "The Interest arising from Bankruptcy Fund Account," "The Fund arising from Fees in Bankruptcy," and the "Registrar of Meetings" (sect. 22).

insufficient, then out of the chief registrar's account; and such registrar so acting shall have and exercise all powers, except the power of commitment, vested in such court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents: Provided always, that all depositions and examinations of persons and witnesses taken before such registrar, and all acts done by him, shall be reduced to writing, and be signed by such registrar, and shall be annexed to and form part of the proceedings." Powers of registrar so acting.

By sect. 53, 24 & 25 Vic. c. 134, "any party shall, during the proceedings before a registrar, be at liberty to take the opinion of the commissioner upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the registrar in the shape of a short certificate to the commissioner, who shall sign the same, if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding: but every such certificate may be discharged or varied by the commissioner, at chambers or in open court." Parties may take opinion of the commissioner. Certificates of registrars at chambers to be binding.

By sect. 54, id. "parties and witnesses summoned before a registrar shall be bound to attend in pursuance of such summons, and shall be liable to process of contempt in like manner as parties and witnesses are liable thereto in case of default in attendance under the writ of *subpœna;* and all persons wilfully and corruptly swearing or affirming falsely before a registrar shall be liable to all the penalties, punishments, and consequences of perjury." Penalties upon parties and witnesses not attending, or wilfully swearing falsely before registrar.

By sect. 55, id. "if any person examined before a registrar shall refuse or decline to answer or to swear to or sign his examination when taken, the registrar shall refer the matter to the commissioner, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question, or to sign such examination." Persons refusing to answer may be ordered to pay costs.

By sect. 38, id. "the per-centage heretofore payable by the fifty-fourth section of the Bankrupt Law Consolidation Act, 1849, to the chief registrar's account, on the gross produce of estates in the Court of Bankruptcy, is abolished." Per-centage upon estates abolished.

By sect. 29, id. "there shall be paid to the registrars and other officers of the court the several salaries set opposite to their respective titles in Schedule (A.) to this act annexed, and such salaries shall be payable out of the chief registrar's account, and shall be paid quarterly, free and clear from all taxes and deductions whatsoever, except the tax on income; and when any person for the time being holding any of the said offices shall die, resign, or be removed from the same, the executor or administrator of the person so dying, or the person so resigning or being removed, shall be entitled to receive such proportionate part of his salary as shall have accrued during the time that such person shall have executed his office since the last payment." Salaries of registered officers of the Court of Bankruptcy.

(B) *Taxing-Master.*

By 7 & 8 Vic. c. 96, s. 45, the master is to be appointed by the Lord Chancellor, being a barrister of not less than five years' standing at the bar, or who shall have practised as a pleader for not less than five years, or who shall have held the office of registrar or deputy-registrar of the Court of Bankruptcy for not less than five years, or an admitted attorney of one of her Majesty's superior courts at Westminster and the Court of Bankruptcy, in actual practice, or not less than five years' standing on the roll of such court or courts. His salary is not to exceed 1200*l.* a-year, and he may receive an annuity of two-thirds if permanently disabled for the due execution of his office. He holds his office during good behaviour, and may be removed by the Lord Chancellor for misconduct. He is privileged as other officers of the court from serving on juries, inquests, or in parochial offices. (*See* sect. 47.) By sect. 48 of the 7 & 8 Appointment of. Privileges of.

Vic. c. 96, his duties may be performed by deputy, if absent from illness, &c. for a longer period than two months.

Duties of.

By sect. 13, 24 & 25 Vic. c. 134, "all bills of costs, charges, fees, and disbursements of solicitors and attornies in matters under this act before the Court of Appeal in Chancery sitting in bankruptcy and the court in London, and such taxable bills as may be specially referred to the master by any district court, or any county court, shall be taxed by the master, subject to the review of the court in London."

Registrars in country districts to be taxing officers.

By sect. 14, id. "in every country district court, and in every county court exercising jurisdiction under this act, all bills of costs, charges, fees, and disbursements aforesaid, shall (unless where such court shall otherwise direct) be taxed and settled by the registrar of such court, subject to appeal to the court of which he is registrar. It shall be lawful for the commissioner of any district court, or judge of any county court, to refer any such bills, or any question thereon, to the taxing-master in London."

As to the settlement of charges of auctioneers, appraisers, valuers, and accountants.

By sect. 15, id. "all charges, fees, and disbursements of any auctioneer, appraiser, broker, valuer, or accountant, or any other person, not being an attorney or solicitor, in any matter under this act, or any other act in force relating to bankrupts, shall be settled by the master, except such charges, fees, or disbursements as shall be incurred in any district court or county court, and in such cases shall be settled by the registrars of the court in which they arise, in such manner as general orders shall direct, and subject to the review of the court; and the amount of the bills so settled, and no more, shall be recoverable."

(C) *Official Assignees.*[1]

[1] By 1 & 2 Wm. 4, c. 56, s. 2, the Lord Chancellor was directed to choose a number of persons, not exceeding thirty, being merchants, brokers or accountants, or persons who were or had been engaged in trade in the cities of London or Westminster, or the parts adjacent, to act as official assignees in all bankruptcies prosecuted in the Court of Bankruptcy. The Lord Chancellor may from time to time, as any vacancy may occur in the said before-mentioned number of official assignees, appoint some other such person as aforesaid to fill any vacancy so occurring. (Id. s. 24.) The Lord Chancellor was directed to appoint a number of persons, not exceeding thirty in the whole, being merchants, brokers, or accountants, or persons who were or had been engaged in trade in the United Kingdom, to act as official assignees in all bankruptcies prosecuted *in the country*. 5 & 6 Vic. c. 122, s. 48. The Lord Chancellor may remove any official assignee, whether appointed under the 1 & 2 Wm. 4, c. 56, or 5 & 6 Vic. c. 122, and from time to time as any vacancy may occur in the said before-mentioned number of official assignees, may appoint some other such person as aforesaid to fill any vacancy occurring. 5 & 6 Vic. c. 122, s. 50.

By sect. 102, 12 & 13 Vic. c. 106, they are to be appointed forthwith, after adjudication, to act in the particular estate; all the estate and effects of the bankrupt vest in him solely and jointly with the creditors' assignees, when they are appointed. He has not the power of selling or disposing of any of the property, except that before the appointment of the creditors' assignees he may, by order of the court, sell or otherwise dispose of perishable property belonging to the bankrupt (sect. 40). But he is the medium for the collection and distribution of the assets, and therefore all the proceeds of the estate, however obtained, are to be received by him alone (*see* sect. 151); and his duty is to pay over such moneys from time to time to the credit of the Accountant in Bankruptcy, subject to the general rules and regulations issued from time to time by the court. He should require and receive from the bankrupt all his books, papers, &c., and full information respecting them (sect. 105), and generally must exert himself for the benefit of the estate. The dividends are paid by him pursuant to the order of the court, to which every complaint respecting any non-payment must be made, as no action will lie against him to recover any dividend, but he is responsible for the correctness of the list. After a year, and within fifteen months of the order for payment of any dividend, a certificate is to be filed thereof in the chief registrar's office, and within a year of such filing the amount is to be paid into the unclaimed dividend account. An official assignee omitting to file such certificate will be presumed to be retaining the amount in his own hands, and he will be charged twenty per cent interest thereon, just as he is for any sum that he actually does retain, use, or permits to be retained or used by his co-assignees, or neglects to invest pursuant to the order of the court. *See* ss. 262, 263, 265.

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Brewer.
Brickmaker.

Broker.
Builder.
Burner of Lime.
Butcher.
Butlers or Stewards of Inns of Court.
Buying and Selling, Buying and Letting for Hire.
Calenderer.
Calico Printer. *See* Printer.
Carpenter.
Carriers.
Cattle and Sheep Salesmen.
Cheese-maker.
Cider-maker.
Clothier.
Coach Proprietor.
Coal Dealers and Owners.
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Company, Members of. *See* Joint-stock Company.
Contractors supplying Stores.
Corporation, Members of.
Cowkeeper.
Drover.
Dyer.
Exchange and Barter, Dealers by.
Exchequer Bills, Circulators of.
Factor.
Farmer.
Fisherman.
Freight, Insurer of.
Fuller.
Grazier.
Guinea Company, Members of.
Gun-founders to the Crown.
Horse-dealer.
Horse-letting. *See* Livery-stable Keeper.
Hotel Keeper. *See* Innkeeper.
Hounds, Keeper of.
Innkeeper, Keeper of Taverns, Hotels, or Coffee-houses.
Insurers.
Insurance Broker.
Iron Manufacturer.
Joint-Stock Company, Shareholders in. *See* 1 Mont. D. & D. 92, 146, 300; 2 id. 758.
Labourer, Common.
Lime-burner.
Livery-stable Keeper.
Living by Buying only or Selling only.
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Lodging-house Keeper.
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Member of Public Companies. *See* Corporation, Members of.
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By sect. 21, 24 & 25 Vic. c. 134, "the person now exercising the office of provisional assignee of the Court for the Relief of Insolvent Debtors in England shall be an official assignee of the Court of Bankruptcy, and shall act as such official assignee in the court in London, and shall hold office during good behaviour, subject to dismissal by the Lord Chancellor by order, for some sufficient reason to be set forth in such order, and he shall perform the same duties, and receive the same salary, remuneration and allowances, as the other official assignees." Provisional assignee of insolvent court is to be an official assignee.

By sect. 16, id. "upon any vacancy in the office of official assignee of the court in London, the same shall not be filled up unless the number of official assignees in the London district shall, by reason of such vacancy, be reduced to less than five. Any vacancy in the office of official assignee in a country district shall not be filled up if there be another official assignee within such district." Reduction in number of official assignees.

By sect. 31, id. "the fees to be taken by official assignees in respect of duties performed by them shall be defined by general orders. Each official assignee shall make a return half-yearly to the chief registrar, in such manner as general orders shall direct, of the amount of fees received by him during the six months preceding the date of such return. Each of the present official assignees in the London district shall receive an annual salary of twelve hundred pounds. Each of the present official assignees in the country districts shall receive an annual salary of one thousand pounds. Every future official assignee in the London district shall receive an annual salary of one thousand pounds. And every future official assignee in the country districts shall receive an annual salary of eight hundred pounds. All such salaries shall be paid quarterly out of the monies standing in the chief registrar's account, and shall be exclusive of such proper remuneration actually paid to necessary clerks, and of such reasonable office-expenses as shall respectively be allowed by the court. The official assignees shall not be entitled to any further remuneration in respect of any duties performed by them." Salaries of official assignees.

By sect. 108, id. "immediately on adjudication it shall be the duty of the official assignee to take possession of the bankrupt's estate, and to retain possession thereof until the appointment of a creditor's assignee; but if such official assignee, or if the court, upon the representation of any creditor, shall be of opinion that the keeping possession of the bankrupt's property is not requisite for the due protection of the creditors, such possession shall not be continued." Official assignee to take possession.

By sect. 119, id. "the creditors' assignee shall, in the presence of a registrar, audit such account, and may call for such information from the official assignee as he possesses concerning the estate. The account shall be audited in the presence of the judge of the court, in cases where the registrar of such court is also the official assignee. A printed copy of such account of the official assignee, when audited, shall, unless the registrar or the judge, as the case may be, shall otherwise direct, be sent by post by the creditors' assignee to every creditor who has proved." Creditors' assignee shall audit accounts of official assignee.

By sect. 128, id. "the official assignee shall collect, realise, and recover every debt due to the estate, the amount of which shall not exceed the sum of ten pounds, and shall pay all sums so collected, realised and recovered, forthwith into the Bank of England, or otherwise in manner in the next preceding clause provided; and as to all such sums of money he shall be and shall be deemed sole assignee of the estate, notwithstanding the appointment of a creditors' assignee." The official assignee to collect debts under 10*l*.

By sect. 129, id. "the creditors' assignee shall, at the end of three months from and after his appointment, and thenceforth at the expiration of every succeeding three months, render to the official assignee, in the presence of the registrar, a debtor-and-creditor account of all sums received and paid on account of the bankrupt or his estate, verified on oath as a full, true, and faithful account of his receipts and payments as such creditors' assignee; and the vouchers for such account, and all books of account in his possession or power, together with his Creditors' assignee to render accounts to official assignee every three months.

banker's pass-book, shall be produced by him to the official assignee, who shall examine the same, and if he shall be dissatisfied with such account, the same, or any part thereof, or any matter arising thereon, shall be inquired into and considered by the registrar, in the presence of the official and creditors' assignee; and if no creditors' assignee be appointed, the official assignee shall in like manner render the account herein required to the registrar, who shall examine the same: Provided that, in the case of county-court registrars, their accounts, as official assignees, shall be in like manner rendered to and examined and passed by the judges of their respective courts."

If no creditors' assignee appointed, official assignee to render accounts.

Accounts to be printed and circulated.

By sect. 130, 24 & 25 Vic. c. 134, "forthwith after the passing of each such account of the creditors' assignee, a copy thereof, or a statement showing the nature and result of the transactions and accounts of the assignee, shall be made out by the official assignee, and sent by him in a printed form through the general post to every creditor who has proved under the bankruptcy."

(D) *Messengers*[1] *in Bankruptcy and Bailiffs in County Courts.*

Messengers discharging duty in Court of Bankruptcy shall continue to act.

By sect. 17, 24 & 25 Vic. c. 134, "the persons now discharging the duty of messenger in the Court of Bankruptcy in London, and in the several district courts of bankruptcy in the country, shall continue to act as such messengers, in such manner, and subject to such regulations, and shall give such security as general orders shall direct, and shall be subject to dismissal by the Lord Chancellor by order, for some sufficient reason to be set forth in such order. Upon any vacancy in the said office, such office shall not be filled up until the number of

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[1] By sect. 107, 12 & 13 Vic. c. 106, "that no action shall be brought against any messenger or his assistants, or other person appointed by the court, for anything done in obedience to any warrant of the court, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such messenger or his assistant, or other person, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, and unless the same hath been refused or neglected for six days after such demand; and if after such demand and compliance therewith, any action be brought against such messenger or assistant, or person so appointed, without making the petitioning creditor defendant, if living, the jury, at the trial of such action, on the production and proof of such warrant, shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the court by which such warrant shall have been granted; and if such action be brought against the petitioning creditor, and the messenger or assistant, or person so appointed, the jury shall, on proof of such warrant, give their verdict for such messenger or assistant, or person so appointed, notwithstanding any such defect of jurisdiction; and if the verdict shall be given against the petitioning creditor, the plaintiff shall recover his costs against him, to be taxed so as to include such costs as the plaintiff is liable to pay to the messenger and his assistant, or person so appointed as aforesaid."

This section is nearly the same as 6 Geo. 4, c. 16, s. 31.

A messenger in bankruptcy under a warrant to seize the goods of A., seized the goods of B., acting *bonâ fide* with the intention to carry the warrant into execution: it was held, that the messenger was not entitled to require a demand to be made for the perusal and a copy of the warrant under this section, and that he was liable in an action of trespass brought against him alone, though no such demand had been made or left at his usual place of abode. *Munday v. Stubbs*, 20 L. J. C. P. 59; 1 Prac. Rep. 675; 14 Jur. 1027; 10 C. B. 422. The words of the above section, "acting in obedience to any warrant," are not satisfied by *bona fides* and intended obedience. (Id.) The intention of this provision is, that where a messenger only does that which is ordered by a warrant and the warrant is wrong, the responsibility should rest upon the petitioning creditor, for the petitioning creditor having held out the warrant and given it to the messenger, may properly be taken to have intended the warrant to be executed whether wrong or not, and ought to be made responsible rather than the ministerial officer acting in pursuance of his authority: *per Maule, J.* (Id.)

The messenger had been directed by warrant to seize property of the bankrupt upon a railway. Having obtained possession of it, he was forcibly ejected by the engineer of the line, assisted by a large body of workmen, it being denied that the property in question belonged to the bankrupt. On an application for the committal of the engineer for contempt of court it was held, that the property upon the line was not in the possession of the bankrupt, and therefore the order was refused without costs. *Re Williams*, 18 L. T. 190. *See* 9 Jur. 626.

messengers in the court in London shall have been reduced to two, and in any district court of bankruptcy in the country to one. Any vacancy thereafter occurring may, if necessary, be filled up by the Lord Chancellor by the appointment of some fit person.

By sect. 18, 24 & 25 Vic. c. 134, not to be filled up except by Lord Chancellor's order.

Remuneration of messengers.

By sect. 32, id. "the messengers shall receive such remuneration by way of fees as general orders shall direct and allow; provided that the total net annual remuneration to be received by any messenger in the London district shall amount to, but not exceed the sum of five hundred pounds, and of any messenger in the country districts the sum of four hundred pounds. Any surplus of such fees upon the aggregate of the receipts of each year, after deducting the aforesaid salaries, and reasonable payments by the messengers for assistance, to be allowed by the court, shall be paid over by the several messengers in such manner and at such times as general orders shall direct, to the credit of the chief registrar's account."

Surplus fees to be paid over.

High bailiffs of county courts to discharge duties of messenger in matters of bankruptcy.

By sect. 11, 24 & 25 Vic. c. 134, "the high bailiffs of the several county courts exercising jurisdiction under this act, shall discharge the duties of messenger in all matters of bankruptcy within their several districts in such manner, and shall give such security in respect of such duties, and shall receive such remuneration in respect of such services, as general orders shall direct."

(E) *Accountant in Bankruptcy.*

Abolition of office of accountant in bankruptcy upon the first vacancy.

By sect. 12, 24 & 25 Vic. c. 134, "upon the first vacancy in the office of Accountant in Bankruptcy the office shall be abolished, and the duties thereof shall thereafter be discharged by the chief registrar, and the several funds standing in the books of the Bank of England to the credit of such accountant shall be transferred to such account or accounts in the name of the chief registrar, and in such manner as general orders shall direct."

(F) *Shorthand Writers.*

Appointment of shorthand writers.

By sect. 61, 24 & 25 Vic. c. 134, "in order to facilitate the business of the courts of bankruptcy in taking examinations, or the evidence of parties examined *viva voce*, the court may, in any matter of bankruptcy or other proceeding within the jurisdiction of courts, direct the employment of a shorthand writer; and general orders shall direct under what regulations such shorthand writer shall be employed, and the amount of the remuneration to be allowed him, and the parties by whom such remuneration shall be paid."

Declaration to be made by shorthand writer.

By sect. 62, id. "every shorthand writer so employed by the court shall in every case make in court the following declaration:—

'I, *A. B.*, do solemnly and sincerely declare, that I will faithfully and truly take down the questions and answers put to and given by persons to be examined in this matter, and will deliver true and faithful transcripts thereof, as the court shall direct.'"

IV. Salaries[1] and Pensions to Retiring Officers.

[1] By s. 29, 24 & 25 Vic. c. 134, salaries of officers of the Court of Bankruptcy are set opposite to their respective titles in Schedule (A.)

"Schedule (A.)

"To the persons filling the undermentioned offices in the Court of Bankruptcy the following salaries shall be payable:—

The Chief Registrar . . .	£1400
The Registrars acting in London, each	1200
The Registrars acting in the country, each	1000
The Registrar in attendance upon the Chief Judge . . .	£1200
The Taxing-Maxter . . .	1400
The Accountant in Bankruptcy	1500
The Registrar of Meetings .	250

The clerks in the several offices of the accountant in bankruptcy, the chief registrar, the taxing master, the ushers of the court, the clerk and trainbearer, ushers, and assistant-ushers of the Lords Justices of the Court of Appeal in Bankruptcy, shall continue to receive the same salaries, and out of the same funds, as if this act had not been passed."

V. Fees and Stamps.

Court fee abolished.

Per-centage upon estates abolished.

General orders to direct what fees to be paid.

Fees to be received in stamps.

Fees may be altered by general order.

By sect. 37, 24 & 25 Vic. c. 134, "the court-fee heretofore payable in respect of public and private sittings in bankruptcy is abolished."

By sect. 38, id. "the per-centage heretofore payable by the fifty-fourth section of the Bankrupt Law Consolidation Act, 1849, to the chief registrar's account, on the gross produce of estates in the Court of Bankruptcy, is abolished."

By sect. 39, id. "general orders may from time to time direct what fees, other than those herein directed, shall be paid in respect of any matters of bankruptcy or proceedings under this act: Provided that all fees shall be received and taken by means of stamps having the word 'bankruptcy' impressed or affixed thereon, in manner hereinafter provided."

By sect. 40, id. "the fees by this act made payable,[1] or any of them, may from

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By s. 30, "the chief clerk, clerks, taxing officer, and other officers of the Court for the Relief of Insolvent Debtors in England shall, upon being in manner herein provided transferred to the Court of Bankruptcy, severally continue to receive the full amount of the salary, remuneration, allowances, and compensations which they now respectively receive, as nearly as may be out of the same funds, and payable in the same manner in all respects, as if this act had not been passed; and for such purpose the annual sums now payable out of monies voted by Parliament for the use and purposes of the Court for Relief of Insolvent Debtors and the officers thereof shall be paid in future into the Bank of England, to the credit of the chief registrar's account in bankruptcy."

As to retiring annuities, compensations, and incidental expenses:—

By s. 33, "the Lord Chancellor may, on a petition presented to him for that purpose, order that an annuity be paid to any commissioner or registrar, or to the accountant in bankruptcy, or taxing-master, or other officer of the Court of Bankruptcy, not exceeding two-thirds of his salary, to be paid out of the chief registrar's account, when such person shall have served in such office for the full period of twenty years, and shall be above sixty-five years of age, or shall have been appointed to such office in or previous to the year 1832, and shall be desirous of retiring, or if such person shall, before the period of twenty years' service is completed, be afflicted with any permanent infirmity; the time during which such person shall have held office in the Court for Relief of Insolvent Debtors shall be reckoned or put at twenty years."

By s. 34, "if any person to whom an annuity shall be granted under this act shall be appointed to and accept any public office of an annual value less than the amount of such annuity, such person, during the time he may continue in such office, shall be entitled to receive only so much of his annuity as shall, together with the salary of such new office, be equal to such annuity. If the salary attached to such public office shall equal or exceed in amount such annuity, then during the time of his continuance in such office such annuity shall altogether cease.

By s. 35, "the compensations now payable to the following holders of abolished offices:—Patentee of bankrupts, the former commissioners of bankrupts, the clerk of the hanaper, and other officers of the Lord Chancellor and the Court of Chancery, and the retiring annuities now respectively payable out of the funds standing to the credit of the chief registrar's account, shall continue to be paid out of the same funds; but the annual amount of the said compensations and retiring annuities shall be paid into the Bank of England to the credit of the chief registrar's account, by the Commissioners of the Treasury, out of monies to be from year to year voted for that purpose by Parliament."

[1] Schedule (B.)

Document.	Stamp Duty in lieu of Fees. £	s.	d.
Every petition presented to a Court of Bankruptcy for adjudication of bankruptcy, or for arrangement between any debtor and his creditors .	5	0	0
Every such petition when presented to the London court, or to a county court, by traders whose debts do not exceed 300*l.*	1	0	0
Every order of discharge	1	0	0
Every declaration of insolvency	0	2	6
Every registration of trust deeds	0	10	0
Every summons of judgment-debtor or debtor	0	2	6
Every admission of such debtor	0	2	6
Every deposition of good defence	0	2	6

time to time be varied or abolished by general orders; and other fees, but not of an amount higher than that by this act prescribed, may be affixed and imposed by such orders; and the provisions of this act respecting stamps are hereby extended and applied to such stamps as may be required by general orders."

Certain documents to be on stamped vellum, &c. in lieu of fees.

By sect. 41, 24 & 25 Vic. c. 134, "every document enumerated in the Schedule (B) to this act annexed shall, in lieu of all fees thereupon, be printed or written upon vellum, parchment, or paper, bearing the stamp-duty set opposite to such documents respectively in such schedule, and having the word 'Bankruptcy' impressed on every such stamp: Provided that the Commissioners of Inland Revenue, besides such impressed documents denoting fees, shall provide like stamps on adhesive paper; and all stamp-duties and fees directed to be paid under this act may be paid by means of such stamps on adhesive paper affixed to documents requiring a stamp-duty: Where any such document shall consist of more than one sheet, only the first sheet thereof shall have such stamp impressed or affixed thereon."

Documents not to be received without a stamp.

Proviso where so received through mistake.

By sect. 42, id. "no document which by this act or by any general order is or shall be required to have a stamp impressed thereon shall be received or filed, or be used in relation to any proceeding in the courts, or be of any validity for any purpose whatever, unless or until the same shall have the proper stamp impressed or affixed thereon: Provided always, that if at any time it shall appear that any document which ought to have had such stamp has, through mistake or inadvertence, been received or filed, or used without having such stamp, the courts may order that such stamp shall be impressed or affixed thereon; and when a stamp shall have been so impressed or affixed on such document, such document, and every proceeding in reference thereto, shall be as valid and effectual as if such stamp had been impressed or affixed thereon in the first instance: Provided also, that nothing herein contained shall affect the provisions contained in the twenty-seventh section of the act of the session of parliament of the seventeenth and eighteenth years of the reign of her present Majesty, chapter eighty-three, or the provisions of the Common Law Procedure Act, 1854, and that every stamp on adhesive paper affixed to a document shall be deemed a stamp impressed thereon."

Officers, &c. taking fees improperly.

By sect. 43, id. "if any judge, commissioner, registrar, accountant, master, official assignee, clerk, or any other officer of the courts of bankruptcy, or of any county court acting in matters under this act, shall, for anything done or pretended to be done under this act, or under colour of doing anything thereunder, fraudulently and wilfully demand or take, or appoint or allow any person whatsoever to take, for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, emolument, gratuity, sum of money, or any thing of value whatsoever, other than is allowed by this act, such person, when convicted thereof, shall forfeit and pay the sum of five hundred pounds, and be rendered incapable,

SCHEDULE (B.)—*continued.*	£	s.	d.
Every bond with sureties	0	5	0
Every application for search for petition or other proceeding	5	0	0
Every application for any meeting in any matter under this act	1	0	0
Every allocatur by any officer of the court for any costs, charges, or disbursements,—where such bill of costs shall not exceed 5*l.*	0	1	6
Exceeding £5 and not exceeding £10	0	2	6
„ 10 „ 20	0	5	0
„ 20 „ 30	0	7	6
„ 30 „ 50	0	10	0
„ 50 „ 100	0	15	0
„ 100 „ 150	1	0	0
„ 150 „ 200	1	10	0
„ 200 „ 300	2	0	0
„ 300 „ 500	3	0	0
„ 500	5	0	0

and is hereby rendered incapable, of holding any office or place under her Majesty."

Officers of the court may be dismissed for fraud or wilful neglect in relation to stamps.

By sect. 44, 24 & 25 Vic. c. 134, "if any such judge, commissioner, officer, or person shall fraudulently do, commit, or connive at any fraudulent act or practice in relation to any stamp used or required to be used in any matter under this act, or to any fee or sum of money collected, or which ought to be collected, by means of any such stamp or otherwise, or shall be guilty of any fraudulent act, neglect, or omission, whereby any fee which ought to be collected by means of such stamp or otherwise shall be lost or the payment thereof evaded, such judge, commissioner, officer, or person so offending shall be liable to be dismissed from his office or employment."

VI. Funds of the Bankruptcy[1] and Insolvent Courts.[2]

VII. Records of the Court.[3]

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[1] By sect. 36, 24 & 25 Vic. c. 134, "the funds standing to the account intituled 'The Chief Registrar's Account,' shall be subject to all such orders as have been heretofore duly made, or as shall from time to time be made by the Lord Chancellor, for payments thereout in respect of the salaries of clerks and other persons employed in the various offices of the several courts of bankruptcy, and for stationery, coals, and candles for the use of the same, and for rent and repairs of the buildings, and in respect of all expenses incidental to carrying this act into effect; and all accounts for such expenses shall be audited and allowed by the commissioner of the court in which they have been incurred before any order for payment shall be made."

[2] By sect. 26, id. "all monies and government securities which shall at the commencement of this act stand in the Bank of England to the credit of the account of the Commissioners of the Court for the Relief of Insolvent Debtors in England, shall be carried by the Bank of England, in such manner as general orders shall direct, to the account of the Accountant in Bankruptcy; and, subject to the orders of the court for the payment thereout of any dividend, or for the distribution of any part thereof, in the matter to which the same originally belonged, shall be applicable in like manner as at present, or in such manner as the Lord Chancellor shall by order direct, towards defraying the salaries of the clerks and other persons hereby transferred from the Insolvent Debtors' Court to the Court of Bankruptcy, and towards defraying the expenses of and incidental to the discharge of pauper prisoners hereinafter provided, and also for indemnifying the provisional assignee of the Insolvent Debtors' Court against all costs and expenses incurred or to be incurred by him in any suit, action, or other proceeding."

[3] By sect. 23, 12 & 13 Vic. c. 106, "all proceedings before the court in any district in the country, or any part of such proceedings, or copies or minutes thereof, shall be transmitted to the chief registrar at such time and in such manner as may by any general rule or order to be made in pursuance of this act be directed, and be by him kept among the records of the court."

By sect. 236, 12 & 13 Vic. c. 106, "any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof, and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided: Provided always, that all fiats and proceedings under the same which may have been entered of record before the passing of the act passed in the parliament holden in the second and third years of the reign of his late Majesty King William the Fourth, intituled 'An Act to amend the Laws relating to Bankrupts,' or purporting to have been sealed before the commencement of this act with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of any such document, and purporting to have been so sealed, shall and may upon the production thereof, and in the case of any fiat or proceedings entered of record before the passing of the last-mentioned act, with the certificate thereon, purporting to be signed by the person duly authorised to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place, anything hereinbefore contained notwithstanding."

By sect. 27, 24 & 25 Vic. c. 134, "the records and proceedings of every kind in the Insolvent Debtors' Court shall be records and proceedings of the Court of Bankruptcy, and shall be kept in such manner as they now are, subject to alteration by any general orders." Records of Court of Insolvency to be records of the Court of Bankruptcy.

By sect. 64, id. "the courts shall cause to be sealed with the seal of the courts all such records, proceedings, documents, and copies of the same as are by this act, or shall be by general orders required to be so sealed, and such other records, proceedings, documents, and copies of the same as the courts shall at any time direct."[1] Records and proceedings to be sealed.

VIII. Buildings occupied for Purposes of the Courts.[2]

[1] The following are the recent enactments, as to official documents:—

By 8 & 9 Vic. c. 113, s. 1, "whenever by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceedings, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made, or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

By 14 & 15 Vic. c. 99, s. 9, "every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purposes, in any court of justice in Ireland, or before any person having in Ireland, by law or consent of the parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

Sect. 10. "Every document which by any law in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England and Wales, or before any person having in England or Wales, or by law, or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or by the judicial or official character of the person appearing to have signed the same."

Sect. 11. "Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

Sect. 14 enacts, "that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio not exceeding ninety words."

[2] By sect. 68, 24 & 25 Vic. c. 134, "the building in Basinghall Street in the city of London, called the Court of Bankruptcy, and the building in Portugal Street, Lincoln's Inn Fields, called the Court for the Relief of Insolvent Debtors in England, together with the pieces or parcels of ground on which the same are severally erected, shall vest in the Commissioners of Her Majesty's Works and Public Buildings, and shall be appropriated

IX. As to Proceedings now Pending, and Course to be Adopted.

Proceedings pending in insolvency courts to be proceeded with.[1]

By sect. 20, 24 & 25 Vic. c. 134, "all matters of insolvency pending at the commencement of this act in any of the courts shall proceed and be completed therein as if this act had not been passed."

Power of courts to proceed summarily in winding up matters depending.

By sect. 24, id. "for the purpose of winding up as expeditiously and conveniently as may be all petitions, matters, and things which shall have been presented to or be depending in the said Court for the Relief of Insolvent Debtors, or any of the county courts, by virtue of any act for the relief of insolvent debtors, it shall be lawful for the commissioners or judges of such courts respectively, at any time after the passing of this act, to summon, as they shall deem fit, all or any of the parties to such petitions, matters, or things, or their solicitors, and thereupon to give such directions and make such orders as may be necessary for the purpose of settling and winding up the same, and to proceed for the purposes aforesaid in the absence of the parties or solicitors neglecting or refusing to attend such summons."

Recognisances of sureties entered into under 1 & 2 Vic. c. 110, for enforcing attendance of insolvents, extended.

By sect. 25, id. "every recognisance which may at the time of the passing of this act have been entered into by any person as surety to the provisional assignee of the Court for the Relief of Insolvent Debtors, with condition that the insolvent therein mentioned shall duly appear at the time and place theren mentioned, shall extend to bind the person who may have entered into the same, in case the insolvent debtor therein mentioned shall not at the time appointed in such recognisance duly appear before the court by which the petition or matter of such insolvent is heard in pursuance of this act, and on every adjourned hearing, or shall not abide by the final judgment of such court."

X. As to General Orders. *See* Appendix to this Title, and Analysis.

Purposes for which general orders are to be framed.

By sect. 45, 24 & 25 Vic. c. 134, "the Lord Chancellor shall, with the assistance of two commissioners, and subject to the provisions of this act, frame general orders for the following purposes:—

For regulating the practice and procedure of the courts of bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in the said courts, in all matters under this act:

For regulating the duties of the various officers of such courts:

For regulating the fees payable and the charges and costs to be allowed with respect to all proceedings before such courts, and before the county courts acting in bankruptcy:

For regulating the practice and procedure upon appeals:

For regulating the filing, custody, and inspection of records:

And, generally, for carrying the provisions of this act into effect."

General orders in county courts.

By sect. 46, id. "for regulating the practice and procedure of the county courts and the place and times of sitting thereof in matters under this act, general orders shall be framed in conformity with the provisions of this act, and subject to the sanction of the Lord Chancellor, by such judges of the said courts as the Lord Chancellor shall from time to time nominate for that purpose."

Alteration of general orders.

By sect. 47, id. "after such general orders shall have been so framed they or

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to such purposes as the Lord Chancellor shall direct.

By sect. 64, 12 & 13 Vic. c. 106, "that the several buildings which have been provided for the Court of Bankruptcy in the several districts in the country shall be used for the purposes of this act; and such buildings, and such as shall hereafter be provided for such court, in any district in the country, with the appurtenances and effects belonging thereto, shall vest in the respective commissioners acting in such several districts for the time being, in trust for the purposes of this act." *See* 5 & 6 Vic. c. 122, s. 78.

[1] By sect. 23, "the chief clerk of the Court for the Relief of Insolvent Debtors in England shall, on such day before the time appointed for the commencement of this act as the Lord Chancellor shall direct, make a return to the Lord Chancellor of all business then pending or remaining incomplete in such court; and the Lord Chancellor may, if he shall think fit, direct such unfinished matters to be proceeded with and completed before and by the commissioners of such court, who for such purposes shall retain and exercise all the jurisdiction, powers, and authorities now possessed by them respectively."

any of them may be rescinded or varied, and other general orders may be framed in manner aforesaid; and all general orders so framed from time to time shall be laid before both houses of Parliament within one month after the approval thereof by the Lord Chancellor, if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament." All general orders to be laid before parliament.

XI. As to Practice and Procedure of Court. *See* General Orders in Appendix, and Analysis.

By sect. 50, 24 & 25 Vic. c. 134, "the several courts exercising jurisdiction under this act may, in all matters within their respective jurisdictions, take the whole or any part of the evidence, either *vivâ voce* on oath, or by interrogatories in writing, or upon affidavit, or by commission abroad." Evidence, how to be taken.

By sect. 51, id. "the commissioners may sit at chambers for the despatch of such part of the business of their courts as can, without detriment to the public advantage arising from the discussion of questions in open court, be heard in chambers; and when sitting at chambers they shall have in all respects like power and jurisdiction as when sitting in court." Judges may sit at chambers.

By sect. 52, id. "the registrars of the Court of Bankruptcy shall have power to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to grant protection, to pass the last examination of any bankrupt in cases wherein the assignees and creditors do not oppose, to hold and preside at meetings of creditors, to audit and pass accounts of assignees, and to sit in chambers, and despatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general orders, or as the commissioner in any particular matter shall direct; but nothing herein contained shall empower a registrar to commit, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge. The registrar may adjourn any matter coming before him for the consideration of the commissioner. The Lord Chancellor may, by order, from time to time authorise the registrar of any county court to exercise any of the powers hereby given to the registrars of the Court of Bankruptcy." Registrars, their powers and jurisdiction. Registrars to sit in chambers. County-court registrars.

By sect. 53, id. "any party shall, during the proceedings before a registrar, be at liberty to take the opinion of the commissioner upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the registrar in the shape of a short certificate to the commissioner, who shall sign the same, if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the commissioner, at chambers or in open court." Parties may take opinion of the commissioner. Certificates of registrars at chambers to be binding.

By sect. 54, id. "parties and witnesses summoned before a registrar shall be bound to attend in pursuance of such summons, and shall be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna; and all persons wilfully and corruptly swearing or affirming falsely before a registrar shall be liable to all the penalties, punishments, and consequences of perjury." Penalties upon parties and witnesses not attending, or wilfully swearing falsely, before registrar.

By sect. 55, id. "if any person examined before a registrar shall refuse or decline to answer or to swear to or sign his examination when taken, the registrar shall refer the matter to the commissioner, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question, or to sign such examination." Persons refusing to answer may be ordered to pay costs.

By sect. 56, id. "in any bankruptcy or any other proceeding within the jurisdiction of the court the parties concerned or submitting to such jurisdiction may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal." Special case.

Payment of money by party on judgment being given.

By sect. 57, 24 & 25 Vic. c. 134, "the parties may, if they think fit, agree that, upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs."

Courts may direct registrar to hold meetings, &c.

Expenses of such registrar, &c.

Powers of registrar so acting.

By sect. 58, id. "the courts of bankruptcy may direct a registrar to attend at any place, within the district of the court to which he is attached, for the purpose of holding any meeting of creditors, of receiving proof of debts, and generally for the prosecution of any bankruptcy or other proceeding under this act; and the travelling and incidental expenses of such registrar, and of any clerk or other officer attending him, incurred in so acting, shall be settled by such court, and paid out of the assets of the estate in respect of which such registrar has so acted, or if there be no such assets, or if the assets be insufficient, then out of the chief registrar's account; and such registrar so acting shall have and exercise all powers, except the power of commitment, vested in such court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents: Provided always, that all depositions and examinations of persons and witnesses taken before such registrar, and all acts done by him, shall be reduced to writing, and be signed by such registrar, and shall be annexed to, and form part of, the proceedings."

Questions of fact may be tried by a jury.

By sect. 59, id. "it shall be lawful for the judges of the Court of Appeal in Chancery to direct any question of fact to be tried and determined before themselves by the verdict of a special or common jury. The judges of the said Court of Appeal in Chancery may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the superior courts of common law at Westminster, and also may make any other orders which may be requisite for the purpose of such trial; and every such jury shall consist of persons possessing the like qualifications, and shall be struck, summoned, and ballotted for and called, in like manner as if such jury were a jury for the trial of any cause in any of the said superior courts; and every juryman so summoned shall be entitled to the same rights, and be subject to the same duties and liabilities, as if he had been duly summoned for the trial of a civil action in any of the said superior courts; and every party to any such proceeding shall be entitled to the same rights, as to challenge and otherwise, as if he were a party to a cause in any of the said superior courts; and at the trial the jury shall be sworn to try the said question of fact, and a true verdict to give thereon, according to the evidence; and upon every such trial such court shall have the same powers, jurisdiction and authority, as any judge of the superior courts of common law sitting at Nisi Prius."

Issues may be directed.

By sect. 60, id. "it shall be lawful for the judges of the Court of Appeal in Chancery respectively to direct one or more issue or issues to be tried in any court of common law, and either before a judge of assize in any county, or, if required by circumstances, at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery."

Sealing and signature of warrants.

By sect. 63, id. "every warrant issued by any court under this act shall be under the seal of the court, and the hand of the commissioner; and every summons shall be under the hand of the registrar, and under the seal of the court."

Records and proceedings to be sealed.

By sect. 64, id. "the courts shall cause to be sealed with the seal of the courts all such records, proceedings, documents, and copies of the same as are by this act, or shall be by general orders, required to be so sealed, and such other records, proceedings, documents, and copies of the same as the courts shall at any time direct."

Want of form,

By sect. 65, id. "no rule, order, warrant, or other proceeding or document

required by this act to be in a form given in the schedules to this act, or to be given by any general order, shall be invalidated by reason of any want of form or omission therein, if such want of form or omission shall not, in the opinion of the court before which the same shall be brought, be calculated to mislead or prejudicially affect any party." where not to invalidate proceedings.

By sect. 66, "every decision or order of the judge of any county court acting in bankruptcy under this act shall be subject to appeal to the Court of Appeal in Chancery, in like manner, and under the same rules and regulations, as are now directed with respect to appeals from the London and district courts of bankruptcy to the said court of appeal, or as may hereafter be directed by general orders." Appeal from county courts.

By sect. 67, "the registrars, accountant in bankruptcy, master, official assignees, and messengers of the court in London, and of the district courts of bankruptcy, and the registrars of the county courts acting in bankruptcy, shall make to the chief registrar, in such manner and form as general orders shall direct, annual returns of the business of their respective offices; and from such returns the chief registrar shall frame a general return, judicial and financial, as to all matters within this act; and such general return shall be laid before Parliament by the Lord Chancellor as early as may be after the completion thereof; and the returns to the chief registrar shall be kept by him of record, and shall be open to the inspection of persons desirous of inspecting the same, on payment of the fee for inspection of proceedings set forth in Schedule (B.) to this act." Returns to Parliament.

XII. As to the Persons subject to the 24 & 25 Vic. c. 134.

By sect. 69, "all debtors, whether traders or not, shall be subject to the provisions of this act; but no debtor, who is not a trader, shall be adjudged bankrupt except in respect of some one of the acts of bankruptcy hereinafter described as applicable to a non-trader." Abolition of distinction between trader and non-trader.

XIII. As to the Persons subject to the Unrepealed Statutes.

Firstly, As to the Person.

(A) *As to Aliens and Denizens.*[1]

(B) *As to Ambassadors or their Servants.*[2]

(C) *As to Attainted Persons.*[3]

(D) *As to Clergymen.*[4]

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[1] By stat. 12 & 13 Vic. c. 106, s. 277, it is enacted, that "it shall extend to aliens and denizens, both to make them subject thereto, and entitle them to all the benefits given thereby." This clause, as to aliens and denizens, is the same in substance as a section in one of the repealed statutes (21 Jac. 1, c. 19, s. 15), upon which section it has been decided that aliens, or subjects residing in Scotland (*Alexander v. Vaughan*, Cowp. 398); Ireland (*Dodsworth v. Anderson*, Ld. Raym. 375); the Isle of Man (*Allen v. Cannon*, 4 B. & A. 418); the British colonies (*Ex-parte Smith*, Cowp. 402, *cited*, and see *Ex-parte Williamson*, 1 Atk. 82); or in any foreign country (*Bird v. Sedgwick*, 1 Salk. 110), trading to or from this country—that is to say, buying goods in England and sending them abroad for sale, or buying goods abroad and sending them to England for sale, may, if they come here and commit an act of bankruptcy, be made bankrupts here.

[2] A servant of an ambassador or public minister may be a bankrupt. The stat. 7 Anne, c. 12, after containing enactments for preserving inviolate the privileges of ambassadors, and other public ministers of foreign states, directs, by s. 5, "that no merchant, or other trader whatsoever within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador, or other public minister, shall have or take any manner of benefit by that act." *See ante*, vol. i. Ambassador, p. 317, and id. *Deserisay v. O'Brien*, Ca. Pr. 134. *Martin v. Shawpin*, id. 65.

[3] *Semb.* a commission may be supported against a person attainted. In *Ex-parte Bullock*, 14 Ves. 452, *Lord Eldon* asked, "Could a commission be taken out after attainder? That is a considerable point, recollecting all that is to be done under a commission. In Foster it is held, that an attainder does not prevent a civil action against the attainted party." *See ante*, Attainder, p. 1; and *see* Cro. Eliz. 516; Owen, 61; Noy. 1; and *Re Medhurst*, 11 July, 1861: *Cresswell, J.*

[4] A clergyman, if he trade, may become

(E) *As to Commons, Members of House of.* *See* Commons, House of.

(F) *As to Executors, Administrators, or Trustees.*[1]

(G) *As to Infants.*[2]

(H) *As to Lunatics.*[3]

(I) *As to Married Women.*[4]

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bankrupt. In arguing against the validity of a commission of bankruptcy the counsel abandoned an objection, which was at first taken, that the defendant was a clergyman, in priest's orders, and that the clergy being prohibited, by the 21 Hen. 8, c. 13, from using any manner of merchandise, the defendant could not legally be said to be an object of the bankrupt laws. *Hankey & another v. Jones*, Cowp. 745. The court said this prohibition is properly construed as a penalty upon the bankrupt only, and not interpreted so as to enable him to avoid the contract for his own benefit, or to exempt him from any remedy the creditors might have against him. 2 Camp. 144; 1 East, 180. *Ex-parte Meymott*, 1 Atk. *Hull v. Franklin*, 3 Mee. & W. 259. (1 & 2 Vict. c. 106.)

[1] An executor or other person, who carries on a business as trustee in pursuance of the will of a deceased trader, may be a bankrupt in respect of such business. *Ex-parte Garland*, 10 Ves. 110. *Viner v. Cadell*, 3 Esp. 88. *Ex-parte Nutt*, 1 Atk. 102. *Ex-parte Richardson*, 1 Madd. 138. But not by merely selling off the deceased's stock-in-trade, although he be obliged to purchase articles to mix with it in order to make it saleable. *Ex-parte Nutt*, 1 Atk. 102; Cooke, 78, 79. But if he carries on the trade with an intent to continue it indefinitely, and to make a general profit either for the benefit of himself or of those who were entitled to the testator's or intestate's stock-in-trade, he clearly would be a trader subject to the bankrupt laws. *See* 4 H. & N. 1; 28 L. J. Ex. 47.

In a work of repute (1 Cooke, B. L. 78, 8th edit.) it is laid down generally, that there can be no such thing as an equitable bankruptcy; it must be a legal one, and the party must be a trader in his own right: for if a person that is a trader make another his executor, who only disposes of the stock of his trade, it will not make the executor a trader, and liable to be a bankrupt. *See* 2 P. Wms. 429. *Hankey v. Hammond*, cited 1 Cooke, 78, 8th edit.; *Hankey v. Towgood*, cited id. Mr. Cullen, in commenting upon these cases, observes that, though a person may carry on a trade *en autre droit* as executor or trustee, and if those with whom he deals are not apprised of the capacity in which he acts, or the circumstances of the fund upon which the trade is carried on, may make himself personally liable—for this would be trading on his own personal credit—yet it is not easy to imagine how a person, acting notoriously and *bonâ fide* in the capacity of a trustee, can become a bankrupt in respect of such trading, unless he could be supposed capable of committing an act of bankruptcy also *en autre droit*. *See* Christian's *Bankrupt Laws*, p. 76, 2d edit.

[2] An adjudication cannot be sustained upon a trading during infancy. *The King v. Cole*, 1 Ld. Raym. 443; S. C. 12 Mod. 243; S. C. Holt. 360. And where one of a firm is a minor there cannot be a joint adjudication; and it may be superseded, not only upon the petition of the infant, but of any other person interested, as of the assignees, under a separate commission. *Ex-parte Henderson*, 4 Ves. 163–178. *Ex-parte Barwis*, 6 Ves. 102. A petition was presented by a bankrupt, praying that the adjudication might be annulled, on the ground that he was under the age of twenty-one years at the time it issued. The assignees opposed it. *Per Lord Chancellor Eldon:*—"As it appears, in this case, that the petitioner held himself forth to the world as an adult, and *sui juris*, and traded in that character, and contracted debts to a considerable amount, for two years previous to the commission; and as this petition is opposed on behalf of the creditors, I will make no order, but leave the bankrupt to bring his action at law, if he shall think proper so to do. I consider him no more entitled to any favour or assistance than a *feme covert*, who lives apart from her husband, and holds herself out as a *feme sole*, and contracts debts, is entitled to any summary relief from the judges at common law, who always leave a woman of that description to make the best she can of her plea of coverture in any action brought against her, and constantly refuse to interfere so as to afford her summary relief." *Ex-parte Watson*, 16 Ves. 265. *See* 1 Ves. & B. 424; 2 Mont. D. & D. 337. The infant may try the validity of the proceedings without applying for a *supersedeas*. *Bellin v. Hodges*, 2 M. & Scott, 496.

[3] They may be bankrupt, provided the act of bankruptcy be committed during a lucid interval. *Anon.* 13 Ves. 590. *Ex-parte Glump*, 1 De Gex, 345. *Ex-parte Layton*, 6 Ves. 434; 13 id. 590; Christian, B. L. 84, 2d edit.; Shelford on Lunacy, 429.

[4] In all cases where the trade of a married woman is not under the control of her husband, and he is not answerable for the debts contracted by her in it; or, in other words, in all cases where, in actions against her upon her contracts in trade, coverture would be no plea, she is subject to the bankrupt laws as fully as a *feme sole*. See *Ex-parte Preston*, 1 Cooke, 40. *Ex-parte Mear*, 2 Bro. 266. Therefore a married woman, although living upon a separate maintenance apart from her husband,

(K) *As to Peers.*[1]

(L) *As to Uncertificated Bankrupts.*[2]

SECONDLY, AS TO THE TRADING.[3]

who is in England (*Marshall v. Rutten*, 8 T. R. 845), or a married woman in respect of her trading as a *feme sole* before marriage (*Ex-parte Mear*, 2 Bro. 266), cannot be bankrupt; but the wife of a convict sentenced to transportation may be a bankrupt if she become a trader, and although, in fact, the husband remains in England (*Ex-parte Franks*, 1 M. & Scott, 1; 6 M & P. 1; 7 Bing. 762); and also a *feme covert*, who is a sole trader according to the custom of London, may be a bankrupt. *Lavie v. Phillips*, 3 Burr. 1776. *Ex-parte Carrington*, 1 Atk. 206.

By the law of Scotland, when there is a separation, and the wife acts as a single woman, and entering into trade in that character is trusted, she may be a bankrupt. Bell. 50.

[1] A peer may be a bankrupt. In *Ex-parte Meymott*, 1 Atk. 197, *Lord Hardwicke* observed, "A commission of bankruptcy issued against a peer, an Earl of Suffolk, for trading in wines, and though there may be some particular powers that commissioners of bankruptcy cannot exercise against a peer, yet, notwithstanding this, he may be liable to a commission of bankruptcy." See *Sir John Wolstenholme's case*, 1 Hughes, *Abridg.* 315.

[2] A second adjudication of bankruptcy against an uncertificated bankrupt is a nullity, because his property, as well after acquired or otherwise, is already assigned under the first bankruptcy. Cowp. 824; 15 Ves. 114; 3 Mont. & Ayr. 294; 7 B. & C. 684.

[3] A single instance of trading will not support an adjudication, where the intent to trade generally is not proved. *Ex-parte Wilkes*, 2 Mont. & Ayr. 667. Where a person engaged in the Greenland whale-fishery made three purchases of oil, one of which he sold again, it was held, that it was a question for the judge to determine whether these dealings constituted a trading within the meaning of the stat. 1 Jac. 1, c. 15, s. 2. *Gale v. Halfknight*, 3 Stark. 56. So, trading, in the instance of an attorney buying and selling books, may be sufficient in the absence of any fraudulent intention: the nature of the dealing, though small, being such as to manifest an intention to deal generally. *Ex-parte Bryant*, 1 Ves. & B. 211; 1 Rose, 288. *Ex-parte Dart, re Sandys*, 2 Deac. & Chit. 543. A fisherman buying fish of other boats at sea, and selling it on shore, is a trader; and if such be the usual practice of a particular class of fishermen, one of them who is proved to have done so once will be presumed to have continued to carry on his business in the same manner till the time of his bankruptcy. *Heanny v. Birch*, 1 Rose, 356; 3 Camp. 233. The publisher of a newspaper, buying the whole daily impression from the proprietors, reselling it at a profit, and bearing the loss of such as remain unsold, is a trader within the bankrupt laws. *Gimmingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472. The true criterion to decide the question of trading is not whether the party bought and sold to increase his income, but whether he did so with a view to gain his livelihood. A party having no other visible occupation was made a bankrupt, as a dealer in yachts. The only evidence of a trading was, that upon three several occasions he bought and sold a yacht for profit, realising on such sale a profit of 190*l.*; and that on some of these occasions he employed a broker, to whom he said, that "he thought it no disgrace thus to increase his income," but there was no direct evidence that he thus dealt for the purpose of gaining his livelihood, or that he was considered as a trader by any person who knew or dealt with him. *Ex-parte Cromwell, re Young*, 1 Mont. D. & D. 158.

Where a trader has been proved to have traded in the usual course once, he will be presumed to have continued to carry on his business in the same manner until the time of his bankruptcy. *Heanny v. Birch*, 1 Rose, 356; 3 Camp. 233.

To constitute a trading, the transactions must not be isolated, but if the intention be to carry on the particular pursuit to seek a livelihood, thereby even a single act will suffice. See *Heanny v. Birch*, 3 Camp. 233. The intention, not the quantity, is the test (*Ex-parte Moule*, 14 Ves. 602), and a dealing generally is sometimes defined as a willingness to supply any one who will come to buy. So, where the trading has been abandoned, the existence of an intention to resume will be a question of fact. The buying and selling is not trading if it be only ancillary to the enjoyment of real property, or as, for instance, the owner of a colliery selling coal that he has bought, together with part from his own mine. See *Ex-parte Salkeld*, 3 Mont. D. & D. 125. These being the general principles, the specific pursuits are stated in the text and notes. It is to be observed that a contract to victual the fleet will not make a man a trader, although he sell the surplus (*Gibson v. Thompson*, 3 Keb. 415; Skin. 392); nor are commissioners of the navy, sutlers of the army, the king's butlers, or stewards of inns of courts, or farmers of the customs, traders by reason of their respective offices. (Id.)

Whether a man is a trader within the bankrupt laws is a question of law and not of fact. *Hankey v. Jones*, Cowp. 752. A trading to support an adjudication depends upon the intention: and it is a question for a jury whether there is enough to evidence the intention. *Ex-parte Magennis*, 1 Rose, 84. *Patman v. Vaughan*, 1 T. R. 572. If a man buys, and represents himself as a dealer, and offers goods in exchange, it has been

Secondly, *As to the Trading*—(*continued.*)

(A) *As to the Place where carried on.*[1]

(B) *As to the Time of Trading, and of the effect of apparently continuing to Trade.*[2]

(C) *As to the Trade carried on.*

(*a*) *In general.*[3]

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held that it should be left to the jury to say whether he did not buy to sell again. *Milliken v. Brandon*, 1 C. & P. 380. The question when a trader ceases to trade is, in all cases, purely for the consideration of the jury. *Dance v. Wyatt*, 4 M. & P. 201.

The declarations of a bankrupt to a party with whom he is dealing respecting his transactions in trade, are not evidence to prove the trading of such bankrupt. *Brinley v. King*, 1 C. & P. 646; S. C. nom. *Bromley v. King*, R. & M. 228. But declarations made by a party of his object in buying a particular article are admissible in evidence to prove his intention, and whether he thereby became a trader. *Gale v. Halfknight*, 3 Stark. 56. An acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading, although no acts of buying or selling were proved to have taken place during the partnership. *Parker v. Barker*, 3 Moore, 226; 1 B. & B. 9.

[1] It is not essential that the trading should be in England. *Doddesworth v. Anderson*, T. Raym. 375.

Hence a person living in the Isle of Man, coming from time to time to England to buy goods, and selling them in the island, but never in England (*Allen v. Cannon and others*, 4 B. & Ad. 418); or a person not residing within the realm who comes occasionally to England and trades (*Alexander v. Vaughan*, Cowp. 398); or a factor trading from Lisbon to London, are respectively liable to the bankrupt laws. *Bird v. Sedgwick*, 1 Salk. 100. And where a trader carried on business on his own account in London, who was also one of a firm in Ireland, and sent goods from England to that firm, it was holden that the whole firm were traders within the English bankrupt statutes. *Williams v. Nunn*, 1 Taunt. 270; S. C. 1 Camp. 152. *See* 9 N. Ch. R. 150.

[2] A debt contracted during the bankrupt's trading, though he may have since retired from trade (*Bateman v. Harvey*, 1 Lev. 17. *See* 2 Keb. 452–3, 487; 1 Vent. 5, 29; 1 Sid. 411; Palm. 323; 1 Ld. Raym. 286), or contracted previous to his trading, will support an adjudication (*Butcher v. Easto*, 1 Dougl. 295); and if the debt be contracted whilst the bankrupt was in trade it is sufficient, though it has been merged by the trader giving afterwards a higher security (*Dawe v. Holdsworth*, Peake, 64); but he is not liable to be bankrupt for debts contracted subsequent to his retiring from trade. *Meggott v. Mills & another*, 12 Mod. 159; S. C. 1 Ld. Raym. 286; S. P. *Anon.* Comb. 463; S. P. *Bateman v. Harvey*, 1 Lev. 17; *Willoughby v. Thornton*, 1 Selw. N. P. 175; *Doe d. Barnard v. Lawrence*, 2 C. & P. 134; *Ex-parte Dewdney*, 15 Ves. 495. And where the bankrupt had contracted a further debt after he had retired from trade, and paid money without any direction as to its application, it was holden that the payment went in liquidation of the old debt. *Meggott v. Mills*, 1 Ld. Raym. 287; S. C. 12 Mod. 159. So where a trader, who had retired, continued selling off his stock, it was holden that he could not be made a bankrupt on account of such dealing. *Cotton v. Daintry*, 1 Vent. 29; S. C. 2 Keb. 487. But where a fisherman has occasionally bought and sold fish as incidental to his business, it will be presumed, whilst he remains a fisherman, that he carries on business in the same manner. *Heanny v. Birch*, 3 Camp. 233. Though if a trader solicits orders and evinces any intention to trade, although he ceases to manufacture, he is, nevertheless, a trader within the meaning of the bankrupt laws. *Wharam v. Routledge*, 5 Esp. 235. *Rawlinson v. Pearson*, 5 B. & A. 124. *See* 1 Rose, 402; 2 id. 357; 1 M. & M. 263; S. C. 3 C. & P. 500.

[3] By s. 65, 12 & 13 Vic. c. 106, "all alummakers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach-proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee-houses, lime-burners, livery-stable keepers, market-gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener receiving other men's monies or estates into their trust or custody, persons insuring ships or their freight or other matters against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt: Provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading company established by charter or act of Parliament, shall be deemed as such a trader liable to become bankrupt."

(*b*) *Particular Trades.*

Agents.[1] *See* Factor.
Alum-maker.[2]
Apothecaries.[3]
Army Agent.[4]
Artizan.[5]
Attorney.[6]
Auctioneer.[7]
Baker.[8]
Banker.[9]
Bills, Negotiators of.[10]
Blacksmith.[11]
Bleacher.[12]
Boarding-house Keeper. See Lodging-house Keeper.
Brewer.[13]
Broker.[14]
Brickmaker.[15]
Builder.[16]

[1] By s. 65, 13 & 14 Vic. c. 106, "all persons who, as *agents* or factors, seek their living by buying and selling, are traders."

[2] Trader by s. 65, 12 & 13 Vic. c. 106. *See* 5 & 6 Vic. c. 122.

[3] Trader by id. See *Ex-parte Daubeny*, 2 Deac. 72; 3 Mont. & Ayr. 16.

[4] *Qu.?* *See* 1 Mont. B. L. 2; 6 Geo. 4 c. 16, s. 2.

[5] As such not a trader. See *Crisp v. Pratt*, Cro. Car. 551. *Wills v. Parker*, Cooke, B. L. 47.

[6] In *Ex-parte Warren*, 2 Sch. & Lef. Rep. the *Lord Chancellor* said, that it must now be pretty well understood, that an attorney or solicitor, acting in the common and ordinary business of solicitors, and merely taking procuration-money upon a loan, does not thereby become a scrivener subject to the bankrupt laws. *Vide infra*, Scrivener.

[7] Trader by s. 65, 12 & 13 Vic. c. 106. Might be so as a furniture-broker. *Ex-parte Moore*, 2 Deac. 287.

[8] Is a trader. Cullen, B. L. 13; 3 Mont. & Ayr. 130.

[9] Trader by s. 65, 12 & 13 Vic. c. 106. In *Ex-parte Wilson*, 1 Atk. 218, it was said, that a person who receives money as a banker, although his books are kept in a different manner from that in which bankers' books are usually kept, and although, upon receiving any large sum, he pay it to his own established banker, upon whom he gives drafts for the payments of large bills upon him, he only keeping cash to answer small drafts, is a banker within the bankrupt statutes. To constitute a banker he need not keep an open shop. (Id.) An agent to a regiment is deemed a banker for special purposes. *See* 2 H. Black. 235, as to the holding of shares in a joint-stock bank being a trading. See *Ex-parte Hale*, 3 Deac. 405. *Ex-parte Wyndham*, 1 Mont. D. & D. 146.

It is now settled that members of banking companies under 7 Geo. 4, c. 64, cannot be made bankrupt in respect of debts of the company, without previous judgment against the public officer, for the statute requires all legal proceedings to be taken against such public officer in the first instance. *Davison v. Farmer*, 6 Ex. 242, overruling *Ex-parte Wyndham*, 1 Mont. D. & D. 146; *Ex-parte Wood*, id. 92. In these cases no notice appears to have been taken of the proviso similar to this contained in 6 Geo. 4, c. 16, s. 2. Where shares were purchased by the bankrupt for the mere purpose of obtaining the benefit of the bankrupt laws, it was held on the petition of a creditor not to be a sufficient trading to support the bankruptcy. 2 Deac. 219.

[10] A trader resident abroad, drawing bills upon this country for the value of other bills sent here for the sake of the exchange, and contracting debts here, is a trader within the bankrupt laws. *Inglis v. Grant*, 5 T. R. 530. But an occasional drawing and redrawing of bills, though for the sake of profit, as where it is done for the purpose of raising money to improve a person's own estate, does not render the person subject to the bankrupt laws. *Hankey v. Jones*, Cowp. 745.

[11] One who buys iron, and manufactures it into horse-shoes to all who come to him, without making a demand for his time, is amenable to the bankrupt laws. *See* 1 Christ. B. L. 49.

[12] Formerly it was conceived that a bleacher could not be made a bankrupt (1 Mont. B. L. 17; Christ. B. L. 46), but now, by s. 65, 12 & 13 Vic. c. 104, as they were by 6 Geo. 4, c. 16, s. 2, they are expressly declared to be traders.

[13] A brewer, as such, is subject to the bankrupt laws. *See* 1 Cooke, B. L. 48.

[14] Trader by s. 65, 12 & 13 Vic. c. 106.

[15] Id. Formerly a man who sold and made bricks with a view to profit, if made from his own land, was not a trader. *Parkes v. Wells*, 1 T. R. 34. *Sutton v. Weeley*, 7 East, 442. *Ex-parte Harrison*, 1 Bro. C. C. 122. But if the bricks were made from earth procured expressly for the purpose it was otherwise. (Id.)

[16] Trader, by s. 65, 24 & 25 Vic. c. 104. A person who buys land to build houses on, and let or sell them, is not a builder within the bankrupt laws, if what he does is an isolated transaction, and not part of a general system of business (*Stuart v. Sloper*, 3 Ex. 700; 18 L. J. Ex. 321); but the fiat in this instance was annulled without costs, as the alleged bankrupt, a barrister, had accepted a bill addressed to him as a "builder." *Ex-parte Stuart*, 3 De Gex & S. 554; 18 L. J. Bank. 14. *See* also *Ex-parte Edwards*, 1 Mont. D. & D. 2. But in *In re Fowler*, 1 Fonb. 201, Mr. Commissioner Fane expressed his dissatisfaction with the opinion of the jury in *Stuart's case*, and held that a person who exercised the profession of an architect, and purchased several pieces of ground in different places, and pulled down the build-

Burner of Lime.[1]
Butcher.[2]
Butlers or Stewards of Inns of Court.[3]
Buying and Selling, Buying and Letting for Hire.[4]
Calenderer.[5]
Calico Printer. *See* Printer.
Carpenter.[6]
Carriers.[7]
Cattle and Sheep Salesmen.[8]
Cheese-maker.[9]
Clothier.[10]
Coach Proprietor.[11]
Coal Dealers and Owners.[12]
Coffee-house. *See* Innkeeper.
Company, Members of. *See* Joint-stock Company.
Contractors supplying Stores.[13]
Corporation, Members of.[14]

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ings erected thereon, and built new houses with materials which he bought for that purpose, and did not employ a builder to carry on the works, but did himself pay the several persons employed thereon, with the intention of selling or otherwise disposing of the ground and the buildings so erected thereon, was a builder within the meaning of the bankrupt laws. *Ex-parte Neirincks*, 2 Mont. & Ayr. 284, would hardly now be supported.

[1] In *Ex-parte Ridge*, Rose, 316, a man rented a quarry, dug the stones, burnt them, and sold the proceeds when burnt as lime. *Lord Eldon* held he was not a trader, and superseded the commission.

[2] Is a trader within the bankrupt laws. *Dully v. Smith*, 4 Burr. 2148. But not if he merely kills and sells cattle he breeds and rears himself. (Id.)

[3] Not traders. *Gibson v. Thompson*, 3 Keb. 451; Skin. 392.

[4] Trading by s. 65, 24 & 25 Vic. c. 104. These general terms include persons who, whether on a large or small scale, purchase goods or materials to sell them again in their original or in an altered state. But merely selling and not buying, as a fisherman selling what he has caught, is not a trading (*Heanny v. Birch*, 3 Camp. 233); nor a farmer selling horses or stock which he has bred upon his farm. Buying and selling land is not within the statute. And owners or occupiers of land, who convert the soil into a source of profit, are not traders: *e.g.* a coal-owner, who works and sells the produce of his mine (*Anon.* 1 Fonbl. 251), or who sells stones from his quarry (*Ex-parte Gardner*, 1 Rose, 377), or who manufactures salt from salt-pits (*Ex-parte Atkinson*, 1 Mont. D. & D. 300); or a farmer working a lime-pit and selling the surplus beyond what he requires for manure. *Ex-parte Ridge*, 1 Ves. & B. 360. In these and similar cases the question is, whether what is done is a means of enjoying the profits of the land, or whether it is a manufacture carried on as a trade? A schoolmaster supplying his scholars with books, &c. at advanced prices, is not a trader (*Valentine v. Vaughan*, Peake, 76), for there is no intention of selling generally. The workmanship of goods and commodities includes persons who, by their own personal labour, manufacture goods for sale. A livery-stable keeper buying horses for the purpose of letting out, and occasionally letting them out even without a horse-dealer's license, may become a bankrupt. *Martin v. Nightingale*, 11 Moore, 305. But a person who buys furniture for the purpose of furnishing apartments, and lets the apartments so furnished (2 Deac. 39), or the shareholders of a steam-packet, are not traders within this clause. *Ex-parte Wiswould*, Mont. 263.

[5] Trader by s. 65, 12 & 13 Vic. c. 104.

[6] Id. Under the early statutes it was questionable whether he was a trader. *Chapman v. Lansphere*, 3 Mod. 145; S. C. Camp. 74.

[7] Id.

[8] Id. See *Mills v. Hughes*, Willes, 139; Christ. B. L. 579. A farmer accustomed to purchase more sheep than necessary to stock his farm, and to sell the surplus at a profit, is a trader within this section. *Ex-parte Newall*, 3 Deac. 333.

[9] A farmer who makes and sells cheese on his own farm is not a trader. *Per Lord Mansfield* in *Wells v. Parkes*, 1 T. R. 34; 1 Cooke, B. L. 60; 1 Mont. B. L. 9; 7 East, 447.

[10] Is a trader. 1 Cooke, B. L. 48.

[11] Trader by s. 65, 12 & 13 Vic. c. 104.

[12] Persons who buy coals to sell again, with a view to profit, are liable to be made bankrupt; but if they sell only such as they procure from their own mines they are not. *Port v. Tartin*, 2 Wils. 169. *See* Cooke, B. L. 48, 8th ed.

[13] Not a trader. *Littleton's case*, 1 Vent. 270. *Erfin v. Thompson*, 3 Rob. 451.

[14] Formerly a member of the East India Company was, *as such*, amenable to the bankrupt laws (*Wolstenholme's case*, 1 Hughes, Abr. 315), but now the trading which arises from being a member of a *corporate* company is not in any case a trading within the bankrupt laws (*Ex-parte Bell*, 15 Ves. 355; 2 Mont. B. L. n. d.); hence no member of the East India Company is a trader on account of the stock he holds. 9 & 10 Wm. 3, c. 44; 13 & 14 Car. 2. Neither is a member of the Guinea Company (13 & 14 Car. 2); nor an adventurer in the Royal Fishing Trade (id.); nor a member of the Bank of England (8 & 9 Wm. 3, c. 20; 3 Geo. 1, c. 8, s. 43); nor a member of the London Assurance or the Royal Exchange Assurance Companies (6 Geo. 1, c. 13, s. 6); nor a member of the South Sea Company (9 Anne, c. 21, s. 42; 8 Geo. 1, c. 21, s. 12); nor a member of the English Linen Company (4 Geo. 3, c. 37, s. 13). And it seems that

Cowkeeper.[1]
Cider-maker.[2]
Drover.[3]
Dyer.[4]
Exchange and Barter Dealers.[5]
Exchequer Bills, Circulators of.[6]
Factor.[7]
Farmer.[8]
Freight, Insurer of.[9]
Fuller.[10]
Fisherman.[11]
Grazier.[12]
Gun-founders to the Crown.[13]

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the having a share in the Stationers' Company is not a trading. 2 Ld. Raym. 851; Cooke, B. L. 69. And generally, by sect. 65, 12 & 13 Vic. c. 104, no member of, or subscriber to any incorporated, commercial, or trading companies, established by charter or act of parliament, shall be deemed, as such, a trader subject to the bankrupt laws.

[1] Trader, by s. 65, 12 & 13 Vic. c. 104. Although the act specifies cowkeepers as persons liable to the bankrupt laws, it does not, of course, mean to include all persons who keep cows. A farmer in the Isle of Thanet, occupying two farms, containing together 200 acres, kept five cows, four of which were Alderneys, and seven horses, and no other stock: it was held that his selling the milk of the cows regularly to a retail dealer in Margate, who paid for it on the average 30*s.* a-week, did not render him subject to the bankrupt laws as a cowkeeper. *Ex-parte Dering*, 1 De Gex, 398; 16 L. J. Bank. 3; 11 Jur. 92.

[2] A farmer does not become a trader by making his own apples into cider and selling it. *See* Cooke, B. L. 60; 1 Mont. B. L. 9; 1 T. R. 34; 7 East, 447.

[3] A person who buys and sells cattle at one fair, keeps them three or four days on his own ground, and then drives them to another, was a *drover* within the meaning of the bankrupt laws, and as such within the exception in the 5 Geo. 2. *Mills v. Hughes*, Willes. 588; Bull. N. P. 394. But "drover" not being mentioned in sect. 65, 13 & 13 Vic. c. 104, and the 40th section of the 5 Geo. 2, which exempted him from the operation of the bankrupt laws, being repealed, and the above case of *Mills v. Hughes* having decided that a drover is a person "who buys and sells," he is within the clause relating to buying and selling, and a trader. *See* W. Jones, 309; 11 East, 274; 1 Swanst. 65.

[4] Trader by s. 65, 12 & 13 Vic. c. 104: was so under the earlier statutes. See *Squire v. Johns*, Cro. Jac. 585; 1 Cooke, B. L. 48.

[5] Id.

[6] The statutes relating to exchequer bills expressly provide that a party circulating the same shall not be deemed a trader within the bankrupt laws. *See* 1 Mont. B. L. 11; Cooke, B. L. 79, 8th edit.; Cullen, B. L. 21; Chit. Bills, 431.

[7] Trader by s. 65, 12 & 13 Vic. c. 104.

[8] The 65th sect. 12 & 13 Vic. c. 104, enacts, that "no farmer shall be deemed a trader." Under this exception difficult questions frequently arise, because, although a farmer as such is exempt, yet if his purchases be in a greater degree than is ancillary to the profitable expenditure of the produce of his farm, or if a grazier indicate an intention to buy and sell generally, he will be liable. *See* Report of Commissioners in 1840.

It is impossible to lay down any more definite principle; each case must depend upon its peculiar circumstances. See *Ex-parte Gibbs*, 2 Rose, 38. *Patten v. Browne*, 7 Taunt. 409. *Stewart v. Bull*, 2 N. R. 78. *Bloxham v. Graham*, Peake's Add. Cas. 3.

Reference to the following illustrations, however, may be useful:—

Although a farmer as such cannot be bankrupt, yet if he carry on any other trade with his farm, which is the principal means of his livelihood, this auxiliary trading subjects him to the bankrupt laws. *Mayhoe v. Archer*, 8 Mod. 46; S. C. 1 Stra. 513. As if he buys and sells horses with a view of making a profit. *Bartholomew v. Sherwood*, 1 T. R. 573 n. And even *ordering* a license as a horse-dealer. *Wright v. Bird*, 1 Price, 20. But in *Ex-parte Gibbs*, 2 Rose, 38, *Lord Eldon* held, that a farmer who buys and sells horses for profit beyond what is incidental to his occupation as a farmer, may be a bankrupt as a dealer in horses, though he is not licensed as a horse-dealer. But a farmer who occasionally buys pigs to sell again, which he feeds from the produce of his farm (*Patten v. Browne*, 7 Taunt. 409); or who purchases seed to be re-sold, and which is mixed with that which he uses on his farm (id.); or who occasionally buys cattle, corn, &c., and sells them immediately without using them on the farm, is not a trader within the meaning of the bankrupt laws. *Stewart v. Ball*, 2 N. R. 78.

[9] Trader by s. 65, 12 & 13 Vic. c. 104.

[10] Id.

[11] A fisherman by purchasing fish at sea, for the purpose of making up a cargo, which he carries ashore and sells, renders himself amenable to the bankrupt law. *Heanny v. Birch*, 3 Camp. 233.

Whether a person engaged in the Greenland fishery, who has purchased oil at three different periods, is a trader, is a question for the jury. *Gales v. Halfknight*, 3 Stark. 56.

[12] Not a trader by s. 65, 12 & 13 Vic. c. 104. The 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, expressly declare that graziers shall not be subject to the bankrupt laws. A farmer and grazier buying and selling cattle from time to time beyond the occasions of his farm is not the less exempt. *Bolton v. Sowerby*, 11 East, 274.

[13] Are not traders. *Luton v. Bigg*, Skin. 292.

Guinea Company, Members of.[1]
Horse-dealer.[2]
Horse-letting. *See* Livery-stable Keeper.
Hotel Keeper. *See* Innkeeper.
Hounds, Keeper of.[3]
Innkeeper, Keeper of Taverns, Hotels, or Coffee-houses.[4]
Insurers.[5]
Insurance Broker.[6]
Iron Manufacturer.[7]
Joint-Stock Company. *See* that title.
Labourer, Common.[8]
Lime-burner.[9]
Livery-stable Keeper.[10]
Living by Buying only or Selling only.[11]
Locksmith.[12]
Lodging-house Keeper.[13]

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[1] Not traders. 9 & 10 Wm. 3, c. 44, s. 74; s. 45, 12 & 13 Vic. c. 104.

[2] Buying and selling horses with an avowed intention to take out a license and become a dealer, is sufficient to constitute a trading within the bankrupt laws, however limited the trading, and though no license had been actually taken out. *Wright v. Bird*, 1 Price, 20. But a person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he might sell such skins at a profit. *Summersett v. Jervis*, 6 Moore, 56; 3 B. & B. 2. A. was a horse-dealer and livery-stable keeper. After his death his widow carried on the business of the livery stable, but without any license, and bought horses to let, which she occasionally sold to customers; it was held a sufficient trading to support an adjudication of bankruptcy against the widow. *Martin v. Nightingale*, 3 Bing. 421; 11 Moore, 305.

[3] Not a trader; nor is a person who buys dead horses for his dogs, and sells the skin and bones for a profit. *Summersett v. Jervis*, 3 B. & B. 2; 6 Moore, 56.

[4] Formerly an innkeeper was not amenable to the bankrupt laws, unless he sold liquors out of his house; but s. 46, 12 & 13 Vic. c. 104, expressly makes him so. *Patman v. Vaughan*, 1 T. R. 572. And the extent of such dealing out of the house was considered material. *Buxall v. Hogg*, 3 Wils. 146. And ought to be found by the jury. *Wollett v. Thomas*, 2 Chit. Rep. 651. Hotel-keepers, of course, were not within the prior statutes. The owner of a private lodging-house, who also seeks a profit by finding and cooking provisions for her lodgers, would be liable as an hotel-keeper, although the provisions were set apart as the separate property of each lodger; but otherwise if she does not sell provisions. *Ex-parte Wilks*, 2 Deac. 1; 2 Mont. & Ayr. 667. *Ex-parte Bowers*, 2 Deac. 99; 3 Mont. & Ayr. 53. So, also, keeping a boarding-house, where the guests are entertained by the month, week, or other definite time, each having a bedroom to himself, but taking his meals with the proprietor of the house, is a trading as an hotel-keeper. *Ex-parte Birch*, 2 Mont. D. & D. 659. *Gibson v. King*, 6 Jur. 1044; 10 Mee. & W. 667; 1 Car. & Mont. 458. *Ex-parte Daniell*, 7 Jur. 334. So the owner of a house who lets apartments to different tenants for different periods, from a week to a year, and supplies the inmates with provisions and wine at stated prices, is an hotel-keeper within the statute. *King v. Simmonds*, 1 Clark & Fin. N. S. 754; 12 Jur. 903. *Smith v. Scott*, 9 Bing. 14.

[5] Traders by s. 65, 12 & 13 Vic. c. 106. "Applies to persons insuring ships or their freight, or other matters, against the perils of the *sea*."

[6] Not within s. 65. *Ex-parte Stevens*, 4 Mod. 256.

[7] One who purchases bar-iron and manufactures it into wares is a trader. Com. Dig. Bankrupt.

[8] Not a trader by s. 65, 12 & 13 Vic. c. 104.

[9] Trader by s. 65. See *Ex-parte Ridge*, 1 Rose, 316. *Paul v. Dowling*, 3 C. & P. 500.

[10] Trader by s. 65, 12 & 13 Vic. c. 104. *Martin v. Nightingale*, 11 Moore, 305.

[11] A trader is described in s. 65 as "persons who seek their living by buying *and* selling." *See* 1 Cooke, B. L. 74, 8th edit.

[12] A trader. Cooke, B. L. 48, 8th ed.

[13] Under the stat. 6 Geo. 4, c. 16, s. 2, it was held, that the keeper of a private lodging-house, who also sought a profit by furnishing her guests with provisions, was subject to the bankrupt laws as an hotel keeper, although the provisions were set apart as the separate property of each guest. *Smith v. Scott*, 9 Bing. 14; 2 M. & Scott, 35. A person may be a lodging-house keeper without being a trader; but such person, keeping a boarding and lodging-house, where guests are entertained by the month or week, each having a bedroom to himself, but taking meals with the proprietor of the house, is a trader. *Gibson v. King*, 10 Mee. & W. 667; 1 Car. & M. 458. *Smith v. Scott*, 9 Bing. 14; 2 M. & Scott, 35. It seems that a person, who for several years kept a house, in which she let apartments to various persons for longer or shorter periods, from a year to a week, and during that time she contracted to supply them, and did supply them, at certain prices, with provisions for their meals, and fire and candles, and with such wine as they required, came under the description of an hotel-keeper within the meaning of the bankrupt act. *King v. Simmonds*, 12 Jur. 903; 1 Clark & Fin. N. S. 754. A lodging-house keeper not proved to have sold provisions, is not a trader. *Ex-parte Wilkes, re Tarrant*, 2 Mont. & Ayr. 667. A party *who lets furnished lodgings* is not a trader within the bankrupt law, notwithstanding he buys the furniture for the purpose of being let with the lodgings, where the principal object was the letting of lodg-

Market Gardener.[1]
Member of Public Companies. *See* Corporation, Members of.
Miller.[2]
Milliners.[3]
Mine-owners.[4]
Nailer.[5]
Navy, Commissioners of.[6]
Newspapers, Vendors of.[7]
Occasional Dealers.[8]
Ore, Sale of own.[9]
Packers.[10]
Painter.[11]
Paper-maker.[12]
Pawnbroker.[13]
Plumber.[14]
Printer.[15]
Receiver-general of Taxes.[16]
Salesmen.[17]
Scavenger.[18]

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ings, and the letting the furniture was only accessory thereto. *Ex-parte Bowers*, 2 Deac. 99; 3 Mont. & Ayr. 33. *Ex-parte Daniell*, 7 Jur. 334.

[1] Trader by s. 65, 12 & 13 Vic. c. 104. A tenant of 130 acres under a farming lease, which obliges him to fallow or plant with peas or potatoes (among other things) every third year, has on his farm twelve acres of young potatoes, and twenty acres of green peas growing in open fields every year, and consigns the produce for table consumption to London salesmen, to whom he allows such commission as is usually allowed by market gardeners; it was held that he was not a market gardener within 5 & 6 Vic. c. 122, s. 10. *Ex-parte Hammond*, 1 De Gex, 93; 9 Jur. 358; 14 L. J. Bank. 14.

[2] Within words of s. 65, "all persons getting their living by the workmanship of goods or commodities."

[3] Traders. 1 Cooke, B. L. 46, 8th ed.

[4] The owner of a mine who buys candles and sells them to his workmen, is not by such dealing a trader. 1 Cooke, 67, 8th ed. A person who owns or rents a mine, works it, and sells the ore, or rents salt-mines or brine-pits, and makes salt from the springs and rock salt, and obtains some of the brine from adjoining premises (1 Mont. D. & D. 300), is not thereby subject to the bankrupt laws; for although he sells, he does not buy (2 Wils. 169); and the same of a person who sells stones taken from his own quarry. 1 Rose, 117. *Ex-parte Salkel*, 3 Mont. D. & D. 125; 7 Jur. 863.

[5] Is a trader. 1 Cooke, B. L. 48, 8th ed.

[6] It has been holden by *Hale, C. J.*, that the buying of victuals in order to serve the navy, and though the commissioner sells that portion of the provisions which are not suitable to the navy to others, it is not such a trading as to subject him to the bankrupt laws. *Luton v. Bigg*, Skin. 291. *See* 1 Bulst. 109.

[7] If a person buys the whole impression of a newspaper and retails them at a profit (*Gunningham v. Laing*, 2 Marsh. 236; S. C. 6 Taunt. 532), or only a portion of the impression, it is a trading within the statute.

[8] Under circumstances, occasional dealing renders a party liable to the bankrupt laws, however small the profit may be. *Newland v. Bell*, Holt, N. P. 221. But purchasing dead horses expressly for feeding of dogs, though the skins and bones are afterwards sold, is not a trading. *Summersett v. Jervis*, 6 Moore, 56; S. C. 3 B. & B. 2. And from *Ex-parte Blackmore*, 6 Ves. jun. 3, and *Richardson v. Bradshaw*, 1 Atk. 129, it seems that no occasional dealings without an intent to continue them would render a person liable to be a bankrupt. *Lord Mansfield, C. J.*, after commenting on *Richardson v. Bradshaw*, in *Hankey v. Jones*, Cowp. 745, says, "this seems clear from considering the principle of the Chancellor's judgment in *Ex-parte Blackmore*, that the laws were never meant to attach upon occasional transactions; which I take to be this, viz. that the laws meant only to attach to those transactions which, by the course of the dealings, enabled a person to gain credit; and must, therefore, be confined to those dealings, not which are *occasional*, but which are *permanent:* therefore, if a person buy and sell in the way of merchandise only occasionally, without any intention permanently to continue such dealing, he is not liable to be a bankrupt (6 Ves. jun. 3); but if he occasionally so buy and sell with an intent permanently to continue his dealing, he is liable (1 T. R. 572; 3 B. & P. 79; 4 Ves. jun. 168): the occasionalty of the dealing is a question for the consideration of a jury (1 T. R. 572), whose object of inquiry is, whether from the acts of buying and selling, which appear in evidence, they can infer that he meant to buy and sell more, so as to constitute a general dealing, as whether he sells to any person who applies for the commodity."

[9] Not a trading. *Port v. Turton*, 2 Wils. 169.

[10] Traders by s. 65, 12 & 13 Vic. c. 104.

[11] Trader. Com. Dig. Bankrupt.

[12] Id. 1 Cooke, B. L. 48, 8th ed.

[13] The word "broker" in s. 65, includes pawnbroker. *Highmore v. Molley*, 1 Atk. 206. Where a pawnbroker had ceased to take in goods to pledge, but continued to sell the unredeemed pledges, the court held, first, that a pawnbroker is a broker within the 5 Geo. 2, c. 30, and secondly, that in effect, by such selling, he continued to carry on the business of a pawnbroker, and was subject to the bankrupt laws. *Rawlinson v. Pearson*, 5 B. & A. 124.

[14] Is a trader. 1 Cooke, 48, 8th ed.

[15] A trader by s. 65, 12 & 13 Vic. c. 104.

[16] Not a trader by s. 65.

[17] Sect. 65 makes cattle and sheep salesmen traders.

[18] In *Ex-parte Collins*, Rose, 373, a question arose as to whether a scavenger could

Schoolmaster.[1]
Scrivener.[2]
Servant.[3]
Shipowner.[4]
Shipwright.[5]
Smuggler.[6]

be a bankrupt, he paying an annual sum to have all the dust and ashes of a particular parish. *Lord Eldon* said it would be difficult to make a party so contracting with a parish a trader within the meaning of the bankrupt statutes.

Mr. Christian, in page 61 of his *Bankrupt Laws*, vol. i., observes, that "the privilege of sweeping the streets, and of taking away the sweeping or manure, can hardly be thought a buying of merchandise. It is either part of the surface of the earth and not personal property, or it is derelict, and does not become property till it is collected and occupied. But with respect to dust and ashes, they are articles of property, trade, and merchandise, and the law upon the subject seems to be the same, whether a man buys a basket of ashes or a basket of coals. By acts of parliament, the owners are restrained from selling themselves, but the parish officers are to sell the whole for the benefit of the parish; but that can make no difference with respect to the purchaser. One cannot, therefore," he says, "see any reason why a purchaser of dust and ashes, and who seeks to make a profit of them by selling them again, should not be a bankrupt, for a dealer in dung is just as much a trader as a dealer in diamonds."

[1] A schoolmaster who buys and dresses provisions for his boarders (*Newton v. Trigg*, 3 Mod. 330), or who buys books and shoes, and retails them out to his scholars at a profit, is not a trader. *Valentine v. Vaughan*, Peake N. P. 108.

[2] By s. 65, "a person using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody," are traders.

An attorney does not become a scrivener, liable to be adjudged a bankrupt, by lending the money of clients, and charging a procuration fee to the borrowers. Nor a transaction in which an attorney calls in and receives the money of a client, and retains the money in his possession, paying interest to such client. *Lott v. Melville*, 3 Man. & G. 60; 3 Scott, N. R. 346; 9 D. P. C. 882; 5 Jur. 436. Where an attorney was in the habit of having the money of his clients deposited with him to lay out for them upon mortgage, and received from others a compensation or gratuity for procuring loans of money for them, besides his charges for preparing the mortgage securities, he was held to be a trader within the bankrupt laws as a money-broker, and a person receiving other men's monies into his trust or custody, whether or not he might be considered liable to the bankrupt law as a banker or scrivener. *Ex-parte Gem re Ramsey*, 2 Mont. D. & D. 99; S. P. *Reg. v. Hughes*, 1 F. & F. 726.

A partner in a firm of two solicitors received monies belonging to the sister of the other for the purpose of investment, and in a few instances without any specific security having been arranged. The usual charges of an attorney or solicitor were alone made upon the transactions; it was held that this did not amount to trading as a scrivener. Uncontradicted general evidence of a course of dealing amounting to trading as a scrivener is sufficient to warrant an adjudication, although specific acts are not proved. *Ex-parte Dufour*, 2 De Gex, M. & G. 246; 1 id. B. C. 118; 21 L. J. Bank. 38. See *Harrison v. Johnson*, 2 E. & B. 61; 22 L. J. Q. B. 297.

A mere receipt of money and using it does not constitute a scrivener, as steward or receiver of landed property. 1 Esp. N. P. C. 555. Nor the borrowing money upon one's own right, or upon borrowed accommodation bills, and paying the discount for them. Cowp. 347.

To constitute a scrivener, the party must be a depositary of money, to be laid out in securities at his own discretion (*Adams v. Malkin*, 3 Camp. 534), and receive a *compensation* distinct (*Hutchinson v. Gascoigne*, Holt, N. P. 507), from the charges in respect of the deeds, securities, &c. (*Hard v. Brydes*, Holt, 654). A clerk in the Custom-house, employed by merchants to receive money on debentures, with which he discounts bills on his own account, is not a scrivener within the meaning of the bankrupt laws. *Harrison v. Harrison*, 2 Esp. 55.

The 21 Jac. 1, c. 19, first made a scrivener liable to be a bankrupt. 2 Ld. Raym. 851.

[3] If a servant buys goods of his master and sells them at a profit, he is a trader within the bankrupt laws. *Gerningham v. Laing*, 2 Marsh. 236; S. C. 6 Taunt. 532.

[4] Trader by s. 65.

[5] Id. See *Kerney v. Smith*, 1 Ld. Raym. 741.

[6] In *Cobb v. Symonds*, 5 B. & A. 516; S. C. 1 D. & R. 111; the question was whether a smuggler who had bought and sold smuggled goods, and never trafficked in legal merchandise, could be said to be a trader, subject and liable to the bankrupt laws.

Per Cur. "The words of the statute 1 Jac. 1, c. 15, s. 2, the authority of *Lord Hardwicke* in the case of *Ex-parte Meymott*, 1 Atk. 197, and the principle of the thing, call upon us to declare, that a party circumstanced as now disclosed to us is an object of the bankrupt laws. The words of the act are general, 'persons seeking their trade of living by buying and selling.' Now these words do not authorise us in determining that the legislature did not intend to include in them every species of buying and selling, whether legal or illegal. Indeed, it would be very strange if a party could set up his own illegality to prevent himself being made a bankrupt. As to the authority of *Lord Hardwicke*, it is true that the point now under discussion was not the point de-

Stable-keeper. *See* Livery-stable Keeper.
Standing Timber, Buyer of.[1]
Stationers' Company, Members of. *See* Corporation, Members of.
Stewards of Inns of Court. *See* Butlers.
Stockbroker.[2]
Stockjobber.[3]
Stone-dealer.[4]
Sugar-baker.[5]
Sutlers of the Army.[6]
Tailor.[7]
Tanner.[8]
Tavern-keeper. *See* Innkeeper.
Timber-dealer.[9]
Victualler.[10]
Warehouseman.[11]
Wharfinger.[12]
Workman for Hire.[13]

(D) *Legality or Illegality of Trading.*[14]

XIV. Of the several Acts which make a Person a Bankrupt.[15]

(A) *Of Acts of Bankruptcy generally.*

(*a*) *Of the Statutes relating thereto, and the mode in which they are to be construed.*

Firstly, As to *Traders.*

With respect to acts of bankruptcy generally.—By sect. 67, 12 & 13 Vict. c. 106, it is enacted, "that if any trader liable to become bankrupt shall depart this realm, or being out of this realm shall remain abroad, or shall depart from his dwelling-house or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested or taken in execution, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making or causing to be made any of the acts, deeds, or matters aforesaid, with

Trader departing the realm, absenting himself, beginning to keep house, yielding to prison, fraudulent outlawry, arrest, attachment, execution, conveyance, surrender, gift, delivery, or transfer, commits an act of bankruptcy.

cided in *Ex-parte Meymott;* but *Lord Hardwicke* refers to it, and assumes it to be an incontrovertible proposition. As to the principle of the thing, the very circumstance that such party's trade is illegal puts his estate in greater danger, and requires that his real creditors, whose debts are unaffected by the illegal transactions, should have the benefits accruing from a commission, the object of the bankrupt laws being to protect the meritorious creditors, and prevent them from being placed in jeopardy by the improper speculations of their debtor." *See* Ld. Raym. 444; and in 1 Atk. 197, it is said a runner of goods is a trader. *See* 4 Burr. 2066; 11 Moore, 305; 1 D. & R. 111; S. C. 5 B. & A. 516.

[1] Is a trader. *See* 1 Cooke, B. L. 73, 8th ed.; 2 Taunt. 176.

[2] Trader by s. 65. Cull. B. L. 68.

[3] Buying and selling bank-stock, or other government securities, will not make a man a trader, they not being goods, wares, or merchandise within the intent of the bankrupt laws, by which a profit may be fairly made. See *Colt v. Nettervill,* 2 P. Wms. 308.

[4] A person, by selling stones from a quarry upon his own estate, does not render himself subject to the bankrupt laws. *Ex-parte Gardner,* 1 Beames, 48.

[5] Is a trader. Com. Dig. Bankrupt.

[6] 3 Keb. 451; Skin. 392.

[7] Is a trader, unless a mere working one. 1 Cooke, B. L. 48, 8th ed.

[8] Id.

[9] If a man purchase timber (even standing timber) to sell again, with a view to profit, he is liable to be bankrupt (2 Taunt. 178); but if he sell only such as he cuts down upon his own land, he is not.

[10] Trader by s. 65, 12 & 13 Vic. c. 104; and see *Saunderson v. Bowles,* 4 Burr. 2064.

[11] A trader by s. 65.

[12] Id.

[13] Not a trader by s. 65.

[14] The illegality of the buying or selling does not affect the question of trading. We have seen, *ante,* p. 176, that even a smuggler may be a bankrupt, although his trade was obviously illegal. So a trader who has not taken out a license, as required by law, to authorise his dealings. *Saunderson v. Rowles,* 3 B. & B. 2; 6 Moore, 56. So a clergyman (*see ante,* p. 167) may be a trader and bankrupt, though his trading is prohibited by 1 & 2 Vic. c. 106. *See* also 4 & 5 Vic. c. 14, s. 1.

[15] An act done or suffered by a debtor tending to defraud his creditors (as by endeavouring to avoid them, or evade their just demands), by which he becomes subject to the bankrupt laws. *See* 8 Taunt. 791.

intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

Conveyance of all a trader's property not an act of bankruptcy, unless a petition for adjudication be filed within three months.

Sect. 68, id. "That if any such trader shall execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof, provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader and by every such trustee be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the *London Gazette*, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the *London Gazette* and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor."

Compounding with petitioning creditor.

By sect. 71, 12 & 13 Vic. c. 106, "that if any such trader, after the issuing of any fiat or filing of any petition for adjudication of bankruptcy against him, shall pay money to the petitioning creditor, or give or deliver to such petitioning creditor any satisfaction or security for his debt or for any part thereof, whereby such petitioning creditor may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction or security, shall be an act of bankruptcy; and if adjudication of bankruptcy shall have been made under such fiat or petition, the court may either declare such adjudication to be valid, and direct the same to be proceeded in, or may order it to be annulled, and a petition or new petition for adjudication may be filed, and such petition or new petition may be supported either by proof of such last-mentioned or any other act of bankruptcy.

Adjudication may either be annulled or declared valid.

Filing petition in Insolvent Debtors' Court in England.[1]

Sect. 74, id. "That the filing of a petition in the Court for the Relief of Insolvent Debtors in England by any such trader who shall be in actual custody, for his discharge from custody, and who shall apply by petition to such court for his discharge from custody, according to the laws for the relief of insolvent debtors in England, shall be deemed to be an act of bankruptcy from the time of filing such petition; and any petition for adjudication of bankruptcy filed against such trader, and under which he shall be adjudged bankrupt, before the time appointed by the said Court for the Relief of Insolvent Debtors, and advertised in the *London Gazette*, for such prisoner to be brought up to be dealt with according to the laws for relief of insolvent debtors in England, or at any time within two months from the time of making any order vesting the estate and effects of any such prisoner in the provisional assignee of such court, whether upon the petition of such prisoner or the petition of a creditor, shall have the effect of divesting the real and personal estate and effects of such person out of the provisional assignee: Provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such trader be adjudged bankrupt before the time so advertised as aforesaid, or within such two months as aforesaid."

Filing petition for arrangement between a trader-debtor and his creditors.

Sect. 76, id. "That the filing of a petition by any such trader for an arrangement between such trader and his creditors, under the provisions of this act with respect to arrangements between debtor and creditor under the superintendence and control of the court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed: Provided also, that no adjudication shall be

[1] This section is virtually repealed by the abolition of the Insolvent Debtors' Court. *See ante*, p. 145.

made on any such act of bankruptcy unless and until after such petition for arrangement shall have been dismissed."

Trader having privilege of parliament, not paying or compounding to the satisfaction of the creditor, and entering appearance to action within one month.

Sect. 77, 12 & 13 Vic. c. 106. "That if any creditor or creditors of any such trader, having privilege of parliament, to an amount hereinafter declared to be requisite to support a petition for adjudication of bankruptcy, shall file an affidavit in any court of record at Westminster that such debt is justly due to him, and that such debtor, as he verily believes, is such trader, and shall sue out of the same court a writ of summons, in the form contained in Schedule (E.) to this act annexed, against such trader, and serve him with a copy of such summons, if such trader shall not, within one month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, and within one month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons."

And with respect to acts of bankruptcy, by reason of non-payment after summons of the court, and the proceedings thereupon, be it enacted:

Creditor making affidavit of his debt, and of his having given notice requiring immediate payment, &c. court may summon the trader.

By sect. 78, id. "that if any creditor of any such trader shall file an affidavit in the court in the district in which such trader shall reside, in the form specified in Schedule (F.) hereunto annexed, of the truth of his debt, and of the debtor, as he verily believes, being such trader, and of the delivery to such trader personally, or to some adult inmate, at his usual or last-known place of abode or business, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, in the form specified in Schedule (G.) annexed to this act, it shall be lawful for the court in which such affidavit shall be filed to issue a summons in writing, in the form contained in Schedule (H.) annexed to this act, calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon to appear as hereinafter provided: Provided always, that if the demand of a creditor appear by such affidavit to be due from two or more persons carrying on trade in partnership, the delivery of such account and notice to any one of the partners personally, or to some adult inmate at his usual or last known place of abode or business, and also at the place of business of the firm, as aforesaid, shall be sufficient to authorise the court to issue such summons against any other of such partners, as well as against the partner served personally with such account and notice."

Delivery, notice, &c. in cases of partnership.

Manner of proceeding upon the appearance of the trader.

Sect. 79, id. "That upon the appearance of any such trader so summoned as aforesaid it shall be lawful for the court to require him to state whether or not he admits the demand of the creditor, or any and what part thereof, and if such trader shall admit such demand, or any part thereof, to reduce such admission into writing, in the form contained in Schedule (I.) annexed to this act; and such admission so reduced into writing such trader is hereby required to sign, and, being so signed, the same shall thereupon be filed in such court; and it shall also be lawful for the court to allow such trader upon his said appearance to make a deposition upon oath, in writing under his hand, to be filed in such court, in the form contained in Schedule (J.) annexed to this act, that he verily believes he has a good defence upon the merits to such demand, or to some and what part thereof; and in such case it shall be lawful for the court at the same time to require such trader to enter into a bond, according to the form contained the Schedule (K.) to this act annexed, in such sum and with such two sufficient sureties as the court shall approve of, to pay such sum or sums as shall be recovered, together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand, or of any part thereof in respect of which such deposition shall be made."

Trader not attending summons, or refusing to admit the demand, &c., and not paying or compounding within a certain time, or giving bond for payment of the same if recovered in an action, &c. with costs, to be an act of bankruptcy.

Sect. 80, id. "That if any such trader so summoned as aforesaid shall not come before the court at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the court, and allowed), or if any such trader, upon his appearance to such summons, or at any enlargement or adjournment thereof, shall refuse to admit such demand, and shall not make a deposition, in the form aforesaid, that he believes he has a good defence upon the merits to such demand, or some part thereof, and (if required by the court so to do) enter into such bond as last aforesaid, then and in either of the said cases, if such trader shall not, within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, as the case may be, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit."

Trader signing admission, and not paying, securing, or compounding within a certain time, an act of bankruptcy.

By sect. 81, 12 & 13 Vic. c. 106, "that if any such trader so summoned as aforesaid shall upon his appearance sign and file an admission of such demand in form aforesaid, and shall not within seven days next after the filing of such admission pay or tender and offer to pay such creditor the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after the filing of such admission, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit."

Trader admitting part only of a demand, &c., and the trader not paying, &c. the sum admitted, and as to residue not paying the same, &c., or giving bond to pay the same if recovered in an action, with costs, an act of bankruptcy.

Sect. 82, id. "That if any such trader so summoned as aforesaid shall upon his appearance sign an admission for part only of such demand in the form aforesaid, and shall not make a deposition in the form aforesaid that he believes he has a good defence upon the merits to the residue of such demand, and (if required by the court so to do) enter into such bond as aforesaid to pay such sum or sums as shall be recovered, together with such costs as shall be given in any such action as aforesaid for the recovery of such residue, then and in such case, if such trader, as to the sum so admitted, shall not, within seven days next after the filing of such admission, pay or tender and offer to pay to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor, and as to the residue of such demand shall not, within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as the court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit."

What shall be deemed a refusal to admit of debt.

Sect. 83 id. "That if any such trader so summoned as aforesaid shall upon his appearance refuse to sign the admission in that behalf required, whatever may be the nature of his statement, or whether he makes any statement or not, it shall be deemed, for the purposes of this act, that every such trader thereby refuses to admit such demand: Provided always, that it shall be lawful for the court, upon reasonable cause shown, to enlarge the time for calling upon such trader to state whether or not he admits such demand, or any part thereof, and for entering into such bond, or for any or either of such matters, for such time as the court shall think fit."

Court may enlarge the time for admission or entering into bond, &c.

Sect. 84, id. "That an admission of any debt made after such summons, and signed by any such trader elsewhere than before the court, may be filed in court, and shall be of the same force and effect to all intents and purposes as an admission signed by such trader on his appearance in court, provided such admission be made in the form contained in Schedule (L.) to this act annexed, and there be present some attorney of one of her Majesty's superior courts of law on behalf of such trader, expressly named by him and attending at his request, to inform him of the effect of such admission before the same is signed by such trader; and provided also, that such attorney do subscribe his name thereto as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the said trader, and state therein that he subscribes as such attorney."

Admission of debt signed elsewhere than in court, if attested by trader's attorney, to have the same force as an admission signed in court.

By sect. 85, 12 & 13 Vic. c. 106, "that where any such trader against whom an affidavit of debt is filed by any creditor as aforesaid shall be summoned to appear before the court in which such affidavit shall be filed, every such creditor or trader shall have such costs as the court in its discretion shall think fit, or the court may direct the costs of either party of, incident to, or attendant upon such affidavit and summons to abide the event of any action which shall have been brought or shall thereafter be brought for the recovery of such demand or any part thereof, and in such case such costs shall be costs in the cause, and recovered under the judgment and execution in such action."

Court may award costs to the creditor, or the trader summoned.

Sect. 86, id. "That in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed, to take out execution for such costs in like manner as a defendant may now by law have execution for costs in other cases."

If creditor bring an action, and do not recover the amount sworn to in his affidavit of debt, and if the affidavit be made for such amount without probable cause, the defendant in the action shall be entitled to costs.

Sect. 87, id. "And be it enacted, that if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be deemed to have had such notice."

Notice of acts of bankruptcy to agents of corporate bodies, &c.

Sect. 88, id. "And be it enacted, that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy or the filing of any petition for adjudication of bankruptcy against him, and that no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt."

No person liable upon an act of bankruptcy committed more than twelve months before fiat, &c.

Secondly, As Relates to *Non-Traders*.

With respect to acts of bankruptcy under 24 & 25 Vic. c. 134, it is enacted by sect. 70, "if any person, *not being a trader*, shall, with *intent to defeat or delay* his creditors, depart this realm, or being out of this realm shall with such intent remain abroad, or shall with such intent make any fraudulent conveyance,

Non-trader going or remaining abroad, or making frau-

dulent conveyance, with intent to defeat or delay his creditors.

gift, delivery, or transfer of his real or personal estate, or any part thereof respectively, such person shall be deemed to have thereby committed an act of bankruptcy: Provided always, that before any adjudication in bankruptcy shall be made against the debtor under this section, the following rules shall be observed:—

Rules to be observed before adjudication under this section.

1. A copy of the petition for adjudication shall be served personally on the debtor, either within the jurisdiction, or in such place or country, or within such limits abroad, as the court shall, upon application for that purpose, direct:
2. Such copy petition shall have endorsed thereon a memorandum, in a form to be settled by a general order, specifying the time within which the debtor is to appear on such petition; and such time shall, when the service is to be made abroad, be the time which the court shall think reasonable, having regard to the place or country where the service is to be made:
3. In no case shall the time for appearance be less than thirty days after service:
4. If such personal service has not been effected, the court must be satisfied that every reasonable effort was made to effect the same, and that the attempts to serve such petition came to the knowledge of the debtor and were defeated by his conduct:
5. If at the expiration of the time limited for appearance the court shall, on the hearing of such petition, be satisfied that an act of bankruptcy has been committed within the meaning of this section, it may adjudge such debtor to be a bankrupt:

Proviso.

Provided always, that no non-trader, who shall be abroad at the time of the passing of this act, shall be deemed to remain abroad with intent to defeat or delay his creditors until the expiration of six months after the passing of this act."

THIRDLY, AS RELATES TO *TRADERS* OR *NON-TRADERS*.

Trader or non-trader lying in prison, or escaping out of prison.

By sect. 71, 24 & 25 Vic. c. 134, "if any debtor, whether a *trader or not*, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, or, having been arrested for any cause, shall lie in prison as aforesaid, after any detainer for debt lodged against him, and not discharged, every such debtor shall thereby be deemed to have committed an act of bankruptcy; or if any such debtor, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such debtor shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: but no debtor shall be adjudged bankrupt on the ground of having lain in prison as aforesaid, unless having been summoned he shall not offer such security for the debt or debts in respect of which he is imprisoned or detained, as the commissioner or registrar whose duty it would otherwise be to adjudicate, shall deem reasonably sufficient."

Trader or non-trader filing a declaration that he is unable to meet his engagements.

Sect. 72, id. "If any debtor, whether a *trader or not*, shall file in the office of the chief registrar, or with the registrar of a district court of bankruptcy, or of a county court having jurisdiction in bankruptcy, a declaration in writing, in such form as general orders shall direct, signed by such debtor, and attested by a registrar of the court, or by an attorney or solicitor, that he is unable to meet his engagements, every such debtor shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy shall be filed by or against him within two months from the filing of such declaration."

Trader-debtor suffering exe-

Sect. 73, id. "If any execution shall be levied by seizure and sale of any of the goods and chattels of any *trader-debtor*, upon any judgment recovered in

any action personal for the recovery of any debt or money demand exceeding fifty pounds, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: Provided always, that, unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution-creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid: Provided also, that, in case of bankruptcy, the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only, after such payment, be paid to the assignees."

Caution to be levied.

By sect. 75, 24 & 25 Vic. c. 134, "the filing of a petition by or against a debtor, whether a trader or not, in any court having jurisdiction for the relief of insolvent debtors in insolvency or bankruptcy in any of her Majesty's dominion, colonies, or dependencies, and the adjudication of an act of insolvency or bankruptcy on such petition, shall, for the purposes of this act, be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such debtor at the time of filing such petition, or of the filing the petition on which the adjudication of an act of insolvency or of bankruptcy shall have been made; and any creditor or creditors of such debtor whose debt or debts shall be of sufficient amount to enable him or them to petition for adjudication of bankruptcy under this act may, at any time within two months after notice of such adjudication shall have been given in the *London Gazette*, petition for adjudication of bankruptcy under this act against such debtor, and under such petition all such proceedings may be had and taken as are authorised by this act."

As to petition by or against *trader or non-trader*, followed by adjudication, in the *foreign dominions of the crown.*

FOURTHLY, AS RELATES TO ACT OF BANKRUPTCY BY NON-PAYMENT AFTER JUDGMENT-DEBTOR SUMMONS, AND THE PROCEEDINGS THEREUPON AGAINST *TRADER* AND *NON-TRADER*.

By sect. 76, 24 & 25 Vic. c. 134, "every judgment-creditor who is or shall be entitled to sue out against a debtor a writ of *capias ad satisfaciendum*, or to charge the debtor in execution, in respect of any debt amounting to fifty pounds, exclusive of costs, shall be entitled, at the end of one week from the signing of judgment, to sue out against the debtor if a trader, or, not being a trader, at the end of one calendar month, and whether he be in custody or not, a summons, to be called a judgment-debtor summons, requiring him to appear and be examined respecting his ability to satisfy the debt."

Judgment-debtor summons against *traders* and *non traders*, who may sue them out, and when.

Sect. 77, id. "Where, after the commencement of this act, a decree or order of a court of equity, or an order in bankruptcy, or insolvency, or lunacy, directing the payment of money, is disobeyed by the debtor, the same having been duly served on him, and the person entitled to receive the money or interested in enforcing payment of it has obtained a peremptory order of the competent jurisdiction, fixing a day for payment, and the debtor does not, being a trader, within seven days, or, not being a trader, within two calendar months, after service on him of the peremptory order, or such order having been duly served, within seven days after the day fixed by the peremptory order for payment (which shall last happen), pay the money, or secure, or tender or compound for it, to the satisfaction of the creditor, the creditor shall be entitled at the end of those seven days to sue out against the debtor a judgment-debtor summons."

The like, in cases of disobedience to decree in equity, or order in bankruptcy, insolvency, or lunacy.

By sect. 78, id. "*The judgment-debtor summons shall, unless the court shall in any case otherwise direct, issue according to the following rules:*

"Where the debtor is in England, then out of the Court of Bankruptcy

Court out of which such summons shall issue.

for the district in which the debtor usually lives, or at the time of the issuing of the summons happens to be:

Where the debtor is not in England, then out of the Court of Bankruptcy for the district in which is the debtor's usual or last-known place of abode in England."

Service of summons.

By sect. 79, 24 & 25 Vic. c. 134, "where the debtor is in England the summons shall be served personally, unless the court issuing the same shall in any case direct that service in some other manner shall be good service: Where the debtor is not in England, the court, upon such evidence as shall satisfy it that the service will be effectual to give notice to the debtor, may order service to be made in such manner and form as it shall deem fit, and shall appoint a time by such order for the appearance of the debtor."

Duplicate of summons.

Sect. 80, id. "Where the debtor is in custody, a duplicate of the summons shall be delivered to the sheriff or other person in whose custody he is, who shall bring him up according to the summons, at the costs of the summoning creditor."

Where service cannot be effected, &c. court may order notice in *London Gazette*, &c.

Sect. 81, id. "If service of the summons be not effected, and the court is satisfied that the debtor is keeping out of the way to avoid service, it may order that one or more notices be inserted in the *London Gazette*, and in one or more newspapers published in the district in which is the debtor's usual or last-known place of abode, requiring him to appear on a day named, being not less than fourteen days after the publication of the first notice."

Procedure upon appearance of debtor.

Sect. 82, id. "Upon the appearance of the debtor he may be examined on oath, by or on behalf of the creditor and by the court, respecting his ability to satisfy the debt, and for the discovery of property applicable in that behalf, and shall be bound to produce, on oath or otherwise, such books, papers, and documents in his possession or power relating to property applicable or alleged to be applicable to the satisfaction of the debt, as the court shall think fit, and to sign his examination when reduced into writing; and any debtor refusing to be sworn, or who shall upon examination refuse or wilfully fail to discover fully and truly, to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and to produce all books, papers, and documents in his possession or power relating thereto, shall be liable to be committed by the court as in the case of a bankrupt."

Adjudication upon summons, and non-payment for failure to secure or compound.

Sect. 83, id. "If, after service of such summons, or due notice thereof, as aforesaid, the debtor shall not pay the debt and costs, or secure or compound for the same to the satisfaction of the creditor, the court may, on the appearance of the debtor, or if he shall not appear, having no lawful impediment allowed by the court, adjudge him bankrupt, without the presentation of a petition for adjudication or other proceeding; and where the debtor has not appeared, notice of such adjudication shall be served upon him in like manner as herein provided with respect to service of the summons."

Time to show cause against adjudication.

Sect. 84, id. "The debtor shall be allowed seven days from such notice, or such further time as the court shall think fit, for appearing to show cause against the adjudication; and if he appear within the time allowed, and show sufficient cause, the adjudication may be annulled; otherwise, at the end of the time allowed, or on the judgment of the court against the sufficiency of the cause shown, the adjudication shall become absolute, and notice thereof shall be forthwith given in the *London Gazette;* and the adjudication shall have relation back to the service of the summons, or the insertion of the first notice in the *London Gazette*, as the case may be; and the stamp duty payable upon the presentation of a petition for adjudication in bankruptcy shall be paid in respect of adjudication under this section, or under the last preceding section, by the official assignee or creditors' assignee, as the case may be, out of the first monies that shall be received under the estate of the bankrupt."

Adjudication, when to become absolute.

Stamp duty thereupon.

Debtor refusing to conform

Sect. 85, id. "The provisions contained in sect. 260 of the Bankrupt Law Consolidation Act, 1849, relating to the committal of a person refusing to be

sworn, or doing or omitting the other acts or things therein mentioned, shall apply to a debtor appearing on a judgment-debtor summons."

may be committed.

The bankrupt statutes having expressly defined the several acts of bankruptcy, and being in many instances penal in their operation, are not to be extended or enlarged by construction or implication. *See* 2 Bl. Com. 479. *Cole v. Davies*, 1 Ld. Raym. 724. *Hopkins v. Grey*, 7 Mod. 139; 2 P. Wms. 429; 1 Burr. 479; 15 Ves. 462; 17 id. 198; 19 id. 543; 1 W. Black. 442; 3 Camp. 350.

Bankruptcy statutes not to be extended by construction or implication.

(*b*) *Of the Locality of or Place where Committed.*

Alexander v. Vaughan, Cowp. 401. *See* Ex-parte Smith, cited Cowp. 402.

Per Lord Mansfield. "There is a locality in acts of bankruptcy. The trader, whether a native or a foreigner, must be in England when he commits the act upon which the commission is founded." *See* S. P. *Hitchcock v. Sedgewick*, 2 Vern. 156. *Bird v. Sedgwick*, 1 Salk. 110. *Ex-parte Williamson*, 1 Atk. 82.

The act of bankruptcy must in general be committed in England.[1]

Ingliss v. Grant, 5 T. R. 530. Norden v. James, Dick. 533.

On a case reserved, one of the questions was, whether certain deeds did not of themselves amount to acts of bankruptcy, being assignments of all the bankrupt's effects to certain creditors for the purpose of a peculiar distribution, by which certain creditors were favoured more than others. Upon this point the court said that no argument could be maintained, inasmuch as the deed, having been executed in India, could not be considered as an act of bankruptcy in England, and this was assented to by the council for the plaintiffs.

Hence, before the stat. 6 Geo. 4, c. 16, a fraudulent deed executed abroad was not an act of bankruptcy.[2]

Lord Kenyon, C. J. "This case is too clear for further discussion. The facts are, that Campbell, before any act of bankruptcy in England, and during his residence in India, conveyed all his property in trust for all his creditors, according to the several proportions agreed upon by all parties there. The transaction

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[1] Mr. Christian, p. 177, 2d edit. says, "It would, perhaps, be unnecessary to inquire, whether a party can become a bankrupt by being *denied abroad*, or by *departing* from his lodgings abroad; because, if a creditor follow him, and he avoid seeing him, by acts, which would be acts of bankruptcy here, I should consider them as evidence of absenting himself from home to avoid his creditors."

And if a trader, domiciled here, executes a fraudulent deed abroad, which is to defraud his creditors of property situated here, there seems to be more and stronger reasons that it should be considered an act of bankruptcy in this country, than if it had been executed in it. There is nothing local in an act of bankruptcy; it does not seem to be necessary that it should be committed within the body of an English county, like an indictable crime. If a merchant, who had gone abroad for the fair purposes of merchandise, should be met at sea upon his return, and there informed that he had suffered great losses by the failure of others, and he should immediately declare that he would not return home to meet his creditors, and should request to be put on shore in any foreign country, or in any part of England distant from his domicile, it might well be contended that this was an act of bankruptcy, by beginning to absent himself, though it was committed on the high seas; and if it could be committed there, a similar act of bankruptcy might be committed in a foreign country. And now by s. 67, 12 & 13 Vic. c. 106, as regards traders (see *ante*, p. 177), and s. 70, 24 & 25 Vic. c. 134, as to non-traders remaining abroad with intent to delay, &c. is declared to be an act of bankruptcy.

[2] But now by s. 106, 12 & 13 Vic. c. 106, *ante*, p. 173, it is expressly enacted that a fraudulent grant, &c. made within the realm or elsewhere by a trader, and by s. 70, 24 & 25 Vic. c. 134, *ante*, p. 181, by a non-trader, shall be deemed an act of bankruptcy. A fraudulent outlawry suffered in Ireland is not. Stone, 172; Billing, 94; Good, 23; Com. Dig. Bank. c. 4. And formerly if a trader departed from England, without any intent to delay his creditors, but, when abroad, resolved not to return, for the purpose of avoiding his creditors, it would not have been an act of bankruptcy; *sed vide* "act of bankruptcy by absenting himself," *post*, p. 189; and *Windham v. Paterson*, 1 Stark. 146, where it was holden, that if a trader leave the realm for the purpose of trade, but whilst he is abroad announce his intention never to revisit England, he commits an act of bankruptcy by absenting himself; and *see post*, p. 188, as to remaining abroad, which is now made remaining abroad with intent, &c. an act of bankruptcy.

was perfectly fair at that time, and without any fraudulent intention, and Campbell acted honestly in executing the deeds; it is, therefore, too much to contend that a commission of bankruptcy, which issued subsequently upon an act of bankruptcy, committed after he came to England, can have a retrospect to, or overhaul an act done fairly and honestly at the time by Campbell, who was not then in a situation in which the bankrupt laws of this country could have any operation either upon him or upon his property."

And now, by s. 75, 24 & 25 Vic. c. 134, a petition by or against trader or non-trader, followed by adjudication, in the foreign dominions of the crown, is conclusive evidence of an act of bankruptcy.

By sect. 75, 24 & 25 Vic. c. 134, "the filing of a petition by or against a debtor, whether a trader or not, in any court having jurisdiction for the relief of insolvent debtors in insolvency or bankruptcy in any of her Majesty's dominions, colonies, or dependencies, and the adjudication of an act of insolvency or bankruptcy on such petition, shall, for the purposes of this act, be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such debtor at the time of filing such petition, or of the filing the petition on which the adjudication of an act of insolvency or of bankruptcy shall have been made; and any creditor or creditors of such debtor, whose debt or debts shall be of sufficient amount to enable him or them to petition for adjudication of bankruptcy under this act, may, at any time within two months after notice of such adjudication shall have been given in the *London Gazette*, petition for adjudication of bankruptcy under this act against such debtor, and under such petition all such proceedings may be had and taken as are authorised and directed by this act."

(c) *Of the Time of, in Relation to the Petitioning Creditor's Debt,*[1] *and Party being in Trade.*

BATEMAN'S CASE, 1 Vent. 166; S. C. 1 Sid. 411. S. P. HEYLOR v. HALL, Palm. 323. MEGGOT v. MILLS, 1 Ld. Raym. 287.

Although a party retires from trade, he may afterwards commit an act of bankruptcy, in respect of creditors whose debts were contracted during the trading, or contracted before, and were subsisting debts while he was in trade.[2]

It was proved that the alleged bankrupt was a Turkey merchant, and traded in the year 1656, but it was not shown that he had afterwards imported or exported anything; but having the effects of his former trade by him to a great value, he showed them to several persons, and obtained the loan of money upon the credit of them. The court held that this brought him within the statute for such debts as he contracted after 1656, otherwise the mischief would be great; for men cannot take notice when another withdraws his trade, or orders his factors abroad to deal no further for him. See *Baillie v. Grant*, 9 Bing. 121; 2 M. & Scott, 193.

(d) *Of Concerted Acts of Bankruptcy.*[3]

[1] The act of bankruptcy must be during the existence of a petitioning creditor's debt (15 Ves. 495; 16 id. 145), which is sufficient though contracted before the trading commenced. *Baillie v. Grant*, 2 M. & Scott, 199; 9 Bing. 121; 1 Clark & Fin. 238.

[2] Whether a trader has ceased to trade does not depend upon the absence of any particular act of trading beyond a certain time, but whether there was an intention to exercise or resume it; and this is a question for a jury. *Ex-parte Paterson in re Bryant*, 1 Rose, 402. *Ex-parte Bamford*, 15 Ves. 449. *Ex-parte Griffiths*, 22 L. J. Bank. 50. As to whether a person who has ceased to trade can make himself a bankrupt, see *Ex-parte Mitchell*, 1 De Gex, 257.

[3] Formerly an act of bankruptcy concerted between the bankrupt and the petitioning creditor would not support a fiat. *Ex-parte Gouthwaite*, 1 Rose, 87. *Ex-parte Brookes*, 1 Buck, 257. *Bamford v. Baron*, 2 T. R. 594, cit. *Eyre v. Birkbeck*, id. 395, cit. But a creditor, not privy to such concerted act, might avail himself of it. *Ex-parte Bourne*, 16 Ves. 145. The bankrupt's agreeing to an act of bankruptcy at the suggestion of a friend, without any concert with the creditors, was held to be no objection to the fiat. *Roberts v. Teasdale*, Peake, N. P. 27. *Simpson v. Sykes*, 6 M. & Scott, 295. But by 12 & 13 Vic. c. 106, s. 115, no fiat in bankruptcy shall be annulled, nor any adjudication reversed, by reason only that the fiat, petition, adjudication, or act of bankruptcy has been concerted or agreed upon between the bankrupt, his solicitor or agent, or any of them, and any creditor or other person. And we have seen, *ante*, p. 182, now by sect. 72, 24 & 25 Vic. c. 134, that a party, whether trader or non-trader, commits an act of bankruptcy by filing a declaration that he is unable to meet his engagements.

(*e*) *Act of Bankruptcy once committed cannot be explained away.*

HOPKINS v. ELLIS, 1 Salk. 110; S. C. Holt, 95. S. P. WRENCHE'S CASE, Cro. Eliz. 13. WORSLEY v. DEMATTOS, 1 Burr. 467. COLKETT v. FREEMAN, 2 T. R. 59. WOOD v. THWAITES, 3 Esp. 244.

Where an act is equivocal, circumstances may explain it, and show it not to have been done with *intent* to defeat creditors; but an act once committed plainly and directly with that intent, can never be purged or explained away by anything done afterwards.[1]

Upon an issue directed out of Chancery, whether a person was a bankrupt or not at a certain time, it was held,—

Per Holt, C. J. "That if he commit a plain act of bankruptcy, as keeping house, &c., though he afterwards goes abroad, and is a great dealer, yet that will not purge the first act of bankruptcy, but he will still remain a bankrupt; but if the act was not plain, but doubtful, then going abroad, and dealing, &c. will be evidence to explain the intent of the first act: for if it was not done to defraud creditors, it will not be an act of bankruptcy within the statute; also, if after a plain act of bankruptcy he pays off or compounds with all his creditors, he is become a new man." See *Mucklow v. May*, 1 Taunt. 479; 1 Ves. & B. 45.

(*f*) *Must not be Committed more than Twelve Months prior to Petition.*[2]

No person liable upon an act of bankruptcy committed more than twelve months before fiat, &c.

By 12 & 13 Vic. c. 106, s. 88, it is enacted, "that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy, or the filing of any petition for adjudication of bankruptcy against him, and that no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt." *See* 5 & 6 Vic. c. 122, s. 7.

(B) *Of particular Acts.*

Firstly, such as relate to the Personal Conduct of the Trader or Non-Trader.

(*a*) *By Departing the Realm,*[3] *whether Trader or Non-trader.*

FOWLER v. PADGET, 7 T. R. 509.

Even under the several statutes there must not only have been a departure and a *delay*, but an *intent* to delay creditors.[4]

In trespass for breaking and entering the plaintiff's dwelling-house and taking and converting his goods, the defendant justified under the bankrupt laws; and the only question was, whether the plaintiff had committed an act of bankruptcy. At the trial it appeared the plaintiff, who was a trader, having received intelligence that one S. in London, who was indebted to him to a large amount, was in a failing condition, left his house early on the 17th April, and went to L. for the purpose of arranging his affairs with S. and getting security for his demand. That having received of S. goods to a considerable value, and a bill

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[1] But if the act itself be equivocal, circumstances may be given in evidence to show that it was not done with any intent to defeat or delay creditors. *Ex-parte Hall*, 1 Atk. 201; 1 Cooke, 121, 8th edit.

[2] That purchases, with notice of an act of bankruptcy more than twelve months old, are valid, *see* s. 134.

[3] These words mean nothing more than the going beyond the jurisdiction of the courts of this country. Hence, leaving England for Ireland is departing this realm. *Williams v. Nunn*, 1 Taunt. 272. *Windham v. Paterson*, 1 Stark. 144.

The words of the 67th sect. 12 & 13 Vic. c. 106, are, "if any TRADER liable to become bankrupt shall depart these realms with *intent* to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy."

In the 70th sect. 24 & 25 Vic. c. 134, they are, "if any person, *not being a trader*, shall, with intent to delay his creditors, depart this realm, shall be deemed thereby," &c.

[4] And it is now settled that a departure of a debtor with an intent to delay his creditors is an act of bankruptcy, though no creditor be in fact delayed. *Robertson v. Liddell*, 9 East, 487. *See* 1 Com. Dig. 523, Bankrupt, C. 1; 1 Bac. Abr. 383, Bankrupt, A.; 2 T. R. 59; 5 id. 175; 8 id. 149; Palm. 325; Barnes, 160; Cullen, 34; 1 Esp. N. P. Cases, 334; 5 id. 139; Cooke, B. L. 4th edit. 74; 3 Bro. C. C. 504. *Aldridge v. Ireland*, cited 7 T. R. 512. *Hawkins v. Lukin*, id. 516.

of exchange for 129*l.* he returned to M. after an absence of ten days, during which time several creditors called at his house for payment of their respective debts, which were not satisfied, the bankrupt not having made any provision for them, nor left any person in charge to conduct his business during his absence. The jury found a verdict for the plaintiff, declaring, in answer to a question put by the judge, "that they thought the plaintiff's intent in going to London was laudable; that he had no intent to defraud his creditors, but that delay did actually happen to some creditors."

Per Lord Kenyon, C. J. "If there be no decision on this subject, I should have thought very little doubt could have been entertained on the construction of the act of parliament. Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural justice and of our law, that *actus non reum facit nisi mens sit rea.* The intent and act must both concur to constitute the crime; and by reading the word 'and' for 'or' in the 1 Jac. 1. c. 15, which is frequently done in the construction of legal instruments where the sense requires it, all difficulty will be removed. But according to the defendant's construction of this act, every merchant in London might become a bankrupt before to-morrow morning. If the words of the statutes are to be taken in their literal sense, any person who happens to go from home only for an hour, during which time any creditor calls for payment, and is for that hour delayed, may become a bankrupt; and it would be no answer to such an argument (as was supposed at the bar) to say that the trader left word where he was gone, because a creditor may have taken out a writ against him in one county, and if he were gone on the borders of the next

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And on the other hand, where the delay of creditors is the necessary consequence of the trader's absenting himself, the departure constitutes an act of bankruptcy. *Ramsbottom v. Lewis*, 1 Camp. 279. *See* 10 East, 418.

A trader resident abroad having come to England for a temporary purpose, commits an act of bankruptcy by leaving it to avoid a creditor. *Williams v. Nunn*, 1 Taunt. 270; S. C. 1 Camp. 152. See *Holroyd v. Gwynne*, 2 Taunt. 126. But if a trader depart with an honest intention compatible with business, he does not commit an act of bankruptcy, unless the fear of arrest concur with the other motive to induce him to depart. *Warner v. Barber*, Holt, 175; S. P. *Windham v. Paterson*, 4 Camp. 286; S. C. 1 Stark. 146.

An adjudication cannot be sustained where the departure was for a fair and proper purpose, and not with a view of defrauding or delaying creditors. Every man has a right to go abroad to look after his affairs, though his creditors may be thereby delayed. *Ex-parte Mutrie*, 5 Ves. 574. *Warner v. Baker*, Holt, 175. The departure from the realm, with a consequential delay of creditors, is not an act of bankruptcy without proof or necessary inference of an *intention* to delay at the instant of departure. *Ex-parte Osborne*, 1 Rose, 387; 2 Ves. & B. 177.

Where a trader appointed to meet A. respecting some accounts in which B. was interested, and failed to do so, but left this country for France, leaving a letter for B., in which he stated he should be back in ten days, and in the meantime would make proposals to the creditors; and on the following day he wrote another letter to B. from Calais, stating that the account current between them might be speedily settled; and a month afterwards he wrote another letter from Paris, stating that he was under the necessity of remaining in France; it was held, that the departing the realm and absence abroad, being a continuous act, these letters were admissible in evidence, and sufficient to establish an act of bankruptcy, by showing the intent with which such trader departed. *Rawson v. Haigh*, 9 Moore, 217; 2 Bing. 99; 1 C. & P. 77. And see *Bateman v. Bailey*, 5 T. R. 512.

Pressure of debts, though strong, is not conclusive evidence of an intention to delay creditors. If the necessary consequence of a trader's departing the realm is that his creditors may be delayed, he thereby commits an act of bankruptcy. *Ramsbottom v. Lewis*, 1 Camp. 279. If a trader go abroad, leaving a general power of attorney with his clerk to transact all his business for him, but provides no means of paying bills of exchange which fall due in his absence, he commits an act of bankruptcy. *Ex-parte Kilner*, 3 Mont. & Ayr. 722; 2 Deac. 324. If a trader, whose house of trade is in Ireland, comes to England on business, and again quits the country to avoid an arrest, it is a departing the realm with intent to delay his creditors, sufficient to constitute an act of bankruptcy. *Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152. A trader who leaves England, and proceeds to Ireland, where he carries on trade with an honest intention compatible with trade, does not thereby commit an act of bankruptcy. *Windham v. Paterson*, 2 Rose, 466; 1 Stark. 144.

county, such creditor would, in fact, be delayed. I do not wish to impeach the authority of *Woodier's case*, or that of *Raikes v. Poreau* (Bull. N. P. 39 ; 1 Cooke, B. L. 85, 8th edit.), because in both the parties went abroad under circumstances that rendered it highly probable they would not return to this country: one had committed murder, and the other was amenable to the laws of his country for a different offence." See *Banny v. Hunt*, 11 Moore, P. C. C. 189.

(*b*) *By being out of the Realm, whether Trader or Non-Trader, shall with Intent to delay, &c. Creditors remain Abroad.*[1] *See* sect. 70, 24 & 25 *Vic.* c. 134, *ante*, p. 181.

(*c*) *By a Trader departing from his Dwelling-house.*[2] *See* sect. 67, 12 & 13 Vic. c. 106, *ante*, p. 177.

(*d*) *By a Trader otherwise absenting himself.* Id.

GIMMINGHAM v. LAING, 2 Marsh. 236; S. C. by the name of GILLINGHAM AND OTHERS v. LAING, 6 Taunt, 532. S. P. BIGGS v. SPOONER, 2 Esp. 651.

The words, "otherwise absent himself,"

In an action by the assignees of one H., a bankrupt, it appeared that the bankrupt was the publisher of a newspaper, and was in the habit of attending

[1] Thus, if a party after departing the realm in the first instance for a proper object, protracts his residence abroad for an unreasonable length of time, assigning no cause for his absence, and leaving no funds, nor making any arrangements in this country for the payment of his debts, it will be inferred that he "remains abroad with intent to delay his creditors." *Cumming v. Bailey*, 6 Bing. 370. *Ex-parte Kilner*, 2 Deac. 326 ; 3 Mont. & Ayr. 722. *Ex-parte Rhodes*, 5 Jur. 580. *Banny v. Hunt*, 11 Moore, P. C. C. 189. *Ex-parte Cohn*, 2 L. T. (N. S.) 90.

[2] This applies only to *traders*. A departure from the dwelling-house must be done with *intent* to defeat or delay creditors; it may, therefore, be explained by circumstances to negative that intent (*Aldridge v. Ireland*, cited in *Fowler v. Padget*, 7 T. R. 509. *Hopkins v. Ellis*, 1 Salk. 110. *Worsley v. Demullor*, 1 Burr. 484. *Phillips v. Sheriff of Essex*, Green, B. L. 52); for the motive must be inquired into, and though the inference from mere departure is against the trader, yet circumstances may explain it away. *Ex-parte Osborn*, 2 Ves. & B. 177. Leaving the house in consequence of pressing debts is strong, although not conclusive of that intention. If the trader depart to avoid an attachment to compel the payment of *money*, upon an award, it is an act of bankruptcy; but not if done to avoid an attachment for not delivering goods, or process to compel performance of a duty. 1 Cooke, 22; Com. Dig. Bank. C. *Lingard v. Eade*, 1 Atk. 196, 240. *Re Greenslade*, 2 L. T. (N. S.) 611.

A voluntary departure for the shortest time is sufficient, if done clearly with an intent to delay creditors. *Maylin v. Eylve*, 2 Stra. 809. But a compulsory absence, as in the case of arrest, will not constitute an act of bankruptcy. *Phillips v. the Sheriff of Essex*, Green, 53.

And it is an act of bankruptcy though no creditor be thereby delayed, or though no creditor call in the trader's absence. *Hammond v. Hincks*, 5 Esp. 139 (see *Robertson v. Liddell*, 9 East, 487, *supra*. *Williams v. Nunn*, 1 Taunt. 270. *Wydown's case*, 14 Ves. 87. *Roach v. Gt. Western*, 4 Per. & D. 686; 1 Q. B. 51); although it was at one time holden otherwise. *Barnard v. Vaughan*, 8 T. R. 149.

Lord Eldon, in *Wydown's case* (14 Ves. 87), observed, "that when a man has actually absconded from his house, it is not very wise to require that a creditor should go to that house to inquire for him."

And if he leave his house on account of domestic dissensions, without giving any directions for carrying on his business, he commits an act of bankruptcy (*Holroyd v. Whitehead*, 3 Camp. 530; S. C. 1 Marsh. 128); or if he quit the house with the intention of delaying a creditor, though under a groundless apprehension of his calling; or if, knowing that an officer has a writ, he departs from his house under a chimerical belief that the officer has the process with him, the act of bankruptcy is complete (*Ex-parte Barnard*, 15 Ves. 459); or if a debtor, after seeing a creditor who calls for payment, leaves the former in the house, under the pretence that he is going out for the money, he commits an act of bankruptcy (*Bigg v. Spooner*, 2 Esp. 651); or if traders leave their shop on the pretext of getting bills discounted, and desire their shopman to tell any creditor that may call that they were not in the way, it not appearing that they have really been engaged in discounting bills, it is an act of bankruptcy. *Capper v. Desanges*, 3 Moore, 4; S. C. by the name of *Deffle v. Desanges*, 8 Taunt. 671.

But where application was made by a creditor at the house of a trader during his absence, and he left word for the creditor that he would not pay him, and stated that he should go out of the way and return to dinner, the court held it not an act of bankruptcy (*Vincent v. Prater*, 4 Taunt. 603); or if a trader quits his house, and assigns for a

are not confined to an absenting from the dwelling-house; hence, where a person accustomed to attend the Royal Exchange to obtain news, absented himself therefrom;

daily at the Royal Exchange, in order to procure the intelligence necessary for its support. The act of bankruptcy charged to have been committed was, that H. had for some time previous to the issuing of the commission retired from the Exchange when he perceived any of his creditors approach, and at those times desired a friend to tell any one who inquired for him that he was not there; and it was shown that in one instance, having appointed a creditor to meet him on the Exchange, the creditor applied for him, and was informed, as usual, that he was absent. A verdict was found for the plaintiffs, with leave for the defendant to move to enter a nonsuit, and a rule *nisi* was accordingly obtained.

Per Cur. "This question must be decided on the construction to be given to the words '*otherwise absent*,' in the statutes of 13 Eliz. c. 7, and 1 Jac. 1, c. 15. Now those acts enact, 'that if any person within their description of a trader shall depart the realm, or begin to keep house, or *otherwise absent* himself, or take sanctuary, &c., or finally, after mentioning other acts of bankruptcy, shall '*depart from his dwelling-house.*' It has been contended that the words *otherwise absenting* are relative to the last provision, viz. *departing from his dwelling-house*, and as such are inapplicable to the present case; but as the effect of those words would be rendered nugatory by the admission of such an interpret-

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reason to his clerk that he does so to avoid any altercation as to the state of his affairs, it is no act of bankruptcy.

A trader who carries on business only at his counting-house in town, leaves it with all his books, and a few days afterwards finally quits his dwelling-house, commits an act of bankruptcy by departing from the counting-house. *Fudine v. Da Cossens*, 1 N. R. 234.

And if a trader has no fixed residence, nor a counting-house, and takes a lodging at a public-house in order to transact business in the neighbourhood, this is a dwelling sufficient to support an act of bankruptcy, by quitting it to avoid his creditors. *Holroyd v. Gwynne*, 2 Taunt. 176.

Where a trader on quitting her house of trade at Bath for London, in order to settle an execution that had issued against her on a warrant of attorney, told her servants that such was her intention, and desired any person who might call to be directed thither, and was afterwards arrested in London, and did not return, the court held that her intention did not appear to have been to delay her creditors, and that therefore she was not a bankrupt. *Aldridge v. Ireland*, 1 Taunt. 273.

A trader, on an execution being put into his house, shuts up his shop and goes from home for two days, without leaving any directions in case of creditors calling for the payment of their debts; during his absence a creditor calls and is unable to discover where he is to be found: it was held, that all these circumstances constituted an act of bankruptcy. *Ex-parte Austen*, 2 Deac. 533. It was questioned whether the shutting up the shop, without making any provision for the payment of creditors, would not of itself amount to an act of bankruptcy. (Id.) It is not sufficient that a sheriff's officer who comes to levy a *fi. fa.* on the trader's effects is refused admittance after the trader has left his house. *Barnard v. Vaughan*, 8 T. R. 849; and see *Schooling v. Lee*, 3 Stark. 149. A. collusively assigns his house in town, stock, &c., to B., and retires to Paddington; B. takes possession and carries on the business, concealing A.'s residence from his creditors. Three months afterwards a commission issues against A., under which the assignees take possession of the house, &c., as being still the property of A. In an action of trespass by B. against the assignees it was held, that there was evidence to go to the jury of A.'s having committed an act of bankruptcy, by departing from his dwelling-house or otherwise absenting himself. *Young v. Wright*, 2 Marsh. 233; 6 Taunt. 540.

Departing from the party's place of business, although he have a dwelling-house elsewhere, is, it seems, an act of bankruptcy within this clause of the statute (*Fudine v. Da Cossens*, 1 N. R. 234. *Spencer v. Billing*, 1 Camp. 310), or, at all events, within the next clause of it, namely, "otherwise absenting himself," and although no creditor actually calls during the absence. *Hammond v. Hincks*, 5 Esp. 139. And it has been holden, that if a trader who has no settled home or counting house, take up a temporary abode at a public-house in the place where his business carries him, he commits an act of bankruptcy by departing from such public-house with intent to defeat or delay his creditors. *Holroyd v. Gwynne*, 2 Taunt. 176.

A trader who orders large quantities of goods of different tradesmen, without the means of payment, and after they are delivered secretly leaves her house in London without leaving word where she is to be found, and goes into obscure lodgings at Reading, must be taken to depart from her dwelling-house with intent to delay her creditors, and thereby commits an act of bankruptcy. *Ex-parte Birch*, 2 Mont. D. & D. 659.

ation, we are of opinion that the object of the legislature in introducing those words was to comprehend all cases where a trader absents himself from his place of business, wherever that may be, with an intent to avoid his creditors. The argument that the Exchange was not the bankrupt's place of trade, is answered by the proof that he obtained his living by a trade that required his attendance there to collect news in order to its support; this is surely a place of trade within the spirit of the act: we therefore think that an act of bankruptcy was committed, and that the rule must be discharged." *See* Com. Dig. Bankrupt, C. 1; 1 N. R. 234; 1 M. & S. 338; id. 676. *Russell v. Bell*, 10 Mee. & W. 340. *Ex-parte Addison*, 18 L. J. Bank. 13.

Fudine v. Da Cossens, 1 N. R. 234.

Or where a trader who carried on business at a counting-house went away taking his books with him.[1]

A trader having a counting-house (the only place in which he carried on business) in town, and a dwelling-house in the country, left his counting-house, to which he never afterwards returned, taking his books with him, and slept at his dwelling-house a few nights, after which he finally quitted that also; it was held that the trader having departed from his counting-house, without any intention of returning, began to absent himself from the time of such departure within the meaning of the statute, and thereby committed an act of bankruptcy at that time. See *Ex-parte Deane*, 2 Mont. D. & D. 127. *Ex-parte Beer*, 1 id. 390; 5 Jur. 104.

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[1] Or where a trader went into a back shop in a neighbour's house to avoid being seen by an officer, who, he said, had a writ against him (*Chenoweth v. Hay*, 1 M. & S. 676); or where he absented himself from a theatre, of which he was proprietor (*Gimmingham. v. Laing*, 2 Marsh. 236; S. C. 6 Taunt. 532); or where, on being arrested, he escaped from the officer, and fled into the house of another person, when the door was kept fast, and the officer not permitted to enter (*Bayley v. Schofield*, 1 M. & S. 338); or where he made a fraudulent assignment of his house, &c. and removed to a distance, and was denied at his former residence, it was holden an act of bankruptcy by "*otherwise absenting*" (*Young v. Wright*, 2 Marsh. 233; S. C. 6 Taunt, 540). But where a trader at the desire of his creditor's attorney goes to the office of the latter to avoid being arrested in the street, held that by so doing he did not commit an act of bankruptcy (*Mills v. Elton*, 3 Price, 142); nor is an act of bankruptcy committed by a trader being merely guilty of a breach of appointment. (*Schooling v. Lee*, Stark. 148. *Sed vide Re Oried*, 9 Ir. Ch. R. 279.

A trader commits this act of bankruptcy by absenting himself from any place in which, in the ordinary course of his life and business, he would be expected to be present, with the intent to avoid, and therefore delay his creditors, whether it be his place of abode or his usual place of resort, or any place in which he had business to transact; for instance, a place fixed by himself to pay or meet a creditor. *Bernasconi v. Farebrother*, 10 B. & C. 549. *Russell v. Bell*, 10 Mee. & W. 340. The intent must be proved; but where the result of the absence is that creditors are delayed, the burthen of proof that such was not his intention is upon the trader. *Ex-parte Beer*, 1 Mont. D. & D. 390. Thus, where a trader failed to keep an appointment made by himself to pay his creditor, he was held to have committed this act of bankruptcy in the absence of evidence to the contrary. *Widger v. Browning*, 9 D. & R. 306. *See* also *Gimmingham v. Laing*, 6 Taunt. 532. Where a trader in insolvent circumstances, being pressed to assign his property, offered a composition, and his solicitor called a meeting of the creditors at the trader's place of business for the purpose of hearing a statement of his affairs laid before them, the non-attendance of the trader was held an act of bankruptcy. *Ex-parte Beer*. And so also where a trader, having attended a meeting of his creditors, was requested to withdraw until they could agree to a resolution as to his affairs, and he retired into the next room, where he was served with a writ, and immediately left the house, and did not return until after the meeting was over. *Ex-parte Dean*, 2 Mont. D. & D. 127; and see *Bramwell v. Lucas*, 2 B. & C. 745. And where a trader, on the dissolution of partnership, the retiring partner left orders at his place of business for his letters to be addressed to him at a particular post-office, the continuing partner afterwards called a meeting of creditors, notice of which was sent to such address of the retiring partner, but he neither sanctioned the meeting nor attended it, it was held that the non-attendance of the retiring partner at the meeting was not an act of bankruptcy. *Ex-parte Addison*, 3 De Gex & S. 580; 13 Jur. 601; 18 L. J. Bank. 13.

The absenting must be voluntary, and not by means of arrest. *Phillips v. Peake*, Green, 52; and *see* 3 Camp. 530 n. The duration of it seems to be immaterial; but it must be with intent to defeat or delay the creditors in the recovery of their debts.

(*e*) *By a Trader beginning to Keep House.*[1] *See* s. 67, 12 & 13 Vic. c. 106, *ante*, p. 177.

Anon. cited by *Buller, J.*, in Colkitt v. Freeman, 2 T. R. 64.

Whether the house in which the trader conceals himself be his own or a friend's, it is equally within the statute.[2]

A bill having become due, and the drawer being pressed for payment, desired the holder to call upon him the next morning at a friend's house, and he would pay him; the holder went accordingly, and was denied at the drawer's request. Upon being asked by his friend if he was aware that he had committed an act of bankruptcy, he answered with surprise in the negative, and said that he did not mean to do so, and immediately went and paid the bill.

Lord Mansfield told the jury, that if they were satisfied the denial was with a view to delay the creditor at the time, it was an act of bankruptcy, and if once committed it could not, clearly and unequivocally, be purged or explained away by subsequent circumstances.

Hopkins v. Ellis, S. P. 1 Salk. 110; *per Lord Mansfield*, in Round v. Byde, cited 1 Cooke, 111.

This act of bankruptcy is equivocal, and in all cases open to explanation;

Per Holt, C. J. "If a party commits a plain act of bankruptcy, as keeping house, &c., though he after goes abroad, and is a great dealer, yet that will not purge the first act of bankruptcy, but he will still remain a bankrupt; but if the act was not plain but doubtful, then going abroad and dealing, &c. will be evidence to explain the intent of the first act: for if it was not done to defraud creditors and keep out of the way, it will not be an act of bankruptcy." See *Wrench's case*, Cro. Eliz. 1583. 13.

Field v. Bellamy, Bull. N. P. 39.

as, that the trader was indisposed, or engaged with company.[3]

Per Lee, C. J. "The denial of the party must be with an intent to delay creditors; therefore, being denied when sick in bed, or engaged in company, will not be an act of bankruptcy."

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[1] This act of bankruptcy is generally proved by a denial to a creditor in consequence of a general or particular direction from the debtor, or from some other person in his presence, or by his debarring his creditors from access to him. Such denial is not essential if there is any other act showing the intent to keep house, as, for instance, if the creditor be excluded from the debtor without a sufficient reason, while he remains in or about the house. *Fisher v. Boucher*, 10 B. & C. 705.

An act of bankruptcy by beginning to keep house may be by closing the doors, without change of place or denial to creditors. *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36. *Ex-parte Poole*, 3 L. T. (N. S.) 59. If bankers close the doors and windows of the bank, and their customers cannot obtain admission, and the jury find that they are so closed to exclude the customers, and the bankers remain within, it is an act of bankruptcy by beginning to keep house. (Id.) Although neither of the partners lived in the banking-house. (Id. See *Ex-parte Mayor*, 19 Ves. 543.) Where one of several partners in a bank, who resided at the place of business, and was the only partner transacting the business (the others residing at a distance), shut up the banking-house and absented himself from it and stopped payment, it was held that this was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 269.

[2] So if he keeps on ship-board; or if a miller keep himself within his mill; or a churchwarden within the church. Stone, 123; Com. Bank. C. 1; Cull. 37. The language of the 1 Jac. 1, c. 15, s. 2, and s. 67, 12 & 13 Vic. c. 106, as to this act of bankruptcy, is the same.

[3] Or a refusal to see a creditor, merely on the ground of his calling at the trader's dinner-hour (*Smith v. Currie*, 3 Camp. 349), or when engaged in business. *Shew v. Thomson*, Holt, 159. A sufficient reason for denial would be that it was Sunday, although the debtor had himself fixed that day (*Ex-parte Preston*, 2 Ves. & B. 311); or that it was late, after the family had retired to rest (*Hughes v. Gillman*, 2 C. & P. 32); and it is apprehended that if a debtor, who was accessible to his creditors at his place of business, and declined to see them at his house, *on the ground that he did not attend to business there*, this would not be considered an act of bankruptcy. See *Park v. Prosser*, 1 C. & P. 176. An untrue statement, however, that he was not at home, would be evidence of a denial with intent. (Id.)

It is not material whether a creditor has been actually denied (*Harvey v. Ramsbottom*, 1 B. & C. 55; S. C. 2 D. & R. 142), or delayed (*Robertson v. Liddell*, 9 East, 487; S. C. 3 Smith, 347; S. P. *Lloyd v. Heathcote*, 2 B. & B. 388). Hence, if a trader keep at home merely to avoid the consequence of a former arrest, he commits an act of bankruptcy. *Dickenson v. Foord*,

HEYLOR v. HALL, Palm. 323.

It was agreed, that if any one kept himself in his house for a long time, this, nevertheless, does not make him a bankrupt; but if he hide himself in his house for one hour, or a day, to put off or defraud his creditors, this makes him a bankrupt within the statute.

The time during which the debtor has kept house is immaterial, whether it be an hour or a day.

C. P. Barnes, 1759. Or if he seclude himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him (*Dudley v. Vaughan*, 1 Camp. 271), though it was long considered that an actual denial was indispensable (*Jackman v. Nightingale*, Buller. N. P. 30. *Field v. Bellamy*, 1742; id. 39), and that an order to be denied without an actual denial was of no avail. *Hawker v. Saunders*, 1 Cooke, 90, 8th edit. *Nokes v. Boucher*, 10 B. & C. 705. *Hare v. Waring*, 3 Mee. & W. 36. And therefore, where persons called to whom the trader was denied who were not creditors, it was holden that no act of bankruptcy was committed. *Garrett v. Moule*, 5 T. R. 575. The distinction between what amounts to *evidence* of a beginning to keep house, and what is an *actual* beginning to keep house, to constitute an act of bankruptcy, was not, in the earlier cases, sufficiently comprehended or specifically defined; and whilst the erroneous judgment pronounced in *Fowler v. Padget*, 7 T. R. 509., and *Barnard v. Vaughan*, 8 id. 149, were upheld as existing law; in which we may remember it was decided that a creditor must be *delayed* when a trader has departed from his house or from the realm; but which (*Robertson v. Liddell*) has now been settled not to be necessary, the *intent* alone being the governing principle: it was thought that a denial to a creditor, or the delay of a creditor, was an inseparable ingredient to constitute a *beginning to keep house*. But this doctrine is now repudiated. *Lord Ellenborough*, in *Dudley v. Vaughan*, 1 Camp. 271, having clearly decided that a denial that the trader is at home is not necessary, if there be evidence that he has concealed himself, or, according to a word used in some of the cases, has *obscured* himself in his dwelling-house, he is, from that moment, a bankrupt. See *Bayley v. Schofield*, 1 M. & S. 338. *Ex-parte Bamford*, 15 Ves. 459. And his lordship observed, an authorised denial to a creditor requiring to see his debtor, is the most usual and familiar evidence of beginning to keep house within the meaning of the statute; it is not the only evidence by which this may be proved. If a trader has no servant, the act cannot be evinced through such a medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy. In *Lloyd v. Heathcote*, 2 B. & B. 390, it was also remarked by *Dallas, C. J.*, that a denial to a creditor does not of itself constitute an act of bankruptcy, but is *only evidence of a beginning to keep house*, which, if accompanied with an intention to delay creditors, is indisputably an act of bankruptcy.

It is not necessary that the order to be denied should be confined to a particular creditor; a general order of denial is sufficient evidence of an intention to delay. *Round v. Byde*, 1 Cooke, 111, 8th edit. *Lloyd v. Heathcote*, 2 B. & B. 388. Even although it should appear that the debtor would not have denied himself to the individual creditor who called upon him, had he known that it was him (*Mucklow v. May*, 1 Taunt. 479); or, if he be denied to several persons whom the witness believes, from their frequent calling, to be creditors, is evidence to go to the jury. *Jameson v. Eamer*, 1 Esp. 381. Or an order by a trader, who was ill in bed, in case *any of his creditors called*, to to be denied (*Lazarus v. Waithman*, 5 Moore, 313); or a denial to be *seen* by a creditor, suffices without a denial of being at home (*Dudley v. Vaughan*, cited in *Robinson v. Liddell*, 9 East, 490); and the denial need not be to the creditor personally (*Bramley v. Mundee*, Bull. N. P. 39; S. P. *Lloyd v. Heathcote*, 2 B. & B. 388. *Colkett v. Freeman*, Cooke, 83), though formerly it was holden otherwise (*Barron v. Fortis*, Green, 44.) But the person making the application, or the party on whose behalf it is made, must be a creditor. *Jackman v. Nightingale*, Bull. N. P. 40; S. P. *Ex-parte Levi*, 7 Vin. 61. Yet if the trader be denied, the intention of the creditor in calling is immaterial. *Ex-parte White*, 3 Ves. & B. 129. *Ex-parte Harris*, 2 Rose, 67. The usual proof is, that the person who asked for the bankrupt told the witness that he came for the payment of his bill; or that he wanted money; or that the witness should swear that he knew the bankrupt was indebted to the person who was denied. But a denial to the holder of a bill on the morning it becomes due is sufficient. *Colkett v. Freeman*, 2 T. R. 59.

A denial to the collector of assessed taxes (*Jeffs v. Smith*, 2 Taunt. 401); or church-rates (*Lloyd v. Heathcote*, 5 Moore, 129; S. C. 2 B. & B. 388); or highway rates, suffices. So a denial to avoid process out of Chancery under a decree for a *debt* will be an act of bankruptcy (2 Com. Dig. 5); but a denial to avoid an attachment for non-delivery of goods will not be an act of bankruptcy, as it is only to evade the performance of a duty (*Lingwood v. Eade*, 1 Atk. 196; *see* 1 Mont. B. L. 49 n). But a denial to a creditor who

(*f*) *By a Trader suffering himself to be Arrested or taken in Execution for any Debt not due.*

This was first made an act of bankruptcy by the 13 Eliz. c. 13, s. 1, and continued as such by 1 Jac. 1, c. 15, s. 2, and 6 Geo. 4, c. 16, s. 3, and now by sect. 67, 12 & 13 Vic. c. 106; *ante*, p. 177. It must be done with intent to defeat or delay the creditors in the recovery of the debts.

(*g*) *By a Trader yielding himself to Prison.* *See* s. 67, 12 & 13 Vic. c. 106, *ante*, p. 177.

Ex-parte Barton, 7 Vin. Abr. 61, 62, pl. 15.

Where a trader, capable of paying, from fraudulent motives voluntarily goes to prison, it is an act of bankruptcy.

B. was arrested for 28*l.*; and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition.

Lord Talbot held this an act of bankruptcy; but observed, that if there had not been an intention to delay creditors, yielding himself to prison to delay creditors would not constitute an act of bankruptcy. *See* the *King v. Paye*, 7 Price, 616; 4 Ves. 68; Billing, 95; Good. 25. *Re Blackwell*, 1 Fonb. T. R. 155.

(*h*) *By a Trader suffering himself to be Outlawed.* *See* s. 67, 12 & 13 Vic. c. 106, *ante*, p. 177.

Radford v. Bludworth, 1 Lev. 13; S. C. 2 Sid. 69; S. C. 1 Keb. 11.

To render outlawry an act of bankruptcy, it must have been suffered with an intent to defraud creditors.[1]

This was a special verdict in an action of ejectment, which stated that A., a merchant, seized of lands and indebted, in 1643 committed an act of bankruptcy, and in 1645 was outlawed, and in 1649 sold the lands to the lessor of the plaintiff, and the same year was outlawed again. It was objected that the verdict was insufficient, not having found that he permitted himself to be outlawed with intent to defraud his creditors; to which it was answered, that in a special verdict it should be intended.

(*i*) *By a Trader procuring himself to be Arrested or taken in Execution, or his Goods, Money, or Chattels to be Attached, Sequestered, or taken in Execution.*[2] (Id.)

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calls for payment, but does not ask to *see* the debtor, is not an act of bankruptcy (*Dudley v. Vaughan*, 1 Camp. 271). After the denial is complete, it cannot be avoided by any subsequent circumstances (*Mucklow v. May*, 1 Taunt. 479; S. P. *Colkett v. Freeman*, 2 T. R. 59. *Wood v. Thwaites*, 3 Esp. 245). And on the other hand, unless the denial to a creditor is in consequence of a direction from the debtor, a subsequent approbation of it by him will not make it an act of bankruptcy (*Ex-parte Foster*, 1 Rose, 50; 17 Ves. 416 n.); nor is an act of bankruptcy committed by the trader himself coming out and saying to the agent of the creditors that he is not at home, this being the very reverse of a beginning to keep house. *Ex-parte Bamford*, 15 Ves. 459.

[1] And in Comyn's *Digest*, Bankrupt, it is stated, that if the outlawry be reversed before the commission issue, or for default of proclamation after commission, that will not be an act of bankruptcy. But no authority is cited. In 7 Vin. Abr. 61, it is also stated, that if the outlawry be reversed for want of proclamation, all that is done in the meantime by the commissioners is void, but a different rule obtains if it was reversed on a writ of error: cites R. S. L. 186; Stone's Read. 124. But the accuracy of these opinions appears exceedingly questionable; for if the outlawry were originally fraudulently suffered, and intended to defeat or delay creditors, no subsequent event would be sufficient to clear the fraud. We have already seen (*ante*, p. 185 n.) that an outlawry in Ireland will not be an act of bankruptcy to support a commission in this country.

[2] This act of bankruptcy was not included in the acts enumerated in the stat. Eliz., but is made a distinct head by 1 Jac. 1, c. 15, s. 2; but the words, "or taken in execution," were omitted, and therefore it was holden that a fraudulent judgment and execution thereupon were not within the meaning of that act. *Harman v. Spottiswoode*, 1 Cooke. *Clavey v. Hayley*, Cowp. 427. For which reason the words "or taken in execution" were introduced into the stat. 6 Geo. 4, c. 16. The word "attached," means that species of attachment by which suits are commenced, such as the foreign attachment, by the custom of London or Bristol, and the like. *Per Lord Mansfield* in *Clavey v. Hayley*, Cowp. 411; and *see* Cullen, 41, 42. A trader by procuring bills of exchange, his property, to be taken in execution, with intent to defeat his creditors, commits an act

(*i*) *By a Trader procuring himself to be Arrested* (*continued*).

EX-PARTE BARTON, 7 Vin. Abr. 61.

An act of bankruptcy is committed by a person procuring himself to be arrested.

Per Talbot, L. C. Where the party procures himself to be arrested upon a *sham* debt, it is immediately an act of bankruptcy.

(*j*) *By a Trader or Non-Trader lying in Prison or escaping out of Prison.*

By lying in prison.

The 69th sect. 12 & 13 Vic. c. 106,[1] is repealed by sect. 23, 24 and 25 Vic. c. 134, and sect. 71 substituted. Set out *ante*, p. 182.

(*k*) *By a Trader or Non-Trader filing a Declaration that he is unable to meet his Engagements.*

By making a declaration.

The 70th sect. 12 & 13 Vic. c. 106, is repealed by sect. 230, 24 & 25 Vic. c. 134, and sect. 72[2] substituted. Set out *ante*, p. 182.

(*l*) *By a Trader Compounding with Petitioning Creditor.*

A trader, by paying or securing the debt of the petitioning creditor, commits an act of bankruptcy.

Adjudication may either be annulled or declared valid.

By sect. 71, 12 & 13 Vic. c. 106. s. 71, "that if any such trader, after the issuing of any fiat or filing of any petition for adjudication of bankruptcy against him, shall pay money to the petitioning creditor, or give or deliver to such petitioning creditor any satisfaction or security for his debt or for any part thereof, whereby such petitioning creditor may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction or security, shall be an act of bankruptcy; and if adjudication of bankruptcy shall have been made under such fiat or petition, the court may either declare such adjudication to be valid, and direct the same to be proceeded in, or may order it to be annulled, and a petition or new petition for

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of bankruptcy (*Edwards v. Cooper*, 11 Q. B. 33); but allowing judgment to go by default, under which judgment the goods are taken in execution, is not procuring the goods to be taken in execution so as to constitute an act of bankruptcy. *Gibson v. King*, 1 Car. & M. 458. So also where a person, being pressed by his landlord for rent due, gave him a warrant of attorney upon an understanding that judgment should be entered up, but not be executed until other writs came in: other writs did come in, and the goods were taken in execution upon the judgment; this is not an act of bankruptcy. *Gore v. Lloyd*, 12 Mee. & W. 463; 12 L. J. Ex. 366. An act of bankruptcy, by procuring goods to be taken in execution, is not committed till actual seizure, and when so committed, is not carried back by relation to an earlier period. *Belcher v. Gunmow*, 11 Jur. 286; 9 Q. B. 873; 11 L. J. Q. B. 158. *Gibson v. King, supra.* The arrest, attachment, sequestration or execution, must appear to have been procured by the bankrupt with the intent to defeat or delay his creditors in the recovery of their debts.

[1] Under the prior stat. 6 Geo. 4, an adjudication could not be supported by an act of bankruptcy by lying in prison, unless the trading were before the imprisonment. *Ex-parte Lynch*, Mont. 453. The act of bankruptcy is not complete until the last day of the period prescribed by sect. 71. See *Higgins v. M'Adams*, 37 L. J. 1. Actual custody is sufficient, though not in prison. *Stevens v. Jackson*, 6 Taunt. 136. See *Glassington v. Rawlins*, 3 East, 407. The escape is not merely such an escape as the sheriff would technically and constructively be responsible for, but an actual escape, manifesting an intention to abscond. *Ross v. Green*, 1 Barn. 437.

[2] A declaration of insolvency, followed by a fiat within two months, was held to be an act of bankruptcy, sufficient to support another fiat issued after that period, on annulling of the former fiat. *Ex-parte Hunt*, 3 De Gex & S. 572. On the 26th of November a trader signed a declaration of insolvency, and left it in the hands of A., who, with his partners, B. and C., were creditors. The trader was also indebted to B. and C. in respect of another business carried on by them, and owed them rent. On the same day B. and C. distrained and took the trader's goods, and then offered his creditors a composition, they retaining the goods; and this offer was agreed to on the following day at the office of A.'s solicitor, but A. was not then present. On the 29th of November the agreement for the composition was executed; and afterwards, on the same day, A. filed the declaration of insolvency, which the trader had signed on the 26th; and on the affidavit of A. of the joint debt due to him and B. and C., the trader was adjudged bankrupt. The adjudication, on appeal, was set aside, for the case must be treated as if the declaration of insolvency had never been on the file, where it ought to have been placed. *Ex-parte Johnstone*, 15 Jur. 739. A commissioner may attend to circumstances of equitable invalidity upon an application to retain or not to retain an adjudication. (Id.)

adjudication may be filed, and such petition or new petition may be supported either by proof of such last-mentioned or any other act of bankruptcy."[1]

(*m*) *By a Trader-Debtor filing a Petition for Arrangement between him and his Creditors.*

The filing a petition for arrangement between trader-debtor and his creditors is an act of bankruptcy.[2]

By sect. 76, 12 & 13 Vic. c. 106, "that the filing of a petition by any such trader for an arrangement between such trader and his creditors, under the provisions of this act with respect to arrangements between debtor and creditor under the superintendence and control of the court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed: provided also, that no adjudication shall be made on any such act of bankruptcy unless and until after such petition for arrangement shall have been dismissed." See *Monk v. Sharp*, 2 H. & N. 540; 3 Jur. 327; 27 L. J. Ex. 29. *Re A.* 1 L. T. (N. S.) 172. *Re Rees*, 6 Jur. N. S. 282; S. C. 1 L. T. (N. S.) 285; 29 L. J. Bank. 7. *Re Hegarty*, 10 Ir. Ch. R. 117. *See* 28 L. J. C. P. 273; 29 id. 237.

(*n*) *By Trader having Privilege of Parliament not Paying or Compounding, &c.*

Trader having privilege of parliament not paying or compounding to the satisfaction of the creditor, and entering appearance to action within one month.

By sect. 77, 12 & 13 Vict. c. 106, "that if any creditor or creditors of any such trader having privilege of parliament to an amount hereinafter declared to be requisite to support a petition for adjudication of bankruptcy, shall file an affidavit in any court of record at Westminster that such debt is justly due to him, and that such debtor, as he very believes, is such trader, and shall sue out of the same court a writ of summons, in the form contained in Schedule (E.) to this act annexed, against such trader, and serve him with a copy of such summons, if such trader shall not, within one month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, and within one month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons."[3]

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[1] This is the same in substance as 4 Geo. 4, c. 16, s. 8. "Debt" here means debt payable at a future period, as well as a debt actually due. (*Re Tidmarsh, per Commissioner Fonblanque*, Oct. 2, 1849.) The words "other creditors" mean the creditors entitled to receive dividends under the particular bankruptcy, and the property, the payment, gift, or delivery of which is hereby declared to be an act of bankruptcy, is property distributable under the particular adjudication, and therefore the section would not embrace the payment by a firm of a joint debt, only one or more members of the firm having been made bankrupt. *Ex-parte Smith*, 3 Mont. D. & D. 144. As to forfeiture, *see* sect. 268.

[2] And by sect. 223, this is an important clause, for if the court are dissatisfied with the petitioning debtor for any of the reasons here specified, he is at once to be declared a bankrupt, and the adjudication advertised. The corresponding section on the Irish Bankrupt Law is 12 & 13 Vic. c. 107, s. 23, but it slightly differs in the proviso, not containing the words "such act of bankruptcy." It has been held that that section, however, does not prevent the trader being summoned under the trader-debtor sections, and committing an act of bankruptcy under the provisions of those sections. *Re Burke*, 20 L. T. 33. See *Ex-parte Barnett*, 15 Jur. 617; 4 De Gex & S. 54.

[3] This provision was enacted as far back as 4 Geo. 3, c. 30, "to support good faith and credit in commercial traders," &c. The sureties would be liable, at all events, for the sum recovered and costs, and no provision is made for the privileged trader admitting one part and disputing the other part. There is a similar enactment in 7 & 8 Vic. c. 111, as to public companies.

(*o*) *By a Trader-Debtor suffering Execution to be levied.*

By sect. 73, 24 & 25 Vic. c. 134, "if any execution shall be levied by seizure and sale of any of the goods and chattels of any trader-debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels." *See* the proviso set out at length, *ante*, p. 182.

Execution levied by seizure and sale of a trader's goods is an act of bankruptcy, provided a petition for adjudication be presented.[1]

(*p*) *By a Creditor filing a Petition against his Debtor, whether Trader or not, followed by Adjudications in the Foreign Dominions of the Crown.*

This act of bankruptcy is created by sect. 75, 24 & 25 Vic. c. 134, set out *ante*, p. 183.

(*q*) *By Non-payment by Trader or Non-Trader after* JUDGMENT*-Debtor Summons.*

See ante, p. 183, ss. 76, 77, 78, 79, 80, 81, 82, 83, 84, 24 & 25 Vic. c. 134.

(*r*) *By Summons of* Trader*-Debtor under* 13 *&* 14 *Vic. c.* 106, *and Procedure thereon.*

A creditor making affidavit of his debt, and of his having given notice requiring immediate payment, &c., court may summon the trader. *See* sect. 78,[2] *ante*, p. 179.

Summoning the trader-debtor.

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[1] This section is entirely novel. On the one hand, it makes an execution actually levied evidence that the debtor is unable to pay not only one but all his creditors, and, on the other hand, it may deprive the individual creditor of the benefit of his legal diligence.

[2] The 11th sect. of 5 & 6 Vic. c. 122, is nearly similar to this section. Proceedings under it might be taken simultaneously with an action at law for the recovery of the same debt. *Covington v. Hogarth*, 8 Scott, 725; 7 Man. & G. 1013. *See* sect. 59 of 6 Geo. 4, c. 16.

Under this and the following sections it is competent to the commissioner to inquire whether the person summoned is a trader. *Anon.* 1 Fonbl. B. C. 251; but the court is not bound to examine witnesses. *Ex-parte Sheward*, 14 Jur. 190.

Its affidavit of debt should only be for the balance actually due. *Marshall v. Sharland*, 15 Jur. 168; 20 L. J. Q. B. 3.

The sufficiency may be disputed at the time of showing cause against the adjudication. *Anon.* 1 Bank. & Insol. R 192: *Evans.*

Where a trader-debtor is summoned under this section, and deposes upon the merits that he has a good defence to the demand of the summoning creditor, the 79th section of this act does not make it imperative upon the court to require a bond, with sureties, to be given by the trader-debtor as security for the demand and costs, but makes it incumbent upon the court to exercise a discretion whether to require such bond or not, having regard to all the circumstances of the case. *Ex-parte in re Wood*, 18 Jur. 229; 2 Eq. R. 300.

In an action of debt the defendant pleaded the general issue to the whole debt, and a set-off as to part. After the action was commenced, the plaintiff obtained a summons in bankruptcy, on an affidavit made by him, under the 5 & 6 Vic. c. 122, s. 11, that the defendant was indebted to him in the full amount for which such action was brought, and allowing no credit for the sum sought to be set-off. The defendant having deposed on oath that he had a good defence to the whole of the plaintiff's demand, the summons in bankruptcy was dismissed, with costs. The cause was afterwards tried in Trinity Vacation, when, the plaintiff having admitted the set-off, a verdict was entered for him for the difference between it and his whole demand. The judge certified for immediate execution, which was issued on the 7th August, and the amount levied was paid under protest. The defendant, on the 20th November, obtained a rule, under the 19th section of the stat. 5 & 6 Vic. c. 122, calling on the plaintiff to show cause on the last day of the term why he should not refund the difference between the sum paid and the amount of the verdict, and to pay the defendant his costs in the action, &c.: it was held that the application was made too late; and it seems that it ought to have been made within the first four days of Michaelmas Term. *Smith v. Temperley*, 16 Mee. & W. 273; 4 Dowl. & L. 510; 16 L. J. Ex. 105; 11 Jur. 244. See *Ex-parte Musgrove*, 3 Mont. D. & D. 386.

A creditor served a debtor with particulars

(C) *Manner of Proceeding upon the Appearance of the Trader.* *See* sect. 79, 12 & 13 Vic. c. 106, *ante*, p. 179.

(*a*) *Appearance to Summons.*[1]

(*b*) *Trader not attending Summons, or refusing to admit Demand.*

Trader not attending summons, or refusing to admit demand.

Trader not attending summons, or refusing to admit the demand, &c., and not paying or compounding within a certain time, or giving bond for the payment of the same, if recovered in an action, &c. with costs, to be an act of bankruptcy. *See* sect. 80,[2] *ante*, p. 181.

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of demand under the 5 & 6 Vic. c. 122, s. 11, stating that the debt arose from returned bills. The creditor then made an affidavit stating the debt to have been incurred for goods sold and delivered. The debtor was summoned to appear before the commissioner in pursuance of the act, but did not appear, and did not satisfy the creditor within fourteen days. A fiat issued against the debtor on the act of bankruptcy alleged to have been committed by him under the circumstances. On a petition to annul the fiat it was held, first, that the creditor had not complied with the forms required by the act; and, secondly, that the debtor's non-appearance before the commissioners did not amount to a waiver by him of the irregularity. *Ex-parte Greenstock*, 15 L. J. (N. S.) 5, Bank.; 10 Jur. 122; 1 De Gex, 230. See *Willding v. Temperley*, 12 Jur. 417; S. C. 17 L. J. Q. B. 184. *Smith v. Temperley*, 16 Mec. & W. 273.

[1] Upon the appearance to the summons, the court will not enter into the consideration of any question as to the validity of the trading, or the other requisites of adjudication (*Anon.* 1 Fonbl. B. C. 227), nor to the validity of the debt sworn to in the affidavit; it is sufficient that the debtor make the deposition that he believes he has a good defence. (Id. 19, 134.) But the court has the power under the summons to inquire whether the party summoned be a trader subject to the bankrupt laws. Id. 251.

In the particulars of demand the debt was stated as due in respect of money paid by the creditors to a third person for the use of the trader-debtor; without stating it was so paid at the request of the trader-debtor; it was held to be insufficient, and the summons was dismissed. (Id. 227.) The description of the parties should be the same in the summons, and in the particulars of demand and notice (rule 73); but the description of the trader in the summons as "nurseryman," and in the particulars of demand as "nurseryman, cowkeeper, dealer in horses, dealer and chapman," was held to be immaterial. (Id.) If the affidavit states the demand to be for goods sold and delivered, and in the particulars of demand the greater portion of the debt is stated to be due merely on bills of exchange, which however, in fact, were given for goods sold and delivered, this is irregular and insufficient to found an act of bankruptcy, and the irregularity is not waived by the trader not appearing to the summons, or his having, on service of the summons, called on the solicitor and signed an undertaking to pay the debt by a time certain, or in default that the creditor might proceed on the summons, the trader at that time not being aware of the irregularity. *Ex-parte Greenstock*, 10 Jur. 122; 1 De Gex, 230; 15 L. J. Bank. 5; and see *Ex-parte Bowers*, 16 Jur. 734; 1 De Gex, M. & G.; B. C. 68.

Where the debtor deposes that he has a good defence upon the merits, it is not imperative upon the court to require the bond to be given.

When the creditor summons the trader, pending an action for the same demand, and the greater part of the demand is paid into court, where the action is pending, the court in its discretion will not require a bond for the balance, unless it is shown to be in danger. *Anon.* 1 Fonbl. B. C. 25.

Where the debt is not denied it is the right of the creditors to have the admission, and it will not be delayed to afford time to complete an arrangement with the creditors under sect. 224, to which six-sevenths of the creditors have assented. (Id. 63.) Where the summons is against a firm, and the debt admitted, each partner should make a separate admission. (Id. 70.) And if the trader admits part of the demand, and deposes that he has a good defence on the merits to the residue, he must give a bond for the whole demand. (Id. 5.) The trader-debtor had deposed to a good defence upon the merits, and after an examination of the trader-debtor the court dispensed with the bond. The creditor afterwards filed an affidavit showing that the trader-debtor had upon the hearing sworn falsely, the court granted a re-hearing. (Id. 256.)

[2] The acts of bankruptcy under this section are,—

(1) The non-appearance after personal service, without due excuse proved to the satisfaction of the court.

(2) The refusal to admit, and not deposing to merits.

If followed in either of such cases by the not paying, securing, or compounding to the creditor's satisfaction, within the seven days or the enlarged time, or the not entering into the bond, if required.

The lapse of two months will bar an adjudication on any of these acts of bank-

(*c*) *By Trader admitting Debt, and not Paying or Securing the Payment, &c.*

By trader admitting debt, and not paying or securing the payment, &c.

By trader signing admissions and not paying, securing, or compounding within prescribed time, an act of bankruptcy. *See* sect. 81,[1] *ante*, p. 180.

(*d*) *Or admitting Part only.*

Or admitting part only.

A trader admitting *part only* of a demand, &c., and the trader not paying, &c. the sum admitted, and as to the residue not paying the same, &c., or giving bond to pay the same if recovered in an action with costs, is an act of bankruptcy.[2] *See* sect. 82, *ante*, p. 180.

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ruptcy. It is to be observed, that although there may be constructive service of the notice, the summons must be personally served.

The compounding means arranging with the creditor to his satisfaction at the time, although some part of the arrangement remains to be carried out, after the specified seven days. *Ex-parte Brown*, 1 Mont. & Chit. 177. *Pennell v. Rhodes*, 9 Q. B. 114. In the case last cited, the Court of Queen's Bench held that, notwithstanding the forms appended to the 5 & 6 Vic. c. 122, they could not construe the act so rigidly as to hold that any accidental omission to conform with its requirements, as to a small part of the debt, there being no intention to refuse the admission, would be an act of bankruptcy. The claim there was for 149*l.* 4*s.*, and 149*l.* only was compounded for, and it was held sufficient. Under the County Court Act, which gives jurisdiction in the absence of the defendant, upon proof of the service to the satisfaction of the judge, a judgment is valid, although there was no service in point of fact (*Robinson v. Lenaghan*, 2 Ex. 333. *Zohrab v. Smith*, 17 L. J. Q. B. 174), and so a defect in the proceedings, under sect. 78, might not prevent the act of bankruptcy being committed by non-appearance if the court adjudicated that the service was sufficient (but see *Ex-parte Greenstock*, 1 De Gex, 230). The time and mode of entering into the bond, when required, is regulated by rules of court.

[1] A lunatic cannot admit an act of bankruptcy by omitting to pay or give security according to this section. See *Ex-parte Stamps*, 1 De Gex, 345. See *Pim v. Wilson*, 2 Phil. Ch. R. 653.

[2] There is no act of bankruptcy arising from the admission of a debt if the debtor afterwards pay it, but if he does not afterwards pay or tender it the admission constitutes an act of bankruptcy. In order to prove that an act of bankruptcy has been committed, the person who is to establish this must prove positively that the debtor signed the admission, and negatively that he did not pay and did not tender. *Per Lord Cranworth, Ex-parte Danks*, 1 De Gex, Man. & G., B. C. 238; id. 230; 2 id. 936; 22 L. J. Bank. 73.

Upon an adjudication of bankruptcy founded on failure to comply with this section, the *onus* is upon the petitioning creditor of proving that there has been no payment or tender. It is questionable whether in such a case the tender need be made with the same strictness as would be required to support a plea of tender in an action. (Id.)

Where a trader who upon summons to the Court of Bankruptcy appears and signs an admission for part only of the demand of the creditor, and also makes a deposition that he believes he has a good defence upon the merits to the residue of the demand, and does not pay the sum so admitted, the petition for adjudication of bankruptcy being filed against him within two months, &c., he does not commit an act of bankruptcy within the meaning of this section. *Oldfield v. Dodd*, 8 Ex. 578; 17 Jur. 261; 22 L. J. Ex. 144; Exch. Cham.

B., against whom proceedings in the Bankruptcy Court were instituted by R., under stat. 5 & 6 Vic. c. 122, on the 15th February, 1844, signed an admission that he was indebted to R. in the sum of 149*l.* On the 29th of February he offered to give a judge's order for the amount, payable by instalments, and to deposit with R. six bills of exchange, which offer R. accepted, and B. delivered the bills to the attorney for R., who returned them, in order that they might be delivered to him through the attorney for B. On the same day the attorney for B. received them from B. On the 2d of March a judge's order was obtained, and B. paid two of the instalments under it, but made default in payment of the others; whereupon R. signed final judgment, and issued execution thereon. The precise amount of the debt due from B. to R. was 149*l.* 4*s.* In an action by the assignees of B. and R. it was held, first, that there was a sufficient admission of the debt within sect. 15 of stat. 5 & 6 Vic. c. 122. *Pennell v. Rhodes*, 15 L. J. (N. S.), Q. B. 352; 10 Jur. 825, Q. B. It was held, secondly, that on the 29th of February there was a compounding for the debt, which prevented an act of bankruptcy under the provisions of the same statute. (Id.)

Refusing to sign an admission of debt, whatever may be the nature of the statement made by the trader, shall be a refusal to admit within the statute.

(*e*) *Refusing to sign an Admission of Debt, whatever may be the nature of the statement made by the Trader, shall be a Refusal to Admit within the Statute.*

The 83d sect. *ante*, p. 180, describes what shall be deemed a refusal to admit the debt, and empowers court to enlarge time for admission or entering into bond, &c.[1]

(*f*) *Admission attested by Trader's Attorney has the same force as an Admission signed in Court.*

Admission attested by trader's attorney has the same force as an admission signed in court.

Admission of debt signed elsewhere than in court, if attested by trader's attorney, to have the same force as an admission signed in court.[2] *See* sect. 84. *ante*, p. 180.

(*g*) *Court may award Costs to either Party.*

Court may award costs to either party.

Court may award costs to the creditor or the trader summoned.[3] *See* sect. 85, *ante*, p. 181. And we have seen, by sect. 86, *ante*, p. 181, it is provided by way of compensation, that if a creditor bring an action, and do not recover the amount sworn to in his affidavit of debt, and if the affidavit be made for such amount without probable cause, the defendant in the action shall be entitled to costs.[4]

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[1] R. 81, R. & O. 19, Oct. 1852:—"Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand, or any part thereof, or for entering into a bond with sureties, shall be supported by affidavit.

"If no such objection be taken, nor any application for adjournment be made or allowed, then the defendant (debtor) is called upon to state whether he admits the demand of such creditor, or any and what part thereof, or has a good defence upon the merits to the same, or any or what part thereof. If the debtor admit the demand of the creditor, or some part thereof, then such admission is reduced into writing and signed by the defendant (debtor)."

The following is the form of admission as given in the Schedule (I.) of the statute:—

THE BANKRUPT LAW CONSOLIDATION ACT, 1849.

Admission of Debt by Trader-Debtor.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of] day of A.D. 18

Whereas I the undersigned, E. F., of am summoned to appear before this honourable court for the purpose of stating in manner prescribed by "The Bankrupt Law Consolidation Act, 1849," whether or not I admit the demand of A. B. of (who claims of me, the said E. F., the sum of [*the amount*] for a debt), or any and what part thereof, or whether I verily believe that I have a good defence upon the merits to the said demand, or to any and what part thereof; Be it known that I, the said E. F., hereby confess that I am indebted to the said A. B. in the said sum of [*or* in part of the said sum of that is to say, in the sum of].

(Signed) E. F.

The admission may be made out of court. *See* 12 & 13 Vic. c. 106, s. 84, 1, p. 72. The form of the admission in that case is as given in Schedule (L.) of the statute.

[2] The cases decided upon 1 & 2 Vic. c. 110, s. 9, are applicable in this section. *See* authorities collected under Warrant of Attorney. It is necessary, however, to notice the important case of *Pocock v. Pickering*, 21 L. J. Q. B. 365. There a warrant of attorney was attested as follows:—"Signed, sealed, and delivered in the presence of me, Henry Clarke, who at the request and in the presence of the said Joseph Heathcote Brooks, James Coghlan, and James Henry Pickering, have set and subscribed my name as the attorney on their behalf, attesting the execution hereof, having first read over and explained to them, and each of them, the nature and contents thereof." *Held* (*Erle, J.*, dissenting), that the attestation was invalid, on the ground that the witness did not by necessary implication declare himself to be attorney for the persons executing the warrant of attorney, as required by the 1 & 2 Vic. c. 110, s. 9.

[3] When the costs of the proceedings in bankruptcy are ordered to abide the event of the action, they may after the determination of the action be taxed by the officers of the Bankruptcy Court, and added to the costs of the action, and final judgment signed for the whole. *Webb v. Hewett*, 6 Ex. 607.

[4] Agreeing to refer the action to an arbitrator, who is to certify how the verdict is to be entered, the costs of the cause, and the reference to abide the event, does not

(*h*) *By* Trader *or* Non-Trader *after Judgment-Debtor Summons under* 24 *&* 25 *Vic. c.* 134.

After judgment-debtor summons against trader or non-trader on non-payment, an act of bankruptcy.

See ss. 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, *ante*, pp. 183 to 185.

(*i*) *By Petitions for Adjudication of Bankruptcy under* 24 *&* 25 *Vic. c.* 134.

Debtor may petition for adjudication against himself, such petitioning an act of bankruptcy.

By sect. 86, "any debtor may petition for adjudication of bankruptcy against himself, and the filing of such petition shall be an act of bankruptcy without any previous declaration of insolvency by such debtor."

SECONDLY, SUCH AS RELATES TO THE DISPOSAL OF A *TRADER'S* OR *NON-TRADER'S* PROPERTY.

Trader within realm or elsewhere making any fraudulent grant, &c. act of bankruptcy.

By sect. 67, 12 & 13 Vic. c. 106, "a *trader* making or causing to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or making or causing to be made fraudulent surrender of any of his copyhold lands or tenements, or making or causing to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed thereby to have committed an act of bankruptcy."

So by non-trader with intent to defraud or delay creditors.

The language of the corresponding section in 24 & 25 Vic. c. 134, s. 70, is, that "if any person *not being a trader* shall, with intent to defeat or delay his creditors, make any fraudulent conveyance, gift, delivery, or transfer of his real or personal estate, or any part thereof, such person shall be deemed to have committed an act of bankruptcy."[1]

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preclude a defendant from applying for costs under this section. *Deere v. Kirkhouse*, 20 L. J. Q. B. 195.

The application under this clause must be by motion within the first four days of term, if speedy execution has been granted; or, in other cases, before judgment signed and execution issued. *Smith v. Temperley*, 16 Mee. & W. 273. It must be by rule or order, and not by suggestion; and the decision of the court will be conclusive. It is now decided that a set-off must be allowed for by the creditor in his claim. *See supra*, *Smith v. Temperley*.

The plaintiff summoned the defendant for the price of a cargo of coals shipped by the plaintiff under a charter-party, by which freight was to be paid during or on the discharge, and purchased by the defendant, who had obtained possession of the coals, and paid the captain the freight. The defendant was held entitled to deduct the freight, under a plea of set-off, and the plaintiff had to pay his costs under this section. *Marshall v. Sharland*, 15 Q. B. 1051; 20 L. J. Q. B. 3.

[1] The words of a similar clause in stat. 1, Jac. 1, c. 15, s. 2, were, "or make or cause to be made any fraudulent conveyance of his, her, or their lands, tenements, goods, or chattels." The words "either within this realm or elsewhere," were introduced into the stat. 6 Geo. 4, c. 16, because it had been decided that the above clause (1 Jac. 1, c. 15, s. 2, did not extend to conveyances executed out of England. *Inglish v. Grant*, 5 T. R. 530. *Norden v. James*, Dick, 533.

In the statute of James, as in this act, the words are, "any fraudulent conveyance;" and under this head were classed all the cases of fraudulent conveyances, that is to say, voluntary conveyances, without a valuable consideration, which are rendered void as against creditors by the stats. 13 Eliz. 5, and 27 Eliz. c. 4. (*Hassells v. Simpson*, 1 Dougl. 88; and see *Whitwell v. Thompson*, 1 Esp. 68); and all grants and conveyances which a court of equity would declare fraudulent (*Jacob v. Sheppard*, 1 Burr. 471. *Unwin v. Oliver*, 481), as well as all cases which either appear from facts themselves to be, or from conclusion of law arising from these facts, would be deemed to be fraudulent as against third parties, however fair they might be as between the parties themselves. *Worsley v. Demattos*, 1 Burr. 467, 474; and *see* under this head *passim*.

The question under the statute is one for the jury, whether, under all the circumstances of the case, the transfer was a fraud. The *indicia* of such fraud will be various, as the want of change of possession, which is, however, not conclusive, if the continuing possession be consistent with the *terms* of the transfer, the *bona fides* of such terms, the existence of a secret trust for the assignee, and the like. But a debtor might formerly at any time have openly preferred one creditor and defeated other creditors, even though they might have commenced actions against him. *Martindale v. Booth*, 3 B. & Adol. 498. *Carr v. Burdiss*, 1 C., M. & R. 782. *Wood v. Dixie*, 7 Q. B. 892. *Minshall v. Lloyd*, 2 Mee. & W. 450. *Doe d. Grimsby v.*

Ball, 11 id. 531. But the 13 Eliz. c. 5, does not avoid such transfer as against future creditors, nor does the present statute. *Oswald v. Thompson*, 2 Ex. 215. Bills of exchange are chattels within the section (*Cumming v. Bailey*, 6 Bing. 368); so also is a payment of money. *Ex-parte Simpson*, 1 De Gex, 9. *Groom v. Watts*, 4 Ex. 727; but see *Tindal, C. J., contrà*, in *Bevan v. Nunn*, 9 Bing. 101.

A transfer is also fraudulent if it contravenes the policy of the bankrupt law, which is an equal distribution of his assets, and so defeats or delays his creditors; therefore an assignment of his whole property, or of the whole with an exception merely nominal, in consideration of a bygone and pre-existing debt, though not fraudulent by a non-trader, is fraudulent under this section. *Worsley v. Demattos*, 1 Burr. 467. *Porter v. Walker*, 1 Man. & G. 686. *Lindon v. Sharpe*, 6 id. 895. If it be an assignment of a specified portion, it must be proved to be such as would cause insolvency; and if of all property at a specified place, that it is substantially the whole of the trader's property. *Chase v. Goble*, 2 Man. & G. 930; see *Carr v. Burdiss*, 1 C., M. & R. 447. It would not be correct to leave it as a question to the jury whether the deed being acted upon would prevent the trader carrying on the particular business in which he is engaged, but it must be a transfer of so much of his property as would prevent him carrying on business by reason of his thereby becoming insolvent. *Wedge v. Newlyn*, 4 B. & Adol. 831. *Wood v. Waud*, 22 L. J. Ex. *Harris v. Reckett*, 4 H. & N. 28; 28 L. J. Ex. 47.

An assignment of part of a trader's effects, even on account of a bygone and before contracted debt, does not, like an assignment of the whole, carry with it any intrinsic evidence of fraud. *Graham v. Chapman*, 12 C. B. 85. *Hutton v. Cruttwell*, 1 E. & B. 15. *Young v. Waud*, 8 Ex. 221. *Bittlestone v. Cooke*, 6 E. & B. 296. *Ex-parte Cottrell*, 1 L. T. (N. S.) 465. And when a trader conveys his property at a particular place, the *onus* of showing that it was his whole property is on the assignees. *Chase v. Goble*, 2 Man. & G. 930. But though not fraudulent or void *per se*, yet if made in contemplation of bankruptcy, and with an intent to give the transferee an undue advantage over other creditors, it is fraudulent and void. And that although it took place more than two months before the filing of the petition (see *Bevan v. Nunn*, 9 Bing. 107), and though not formerly so, it is now, by the section we are considering, an act of bankruptcy. Whether an act be or not of this description, in other words, whether it be or not a fraudulent preference, must be ascertained by putting it to a jury to say whether the transfer, delivery, &c. were made in contemplation of bankruptcy, and voluntary or under fear of compulsion. *Belcher v. Prittie*, 10 Bing. 408. *Cook v. Rogers*, 7 id. 438. *Fidgeon v. Sharp*, 5 Taunt. 539. *Cooke v. Pritchard*, 5 Man. & G. 329. *Morgan v. Brundet*, 2 Nev. & M. 280; 5 B. & Adol. 297. *Bevan v. Nunn*, 9 Bing. 107. *Hartshorne v. Hodden*, 2 B. & P. 582. *Gibbon v. Phillipps*, 7 B. & C. 529. *Poland v. Glyn*, 4 Bing. 22 n. *Flook v. Jones*, id. 20. *Wheelwright v. Jackson*, 5 Taunt. 109. *Moore v. Barthrop*, 1 B. & C. 5. *Crosby v. Crouch*, 11 East, 256. *Thompson v. Freeman*, 1 T. R. 155. *Smith v. Payne*, 6 id. 152. *Bayley v. Ballard*, 1 Camp. 416, doubted in *Cook v. Rogers* by *Park, J.* *Singleton v. Butler*, 2 B. & P. 283. *Churchill v. Crease*, 5 Bing. 177. *De Tastet v. Carroll*, 1 Stark. 88. *Morgan v. Horseman*, 3 Taunt. 41. *Abbott v. Pomfret*, 1 Bing. N. C. 462. *Morgan v. Brundrett*, 5 B. & Adol. 289. In order to make the delivery fraudulent, it must not only have been made at a time when the trader contemplated the event of his own bankruptcy, but it must also have been voluntary; and therefore a delivery under the threat or apprehension of criminal or civil process is valid. This distinction, viz. between a voluntary transfer in contemplation of bankruptcy, and a transfer either voluntary but not in contemplation of bankruptcy, but involuntary and under the pressure of threat or compulsion, is the distinction upon which all modern cases turn. Several of these cases are referred to in the margin, but the dependence of each upon its own peculiar circumstance renders it impossible to give a full account of them. The declaration of the trader at the time of the transfer, or connected with it, are admissible in evidence to show the intention with which it was made. *Ridley v. Gyde*, 9 Bing. 349. *Rouch v. G. W. Railway*, 1 Q. B. 51. See *Phillips v. Eamer*, 1 Esp. 355. In *Ridley v. Gyde* the declarations were made a month after the disputed act. But see *Lees v. Marton*, 1 M. & Rob. 210. *See* also *Smith v. Cramer*, 1 Bing. N. C. 585.

A., a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure future advances, his leasehold property, with all his stock-in-trade, utensils, and effects therein, and also a policy of insurance, as a security for monies advanced or to be advanced. The deed contained a power of sale, and a proviso that the trader should remain in possession until default. The assignment did not include another part of A.'s property equal in amount to the debt covered by the security. In an action by A.'s assignees, to recover part of the property assigned, the jury found that the deed was not executed in contemplation of bankruptcy. It was held that it was a valid deed, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 1 C., M. & R. 433, 722. See *Johnson v. Fesemeyer*, 3 De Gex & S. 13.

A *sale* of all his property by a trader, although he intends to run away with the money, has been held not within this section (*Baxter v. Pritchard*, 1 Ad. & E. 456, recognised in *Lindon v. Sharpe*, 6 Man. & G. 906), because the trader gets a present equivalent for his goods, and the sale is in the course of his business. *Graham v. Chapman*, 21 L. J. C. P. 173. And the sale of part of a trader's stock for the fair price

By sect. 68, 13 & 14 Vic. c. 106, "that if any such trader shall execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of all the creditors of such trader the execution of such

Conveyance of all a trader's property for

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of that part is of course unobjectionable. But the Court of Common Pleas, after commenting upon *Siebert v. Spooner* (1 Mee. & W. 714), *Lindon v. Sharpe*, and *Whitwell v. Thompson* (1 Esp. 68), recently intimated their opinion that an assignment, though made *bonâ fide*, of the whole of a trader's stock for the price of a part, not because the trader is obliged under pressure to sell his stock for less than its value, but because an old debt is taken as part of the price, though the moving cause of the transfer may be a new advance, is a fraudulent transfer, and an act of bankruptcy. And at all events it is so, even without fraud in fact, if it conveys all the trader's property, including the sum advanced, and professes to give the assignee a right to take the trader's future acquired property upon non-payment of his debt within a certain time. *Graham v. Chapman*, 21 L. J. C. P. 173.

The conveyance must have been completely executed so as to divest the trader of the property, and the delivery of such a deed as an escrow would not be an act of bankruptcy. *Bowker v. Burdekin*, 11 Mee. & W. 146. See *Reynolds v. Hall*, 4 H. & N. 519; 28 L. J. Ex. 257.

As to agreements to transfer for valuable consideration, absolutely or by way of security, property or a chose in action, or a fund which the trader is entitled to receive at a future period, see *Dangerfield v. Thomas*, 9 Ad. & E. 292. *Hunt v. Mortimer*, 10 B. & C. 44. *Hutchison v. Heyworth*, 9 Ad. & E. 375. *Belcher v. Odfield*, 6 Bing. N. C. 102. *Vacher v. Cocks*, 1 B. & Adol. 145. *Parnham v. Hurst*, 8 Mee. & W. 743. *Walker v. Rostron*, 9 id. 411.

It is apprehended that the transfer of choses in action, whether seizable in execution or not, under 1 & 2 Vic. c. 110, would be void as against assignees. *Norcutt v. Dodd*, Craig & Phil. 160; 1 Smith's *Leading Cases*, 13 a. *Graham v. Furber*, 23 L. J. C. P. 5.

In extension of the strict words of the bankrupt acts, the courts have further held that a transfer by a trader of part of his property to a creditor in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent as an act of bankruptcy under the Bankruptcy Act, if made voluntarily and in contemplation of bankruptcy. *Vide ante*, p. 202.

A multiplicity of cases have occurred upon the meaning of voluntary *and* in contemplation of bankruptcy, for both circumstances must concur. *Gibbins v. Phillips*, 7 B. & 529. *Brown v. Kempton*, 19 L. J. C. P. 169. If, *in consequence of the act of the creditor, it is not voluntary*, although the creditor may not have power to obtain immediate benefit to himself by taking legal steps, *e. g.* a surety, or one to whom the debt is due, but not payable. *Van Casteel v. Booker*, 2 Ex. 691. *Mogg v. Baker*, 4 Mee. & W. 348. The fact of pressure is not sufficient, if the jury believe that it did not cause the transfer: nor, on the other hand, does it follow as a matter of law, though it is a strong presumption of fact, that because the first step in the transaction resulting in the preference was taken by the bankrupt, that it was therefore voluntary. See *Cook v. Pritchard*, 5 Man. & G. 329. *Edwards v. Glyn*, 5 Jur. N. S. 1397. This definition of "voluntary" will render all the cases on the Insolvent Act (which uses the term "voluntary") applicable. See *Doe v. Gillett*, 2 C., M. & R. 581. *Arnell v. Bean*, 8 Bing. 87, 91. The definition given in that case is a conveyance, gift, &c., made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence of such consideration, or made in favour of a particular creditor spontaneously and without any pressure on his part to obtain it. In *Mogg v. Baker* (4 Mee. & W. 348), it was held that a conveyance, in pursuance of a *bonâ fide* demand, was good, for that *pressure*, or an apprehension that, by not making the payment, he, the insolvent, would be in a worse condition, was unnecessary, and if there be pressure it is immaterial that the trader also desires to give a preference to the trader-creditor in the event of a bankruptcy. *Brown v. Kempton*, 19 L. J. C. P. 169.

Many of the decisions as to the meaning of contemplation of bankruptcy cannot be reconciled. In some, contemplation of actual bankruptcy has been held essential, and contemplation of mere insolvency insufficient; in other cases, the contemplation of bankruptcy has been inferred from that of insolvency, because men's acts must be construed as done with the intention of producing their natural consequences. More recently it has been laid down that it is a question for the jury in each case, and that contemplation of bankruptcy need not be negatived because there was contemplation of insolvency; but that if, at the time of the transfer, &c., the debtor considered that he was likely, from the condition in which he stood, to become a bankrupt, and he knew that his assets were inadequate to the payment of all his creditors, the fraudulent preference would be established. *Morgan v. Brandrett*, 5 B. & Adol. 289. *Aldred v. Constable*, 4 Q. B. 684. *Gibson v. Muskett*, 3 Man. & G. 158; 4 id. 160, 171. *Brown v. Kempton*, 19 L. J. C. P. 169.

Vice-Chancellor Knight Bruce considers hopeless insolvency, so that there is not a reasonable expectation of avoiding bankruptcy, sufficient to constitute contemplation of bankruptcy. *Ex-parte Simpson*, 1 De Gex,

benefit of creditors not an act of bankruptcy, unless a petition for adjudication be filed within three months.[1]

deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof: *provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader and by every such trustee be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the* London Gazette, *and also in two London daily newspapers, and in case such trader does not reside within forty miles of London, then in the* London Gazette *and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor.*"

Thirdly, Distinction between Acts of Bankruptcy depending on *Intent* of Party, and those *independently* of *Intent*.

(A) *Acts of Bankruptcy depending on Intent of Party.*[2]

9. The intent to benefit the creditor has been held essential (*Belcher v. Jones*, 2 Mee. & W. 258); but in *Marshall v. Lamb*, 5 Q. B. 115, it was held that a payment may be void as a fraudulent preference, if by it the equal distribution of the estate be defeated, although the bankrupt did not intend to benefit, nor did in fact benefit, the creditor.

It is held, on the subject of fraudulent preference, that if a banker intending to prefer A., give notice to him of the state of his circumstances, in *order that he may draw out his private balance*, which A. not only does, but also draws out that of a company of which he was a director, that is not a fraudulent preference of the company, for a preference must be *intentional*; and here there was no intention to prefer them. *Belcher v. Jones*, 2 Mee. & W. 258.

[1] An assignment for the benefit of all creditors would, but for this section, be in every case an act of bankruptcy, although not available by any creditor, party to, privy, or acting under such deed, on the ground that it is defeating the creditors of their right under the statutes of bankruptcy to an administration according to such statutes, and necessarily preventing the trader from carrying on his trade. *Jackson v. Thompson*, 2 Q. B. 887. *Siebert v. Spooner*, 1 Mee. & W. 714. *Lindon v. Sharp*, 6 Man. & G. 195.

The compliance with the requisites of this section will render such assignment valid as to all creditors, unless a petition for adjudication be filed within three months. It seems that the forty miles are to be measured as the crow flies. *Reg. v. Saffron Walden*, 9 Q. B. 76. A verbal assent by creditor suffices. *Re A.* 1 L. T. (N. S.) 449. *Re Rees*, 29 L. J. Bank. 7.

A deed of transfer, although it may be an act of bankruptcy, is not void as against future creditors. *Oswald v. Thompson*, 2 Ex. Rep. 215; 17 L. J. Ex. 234. And where a party assigned his property for their benefit, at a time when there was no creditor of sufficient amount to obtain an adjudication, and the trader then sued out a fiat upon his own petition, the assignment was held to be valid against the assignees of his bankruptcy. *Ex-parte Philpott*, 10 Jur. 717; 1 De Gex, 344.

And although there may have been pressure, yet it is a question for the jury whether the payment was made in consequence of it, or whether it was made with a view to give a fraudulent preference. *Cook v. Pritchard*, 5 Man. & G. 329. *Strachan v. Bacton*, 25 L. J. Ex. 182. *Hale v. Allnutt*, id. C. P. 267. Also it is not necessary to render a preference on the eve of bankruptcy valid, that there should be a threat of pressure, with an immediate power of rendering it available by taking legal steps. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors entitled under the fiat, by proving it to be voluntary on the part of the bankrupt and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary. *Van Casteel v. Booker*, 2 Ex. 691. *Marshall v. Lamb*, 5 Q. B. 115.

[2] *As to intent.*—This can be evidenced only by the trader's acts or admissions. If a man admit that he committed the act with the intent of defeating or delaying his creditors in the recovery of their debts, it is almost conclusive evidence of it, and can scarcely be explained away. See *Rawson v. Hay*, 2 Bing. 99. Anything said or written by the bankrupt before his bankruptcy tending to show the intent of an act equivocal in itself is admissible. *Smith v. Cramer*, 1 Scott, 541. *Scott v. Thomas*, 6 Car. & P. 611. So if the act be accompanied by circumstances from which the intent may fairly be presumed it will be sufficient; and where a trader wrote to his son at his manufactory that he was unable to meet his engagements with his creditors, and requested to be denied to any that might call, and shortly after left the house, and was absent from his home and place of business the whole of that and the next day, and such absence unaccounted for, this was held to be an act

Departing Realm, ante, p. 187.
Remaining Abroad, p. 189.
Departing from his Dwelling-house, p. 189.
Otherwise Absenting himself, p. 189.
Beginning to Keep House, p. 192.
Suffering himself to be Arrested for Debt not due, p. 194.
Yielding himself to Prison, p. 194.
Suffering himself to be Outlawed, p. 194.
Procuring himself to be Arrested, or his Goods, Money, or Chattels to be Attached, or Sequestered, or taken in Execution, p. 194.
Making fraudulent Grant, Conveyance, Surrender, Gift, Delivery, Transfer, p. 201.

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of bankruptcy. *Johnstone v. Woolf*, 2 Scott, 372); and although no creditor is actually delayed (*Rouch v. Great Western Railway Co.* 4 Per. & D. 686; 1 Ad. & E. (N. S.) 5); and, on the other hand, a creditor being in fact delayed by the act, is not of itself evidence of the trader's intention in committing it (*Ex-parte Osborne*, 2 Ves. & B. 177. *Fowler v. Padget*, 7 T. R. 509); but if the necessary consequence of the act be that his creditors must be thereby defeated or delayed, this is presumptive evidence of his intention to defeat or delay them (*Ramsbottom v. Lewis*, 1 Camp. 279. *Holroyd v. Whitehead*, 3 id. 530. *Ex-parte Kilner*, 2 Deac. 325; 3 Mont. & Ayr. 722), even although it appear that he had other ostensible reasons for it. See *Woodier's case*, Bull, N. P. 39. *Raikes v. Poreau*, Cooke, 85, and *dict. per Lawrence, J., in Fowler v. Padget*, 7 T. R. 156. So if done to avoid an arrest (*Williams v. Nunn*, 1 Taunt. 270. *Holroyd v. Gwynne*, 2 id. 176. *Warner v. Barber*, 1 Holt, 175. *Chenoweth v. Hay*, 1 M. & S. 676. *Harvey v. Ramsbottom*, 2 D. & R. 142; 1 B. & C. 55. *Ex-parte Bumford*, 15 Ves. 459); even although merely for the purpose of gaining the term (*Maybin v. Egloe*, 2 Stark. 809), and if done to avoid the importunity of creditors (*Ramsbottom v. Lewis*, 1 Camp. 279. *Dudley v. Vaughan*, id. 271; but see *Vincent v. Prater*, 4 Taunt. 603); or if done under a pretence which is false (see *Capper v. Desanges*, 3 Moore, 4); or if a trader receive his creditor, and leave his house under a pretence of going for money to pay him, but instead of doing so go to a billiard-table and do not return for many hours afterwards (*Bigg v. Spooner*, 2 Esp. 585), or make an appointment to meet and pay his creditor and fail to keep it (*Skilger v. Browning*, 9 D. & R. 306); these and the like are circumstances from which it may be fairly presumed that a trader's intention was to delay his creditors, for the necessary consequence of them was that the creditors must have been delayed by them. But even where such a presumption is raised by circumstances attending the act, it may nevertheless be rebutted by evidence showing that the trader did not at the time entertain the intention imputed to him. As, for instance, if he prove that upon departing the realm he left a partner behind him in England (*Ramsbottom v. Lewis*, 1 Camp. 272), or that his presence abroad was absolutely necessary in order to look after his concerns there (*Ex-parte Mutrie*, 5 Ves. 576. *Warner v. Barber*, 1 Holt, 175; and see *Fowler v. Padget*, 7 T. R. 509); or that previous to his departure he made arrangements that the interests of his creditors should be attended to during his absence (*Ramsbottom v. Lewis*, 1 Camp. 277; and see *Windham v. Paterson*, 1 Stark. 144); or that he advertised in the public papers that he was going, that his ship would sail within the month, and that he would take charge of shipments (*Ex-parte Osborne*, 2 Ves. & B. 177); or, in the case of a denial to a creditor, that the creditor called on a Sunday (*Ex-parte Preston*, 2 Ves. & B. 311; 2 Rose, 21); or that he was denied because he called while the trader was at dinner, or engaged in some particular business, or at any other unreasonable hour (*Smith v. Currie*, 3 Camp. 349. *Shaw v. Thompson*, 1 Holt, 159. *Ex-parte Hall*, 1 Atk. 201); or because the trader was sick (Bull, N. P. 39); or that the creditor called at the private house of the trader, and was there desired to go to the counting-house, because the trader never received persons on business at his private house (*Round v. Byde*, Cooke, 110, 111): all these and the like circumstances may be given in evidence to rebut the presumption of the trader's intention arising from circumstances accompanying the act such as those above mentioned. And the act must be done with intent to defeat or delay the creditors, for if done to avoid performing a mere duty, or to avoid an arrest upon an *excommunicato capiendo*, or the service of process to enforce a decree in Chancery (unless a decree for the payment of money, Com. Dig. Bankrupt, C.; 1 Cooke, 9), or to avoid an attachment upon an award for not delivering goods pursuant thereto (*per Willes, C. J.*, in *Linwood v. Earle*, 1 Atk. 196), it will not of itself constitute an act of bankruptcy, unless accompanied by circumstances from which also an intent to defeat or delay creditors may fairly be presumed.

(B) *Acts of Bankruptcy independently of* Intent.[1]

XV. Proceedings *before* Adjudication as relates to Trader and Non-Trader.

(A) *Act of Bankruptcy must not have been Committed more than Twelve Months before Application for it.*[2]

(B) *Proceedings for Adjudication to be by Petition.*

Proceedings to obtain adjudication of bankruptcy to be by petition upon oath.

Proceedings, &c. upon filing petition.

By sect. 87, 24 & 25 Vic. c. 134, "proceedings to obtain adjudication of bankruptcy shall be by petition, on the oath of the petitioner. Every such petition shall be filed of record, and prosecuted as directed by this act; and from and after the filing of such petition, in the case of a debtor petitioning against himself, and from and after adjudication, in the case of a petition filed against a debtor who shall be adjudged bankrupt, the bankrupt personally and all his estate and effects, of what nature or kind soever, shall be subject to the law of bankruptcy."

Petition of debtor against himself.[3]

By sect. 86, id. "any debtor may petition for adjudication of bankruptcy against himself, and the filing of such petition shall be an act of bankruptcy without any previous declaration of insolvency by such debtor."

(C) *Where Petition shall be Filed and Prosecuted; when may be Transferred.*

Petition shall be filed and prosecuted within the district of which debtor shall have resided or carried on business for six months.[4]

By sect. 88, id. "every petition for adjudication of bankruptcy, except as hereinafter provided, shall be filed and prosecuted in the Court of Bankruptcy within the district of which such debtor shall have resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months; but the court in London may order any such petition to be prosecuted in any district, with or without reference to the district in which the debtor shall have so resided or carried on business, or may consolidate the proceedings or any part thereof under two or more petitions for adjudication of bankruptcy, or may impound any petition for

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[1] Debtor lying in prison or escaping. 24 & 25 Vic. c. 134, s. 71.

Filing a declaration of inability to meet engagements. 24 & 25 Vic. c. 134, s. 72.

Paying money, &c. to petitioning creditor. 12 & 13 Vic. c. 106, s. 71.

Debtor filing petition to Insolvent Court in colonies or dependencies. 24 & 25 Vic. c. 134, s. 75.

Non-payment after judgment-debtor summons or disobedience to decrees. (Id. 76, 77.)

Petition of debtor against himself. (Id. 86.)

Filing petition by trader for an arrangement between him and his creditors. 12 & 13 Vic. c. 106, s. 76.

Trading member of parliament not paying or compounding after being duly summoned. (Id. 77.)

Several of the acts designated by the legislature as acts of bankruptcy, it will be observed, are now, in consequence of the creation of others, almost *ejusdem generis*, become of little practical importance. Many are still confined exclusively to traders. It was proposed by the original bill to have rendered all persons committing any of the enumerated acts amenable to the bankrupt law.

[2] By sect. 88, 12 & 13 Vic. c. 106, it is enacted, "that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy or the filing of any petition for adjudication of bankruptcy against him, and that no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt."

[3] These two sections virtually repeal s. 89, 12 & 13 Vic. c. 106.

[4] To support such a petition it is not necessary that the trader shall have carried on business for six months in any district, provided he shall have resided in such district for an equal period. *Anon.* 1 Fonb. *Bank. Ct.* 7. *Re Irwin*, ib. 27. *See* id. 7–51.

The petition may be amended if not in accordance with the facts (1 Fonb. B. C. 51); and where a petition, and the affidavits in support of it, had been wrongly entitled, and the petition had been amended under an order, the court allowed the affidavits to be taken off the file to be amended. *Ex-parte Burton*, 3 De Gex & S. 578; 1 id. 257, 381.

adjudication of bankruptcy, or judgment-debtor summons, and the proceedings thereunder, or any part thereof, upon such terms as the court shall think fit, or may transfer any petition for adjudication of bankruptcy, or judgment-debtor summons, and the proceedings thereunder, and the prosecution or further prosecution thereof, from the court in any one district to the court in any other district, or to a county court having jurisdiction in bankruptcy; and the court to which any such transfer shall be made may remove the official assignee, and appoint a new official assignee to any such bankruptcy."

Powers to consolidate, impound, and transfer proceedings upon petitions.[1]

(D) *Amount and Nature of Petitioning Creditor's Debt, and who may Petition.*[2]

[1] A change on account of residence of witnesses will now be probably rare, as each court is auxiliary to the others. The principle laid down by the Court of Review was that, after the jurisdiction had accrued, the power to change that jurisdiction should not be exercised unless a case of clear benefit to the estate was shown, and the absence of injustice to the bankrupt. *Ex-parte Mitchell*, 3 Mont. D. & D. 397.

Where the petition of adjudication had been filed in the country district in which the bankrupt resided and had property, but the great majority of the creditors resided in London and elsewhere out of the district in which the petition had been filed, the court, upon the application of one of such creditors, made with the consent of the others, directed the removal of the petition and the proceedings thereunder from the country district to the Court of Bankruptcy in London. *Ex-parte Sewell*, 17 Jur. 333; 32 L. J. Bank. 29. The bankrupt was allowed his expenses of changing the venue of the fiat after adjudication. *Ex-parte Cheeseborough*, 1 De Gex, 333. *Anon.* Mont. & Chit. 142.

Where the bankrupt had carried on business in London, which was his last place of domicile, having been also engaged in mining speculations in Cornwall, and had subsequently been living with a relation near Dover under a feigned name, a fiat that had been issued to commissioners at Dover was ordered to be impounded, and the proceedings under it transferred to the Court of Bankruptcy in London, to which a renewed fiat was ordered to be issued. *Ex parte Gregory*, 2 Mont. D. & D. 92.

The venue will not be changed because the existing means of communication between the place of trading and the district court to which it belongs are not so convenient as those between the place of trading and another district court. *In re Oram*, 3 Mont. D. & D. 330; 7 Jur. 696.

The place of business of the bankrupt was in a town situated partly in one county and partly in another, but was actually in one of the two counties belonging to the more remote district court:—It was held, that the fiat ought not to be transferred on that account to the nearer. *Ex-parte Baylies*, 1 De Gex, 440. A fiat in bankruptcy against partners carrying on business in one bankruptcy district, was issued in another district in which one of the partners was residing. The court on petition removed the fiat to the former district, although it was alleged that the separate property of the one partner, to which recourse would be necessarily had, was wholly situate in the district in which the fiat was issued. *Ex-parte Grylls*, 12 Jur. 171; 17 L. J. Bank. 7. See *Ex-parte Hind*, 1 De Gex, 161.

A trader presented a petition for arrangement on January 3d. The first private sitting was fixed for January 10th. On that day the trader did not attend, and the petition for arrangement was dismissed for such non-attendance. During the sitting of the court on January 10th the trader filed a declaration of insolvency, and also a petition of bankruptcy against himself, founded on the declaration of insolvency. On January 13th a creditor filed a petition of bankruptcy against him, founded on the dismissal of the petition of arrangement. On the application of the petitioning creditor, on the sitting for adjudication on the trader's petition, the creditor's petition was ordered to be proceeded with in preference to the trader's. *Re Hegarty*, 10 Ir. Ch. R. 117.

[2] The 230th sect. 24 & 25 Vic. c. 134, repeals ss. 90 to 96 inclusive in 12 & 13 Vic. c. 106, as to petitioning creditor's debt.

The debt must be such as, at the time of the act of bankruptcy, could be recovered *at law*. A debt barred by the Statute of Limitations would therefore be unavailing. Sect. 97, 24 & 25 Vic. c. 134. *Mayor v. Payne*, 3 Bing. 286. So to support an adjudication against the drawer or indorser of a bill, presentment and notice of dishonour must be proved. *Cooper v. Machin*, 1 Bing. 426. And interest on a negotiable instrument, not made payable on the face of the document, is not a sufficient debt, for it is only recoverable at law as damages. The substantive liability, not the precise form of remedy, is the test. *In re Bryant*, 1 Rose, 283; 2 M. & S. 123. Hence, a bill of exchange, though not indorsed until after the act of bankruptcy, is sufficient, for it is a debt from the time it is given. *Glaister v. Hewer*, 7 T. R. 498. So an I. O. U. must be proved to have existed at the time of the act of bankruptcy, although bearing date before it. *Wright v. Lawson*, 2 Mee. & W. 739. Petitioning creditors against joint-stock companies must have the same amount of debt, and may be members. 7 & 8 Vic.

Amount of petitioning creditor's debt, whether against a trader or non-trader.

By sect. 89, 24 & 25 Vic. c. 134, "the amount of the debt of any creditor petitioning for adjudication of bankruptcy against a debtor, whether a trader or not, shall be as follows; that is to say,

The debt of a single creditor, or of two or more persons being partners, shall amount to fifty pounds or upwards:

The debt of two creditors shall amount to seventy pounds or upwards:

The debt of three or more creditors shall amount to one hundred pounds or upwards:

Every person who has given credit to any debtor upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such debtor committed an act of bankruptcy, may so petition or join in petitioning, whether he shall have any security for such sum or not."

Debt of petitioning creditor of a *non-trader* must be contracted after 11th Oct. 1861.

By sect. 90, id. "the debt of the petitioning creditor of any debtor *not being a trader*, and not being at the time a prisoner against whom such creditor would have been entitled to obtain a vesting order in insolvency if this act had not passed, must be a debt contracted after the passing of this act; and the judgment-debtor summons must be a summons in respect of a debt contracted or of a liability incurred after the passing of this act."

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c. 111, s. 1. A debt of 70*l.* or upwards, part of which is owing to several persons as partners, would support the petition. *Doe v. Ingleby*, 14 Mee. & W. 91.

An adjudication may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to trade. *Baillie v. Grant*, 9 Bing. 121; 2 M. & Scott, 193. Where part of the petitioning creditor's debt is contracted after the bankrupt discontinued trading, and the remainder was under the amount then required, it was held not sufficient to support the fiat. *Ex-parte Dalby*, 4 Deac. 261; Mont. & Chit. 636.

A factor who sells goods in his own name, without a *del credere* commission, is a good petitioning creditor against the purchaser, although he has merely communicated the name of the purchaser to his principal (*Sadler v. Leigh*, 4 Camp. 185; 2 Rose, 286); but he ceases to be so when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser. (Id.)

An adjudication founded on the petition of a British subject resident here, for a debt due to himself and partners, also British subjects, but resident and carrying on trade in an enemy's country, is bad. *M'Connell v. Hector*, 3 B. & P. 113. And see *De Metton v. Mello*, 12 East, 234; 2 Camp. 420. *Kensington v. Inglis*, 8 East, 275. Even though he be naturalised in a neutral state. *O'Meally v. Wilson*, 1 Camp. 482. The residence of a British subject in an enemy's country for the purpose of a trade, licensed by the government of this country, is not a disability to petition. *Ex-parte Baglehoe*, 18 Ves. 525; 1 Rose, 271. *Roberts v. Hardy*, 3 M. & S. 533; 2 Rose, 457. *See ante*, vol. i. p. 291.

One of three executors may by himself be a good petitioning creditor on a debt due to the testator. *Treasure v. Jones*, 1 Selw. N. P. 265. A petition may be granted before an executor has obtained probate. *Ex-parte Paddy*, 3 Madd. 241; Buck, 235.

Where a petitioning creditor died after issuing the commission, and before adjudication, it was ordered that the commissioner should be at liberty to adjudicate upon the deposition of his executors. *Ex-parte Tanner*, 1 Mont. & Mac. 292. *Ex-parte Winwood*, 1 Glyn & J. 252. See *Ex-parte Wakefield*, 1 Mont. & Mac. 291.

A trustee is not a sufficient petitioning creditor without the concurrence of his *cestui que trust* (*Ex-parte Gray*, 4 Deac. & Chit. 778; 2 Mont. & Ayr. 283), as he cannot swear (except by legal fiction) that the money is due to him, nor that the money has not been paid to the *cestui que trust*. *Ex-parte Dubois*, 1 Cox, 210. *Ex-parte Bather*, Buck, 426.

A husband alone cannot be the petitioning creditor in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife *dum sola*. *Ramsey v. George*, 1 M. & S. 176; 1 Rose, 108. But he may do so upon a note given to the wife whilst she was single. *Ex-parte Barber*, 1 Glyn & J. 1. An infant, it is said, cannot be a petitioning creditor. *Ex-parte Barrow*, 3 Ves. 554. *Ex-parte Morton*, Buck, 42.

One partner cannot petition against another, unless the debt be such as he might maintain an action upon. *Windham v. Paterson*, 1 Stark. 144; and see *Marson v. Barber*, Gow, 17. If one of three partners undertake to provide two bills drawn by the three, and accepted by a fourth person, such three partners cannot be petitioning creditors on a commission against the acceptor, although the conduct of the partner may, as against his co-partner, have been fraudulent. *Richmond v. Heapy*, 1 Stark. 202. An adjudication cannot be supported on the petition of one only of two partners to whom a joint debt is due. *Buckland v. Newsome*, 1 Taunt. 447; 1 Camp. 474.

By sect. 91, 24 & 25 Vic. c. 134, "if the debt stated by the petitioning creditor in his affidavit, or in his petition for adjudication, to be due to him from any debtor, shall not be really due, or if, after a petition for adjudication of bankruptcy filed, it shall not have been proved that the person against whom such petition has been filed was liable to an adjudication of bankruptcy at the time of the filing of such petition, and it shall also appear that such petition was filed fraudulently or maliciously, the courts shall and may, upon petition of any person aggrieved by such petition, examine into the same, and order satisfaction to be made to him for the damages by him sustained." Petition fraudulently or maliciously filed, court may order satisfaction.

By sect. 92, id. "a petition for adjudication of bankruptcy or judgment-debtor summons against any debtor indebted in the amount aforesaid to any copartnership duly authorised to sue and be sued in the name of a public officer or agent of such copartnership, may be filed or sued out by such public officer or agent as the nominal petitioner for and on behalf of such copartnership: provided such public officer or agent shall, in a declaration signed by him, in such form as general orders shall direct, declare that he is such public officer or agent, and that he is authorised to sue." Petition may be by the public officer of copartnership or its agent.

By sect. 93, id. "every debtor petitioning against himself shall file in court a full, true, and accurate statement, verified by the oath of the petitioner, of his debts and liabilities of every kind, and of the names and residences of his creditors, and of the causes of his inability to meet his engagements, within such time after filing his petition, and in such form, as general orders shall direct." Debtor petitioning against himself to file statement of debts.

By sect. 94, id, "where a debtor petitions for adjudication against himself, and knows or verily believes the debts justly due and provable under the bankruptcy to *amount in the whole to a sum not exceeding three hundred pounds*, such fact shall be stated on oath, and if he be resident within the metropolitan district as herein defined, he shall file his petition in the London Court of Bankruptcy; and where such debts shall not exceed three hundred pounds, and the debtor shall not be resident in the metropolitan district, he shall file his petition in the county court for the district in which he shall have resided for the six months next before the filing of his petition, or for the longest period during those six months, unless he is in custody, and then in the county court for the district in which he is in custody: but such court, if it make adjudication, shall transfer the proceedings to the county court in which the debtor, if not in custody, would have been required to petition." Debtors residing in the metropolitan district to file petition in London court; not residing in metropolitan district, in County Court.

By sect. 96, id. "if the petitioning creditor shall not proceed and obtain adjudication within three days after his petition shall have been filed, or within such extended time as shall be allowed by the court, the court may, at any time on the expiration of such three days, or of such extended time, as the case may be, upon the petition of any other creditor to the amount required to constitute a petitioning creditor, proceed to adjudicate on such last-mentioned petition. If a debtor petitioning against himself does not obtain adjudication within twenty-four hours after filing such petition, the court may proceed to adjudge the debtor a bankrupt on the petition of any competent creditor." Where petitioner does not proceed, power for court to adjudicate.

By sect. 97, id. "in the computation of debts for the purposes of any petition under this act there shall be reckoned as debts,— What shall be reckoned as debts, for the purposes of a petition under this act.

1. Sums due to creditors holding mortgages or other available securities or liens; after deducting the value of the property comprised in such mortgages, securities, or liens:
2. Such interest and costs as shall be due in respect of any of the debts.

But there shall not be reckoned,—

1. The amount of the debts in respect of which the petitioner has already taken the benefit of insolvency, protection, or bankruptcy:
2. Debts barred by any statute of limitations.

(E) *Petition against Partners.*[1]

(F) *Petition against Trader about to quit England, and Proceedings thereon.*[2]

(G) *Court may Adjudicate before Summoning Witnesses to prove Act of Bankruptcy, &c.*[3]

[1] By s. 97, 12 & 13 Vic. c. 106, "that any creditor whose debt is sufficient to entitle him to petition for adjudication of bankruptcy against all the partners of any firm may petition for such adjudication against one or more partners of such firm, and every such petition shall be valid, although it does not include all the partners of the firm; and in every petition for adjudication against two or more persons the court may dismiss the same as to one or more of such persons, and the validity of such petition shall not be thereby affected as to any person as to whom such petition is not ordered to be dismissed, nor shall any such person's certificate be thereby affected."

See 6 Geo. 4, c. 15, s. 16. *Ex-parte Green*, 1 Deac. 349. *Ex-parte Wray*, Mont. & Mac. 195. *Ex-parte Norris*, 3 Deac. 643. *Ex-parte Chambers*, 2 Mont. & Ayr. 440. *Ex-parte Wray*, 1 Mont. & Mac. 194. *Ex-parte Bygrave*, 2 Glyn & J. 391. *Ex-parte Veysey*, 3 Mont. D. & D. 420. *Ex-parte Burlton*, 2 Glyn & J. 344. Where a joint fiat issued against A. and B., who were partners, and the debt was separate, it was held void, and the subsequent superseding it as to A. could not make it good as a separate fiat as to B. *Ex-parte Clarke*, 1 Deac. & Chit. 544.

By s. 98, id. "that after a fiat issued, or a petition for adjudication of bankruptcy filed, against or by one or more member or members of a firm, any petition or petitions for adjudication of bankruptcy against or by any other member or members of such firm shall be filed and prosecuted in the court in which the first fiat or petition was prosecuted; and immediately after the adjudication under such other petition or petitions all the estate real and personal of such bankrupt or bankrupts shall vest in the official assignee and the creditors' assignee (if any) under the first fiat or petition; and thereafter all separate proceedings under such petition or petitions shall be stayed; and such petition or petitions shall, without affecting the validity of the first fiat or petition, be annexed to and form part of the same: Provided that the senior commissioner may direct that such other petition or petitions shall be filed and prosecuted in any other court, or be proceeded in either separately or in conjunction with the first fiat or petition; and such direction shall be made by a memorandum to that effect endorsed on such petition or petitions, and under the hand of the senior commissioner."

See 6 Geo. 4, c. 16, s. 17. *In re Simmons*, 2 Mont. D. & D. 603. *Ex-parte Pryce*, 2 Glyn & J. 161; 1 Deac. B. L. 141, 2d ed.; 1 Mont. & Ayr. B. L. 749, 2d ed.

[2] By s. 99, 12 & 13 Vic. c. 106, "that whenever any petition for adjudication of bankruptcy shall have been filed against any person, and it shall be proved to the satisfaction of the court that there is probable cause for believing that such person is about to quit England, or to remove or conceal any of his goods or chattels, with intent to defraud his creditors, unless he be forthwith apprehended, it shall be lawful for the court to issue a warrant, directed to a messenger of the court and his assistants, or to such person or persons as the court shall think fit, whereby such messenger and his assistants, or other person or persons, shall have authority to arrest the person against whom such petition shall have been filed, and also to seize his books, papers, monies, securities for monies, goods and chattels, wheresoever he or they may be found, and him and them safely keep until the expiration of the time allowed for adjudication on such petition, or until such person shall be adjudged bankrupt under such petition, and be thereon dealt with according to this act: Provided always, that any person arrested upon any such warrant, or any person whose books, papers, monies, securities for monies, goods or chattels, have been seized under any such warrant, may apply, at any time after such arrest or seizure, to the court for an order or rule on the petitioning creditor to show cause why the person arrested should not be discharged out of custody, or why his books, papers, monies, securities for monies, goods and chattels, should not be delivered up to him; and it shall be lawful for such court to make absolute or discharge such order or rule."

See 5 & 6 Vic. c. 122, ss. 5, 6.

[3] By s. 100, 12 & 13 Vic. c. 106, "that the court, before adjudication, may summon before it any person whom such court shall believe capable of giving any information concerning the trading of or any act of bankruptcy committed by the person against whom any petition for adjudication of bankruptcy has been filed, and may require any person so summoned to produce any books, papers, deeds and writings, and other documents, in his custody, possession or power, which may appear to the court to be necessary to establish such trading or act of bankruptcy; and it shall be lawful for the court to examine any such person upon oath, by word of mouth or interrogatories in writing, concerning such trading and act of bankruptcy." *See* 6 Geo. 4, c. 16, s. 24. Persons refusing to be sworn or to answer questions, or to produce books, &c. are liable to be committed. See *post*, s. 260.

(H) *Proceedings to Adjudication against Pauper and other Prisoners for Debt.*[1]

Power for prisoners for debt to petition *in formâ pauperis.*

By sect. 98, 24 & 25 Vic. c. 98, "if any debtor, whether a trader or not, now being or who shall be imprisoned for any debt or demand, shall through poverty be unable to petition the proper court for an adjudication of bankruptcy against himself,[2] he shall be at liberty to petition *in formâ pauperis*, upon making an affidavit that he has not the means of paying the fees and expenses usually payable in respect of a petition by a debtor for an adjudication of bankruptcy. Such affidavit may be sworn before the gaoler of the prison where such debtor is confined, and such gaoler is hereby empowered and required to take such affidavit, and swear the deponent thereto without fee or reward."

Proceedings upon such petition.

If court satisfied, adjudicate and grant protection.

By sect. 99, id. "every person so petitioning *in formâ pauperis* as aforesaid shall, if not previously discharged by a registrar, be brought up to the county court of the district at its next sitting after the presentation of such petition, and shall be examined by the court touching his estate and effects, debts, dealings, and transactions; and if the court shall be satisfied with such examination it shall make an order of adjudication of bankruptcy against the petitioner, and, if it think fit, grant an order of protection to the petitioner."

Gaoler to make monthly return of all prisoners for debt.

By sect. 100, id. "the gaoler of every prison in England or Wales within the walls, rules, or liberties whereof any person shall be in custody upon any process whatsoever, for or by reason of any debt, claim, or demand whatsoever, shall on the first day of every month, or if such day shall happen to be Sunday, then on the day next following, make a return under his hand of the name of every such person, and the date of his or her imprisonment, and the nature and amount of the debt or demand, debts or demands, for which he or she is imprisoned or in custody, and whether he or she is willing or refuses to petition the Court of Bankruptcy, or is unable to do so by reason of poverty, or in such other form and manner and with such particulars as any general orders shall direct. Such return shall also include the names and addresses of every creditor at whose suit each such prisoner is imprisoned or detained, and shall be made by gaolers of prisons situate within the London district to the London court, and by the gaolers of prisons within the country districts to the district court of bankruptcy, or the county court having jurisdiction in bankruptcy, within the jurisdiction of which the gaol is situate, as the case may be."

Registrar to attend at the gaol, and examine every prisoner in such return.

By sect. 101, id. "the commissioner or county-court judge, as the case may be, shall in every case, on receiving such return, make an order that a registrar of the Court of Bankruptcy or of the County Court of the district in which the gaol is situate shall attend at the gaol on a day to be named, being at least seven and not more than twenty-one days from the date of such return. Notice of such order shall be forthwith given to the gaoler and also to the execution and detaining creditors of every prisoner included in such return. On the day named in the order the registrar shall attend at the prison, and examine every prisoner included in such return who shall have been in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, touching his estate and effects, debts, dealings, and transactions: the registrar shall also ascertain the last place of abode and business of each such prisoner within the six months next prior to his imprisonment. The registrar shall have power to make an order of adjudication in bankruptcy against every such prisoner, and to grant him protection, and to make an order for his release from prison, and shall also direct in what court such adjudication shall be prosecuted, having regard to

Power for registrar to make order of adjudication.

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[1] *Petitioner whilst a Prisoner must give Notice to Gaoler of intention to Petition.*—By s. 95, 24 & 25 Vic. c. 134, "every debtor who shall present a petition for adjudication whilst a prisoner in any prison or gaol shall by writing give notice to the keeper of such gaol or prison of his intention to do so, and shall in his petition state that such notice has been given."

[2] This clause must be read in connexion with sect. 86, *ante* p. 206.

the amount of debts and the place of trade or residence of the prisoner within the six months next preceding his imprisonment. The registrar shall certify the particulars of each case to the court of which he is registrar."

Where such prisoner refuses to conform, the court may commit him.

By sect. 102, id. "if the prisoner shall refuse to appear or to be sworn, or to answer all lawful questions of such registrar or of the execution or detaining creditor, or of any other creditor who shall be present, respecting his debts, liabilities, dealings, and transactions, or to make a full discovery of his estate and effects, and of all his books of account, or to produce the same, or to sign his examination when taken, the registrar shall report the same to the court, and the court may, by warrant under the hand and seal of the judge or commissioner, commit him to the common gaol of the county, there to be kept, with or without hard labour, for any time not exceeding one month, and the court may at the same time adjudge such prisoner bankrupt: Provided that if after such adjudication the bankrupt shall, before the period of such commitment has expired, submit to be examined, and in all things conform to the jurisdiction of the court, he shall have in all respects the same benefit as if he had submitted to the court in the first instance."

Adjudication against prisoner for debt to relate back to commitment, &c.

By sect. 103, id. "every adjudication against any prisoner for debt so brought up as aforesaid shall, unless the court shall otherwise direct, have relation back to the date of his commitment or detention, as the case may be, and shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this act."

Persons imprisoned under 8 & 9 Vic. c. 127, and 9 & 10 Vic. c. 95, &c., not to be included in the return.

By sect. 104, id. "no person who is in custody solely under or by reason of any warrant or order made or issued by or by the authority of a judge, under the provisions of the act of the eighth and ninth years of her present Majesty, chapter one hundred and twenty-seven, or of the act of the ninth and tenth years of her present Majesty, chapter ninety-five, or by the authority of any court having the power to commit any person to prison upon or by reason of any order or judgment wherever there shall have been recovered a sum for debt not exceeding twenty pounds exclusive of costs, shall be included in the return so directed to be made by gaolers as aforesaid, or released from such imprisonment by virtue of any order to be made by the registrar as aforesaid, or be entitled to petition *in formâ pauperis* under this act."

Discretion of county-court judge under 8 & 9 Vic. c. 127, and 9 & 10 Vic. c. 95.

By sect. 105, id. "every judge in acting under the last-mentioned statutes, and in deciding whether the party summoned before him has then or has had since the judgment obtained against him sufficient means and ability to pay the debt or damages, or costs, so recovered against him, either altogether or by any instalment or instalments as ordered, shall take into consideration all the debts and liabilities of the party so summoned, and his conduct in disposing of his money or property since the judgment was given."

(I) *Proceedings to Adjudication against Lunatic Prisoners for Debt.*

Adjudication in case of lunatic prisoners for debt.

By sect. 106, id, "if any person being or alleged to be of unsound mind shall be in prison for debt, the gaoler shall forthwith require a justice of the peace for the county or place wherein such prison shall be, to visit such debtor, and to inquire into his state of mind; and such justice shall call to his assistance two duly qualified medical practitioners, each of whom shall be a physician, surgeon, or apothecary, and each of whom shall separately examine such debtor; and if such two medical practitioners shall each sign a certificate with respect to such debtor, according to the form in Schedule (H.) to this act annexed, and such justice shall be satisfied from his own view that such debtor is of unsound mind, he shall certify the same to the proper court, and thereupon the court may appoint some person to represent such debtor, and direct such proceedings to be taken for adjudication in bankruptcy against him as the court shall think fit; and all proceedings under such adjudication shall be had and carried on in the same manner and with the like effect as if such prisoner had been of sound mind, and had presented a petition to the court for adjudication of bankruptcy, or as near thereto as the difference of circumstances will permit."

By sect. 107, id. "any justice of the peace of the county or place aforesaid may thereupon remove such prisoner from such gaol, and may cause him to be sent to the asylum of the county in which such gaol shall be situate, in order that he may be placed under care and treatment as a lunatic; and such removal shall not be considered as an escape or final discharge from such gaol, and such prisoner shall thereafter be dealt with in all respects as a pauper lunatic, and shall be subject to the acts of parliament for the time being in force respecting pauper lunatics, or as near thereto as circumstances will permit: Provided nevertheless, that in the event of his recovery from his lunacy he shall, if still liable to be detained in custody as a debtor, be remitted to the goal from whence he was received."

Power thereupon for justice of the peace to remove such prisoners to county asylum.

XVI. Proceedings pending and under Adjudication.[1]

(A) *Adjudication to be made against a Trader on Proof of Petitioning Creditor's Debt, Trading, and Act of Bankruptcy.*

(B) *After Adjudication, Official Assignee to be forthwith appointed.*[2]

(C) *If Petitioning Creditor's Debt be insufficient, Court may proceed upon application of another Creditor.*[3]

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[1] *Proof as against a Trader must be given not only by Petitioning Creditor's Debt and act of Bankruptcy, but of Trading, except where otherwise provided.*—By sect. 101, 12 & 13 Vic. c. 106, "that the court, under a petition filed by a creditor, shall upon the proof of the petitioning creditor's debt, and of the trading and act of bankruptcy of the person against whom such petition is filed, adjudge such person bankrupt, or if in case of the failure of the petitioning creditor to proceed and obtain adjudication within three days after his petition shall have been filed, or within such extended time as may be allowed by the court, another creditor shall apply for adjudication upon such petition, then upon such application and proof of such creditor's debt, and of the trading and act of bankruptcy of the person against whom such petition is filed, the court shall adjudge such trader bankrupt; and under a petition filed by the trader, the court, upon the application of such trader, and upon proof of the trading, and of the filing a declaration of insolvency, and of the sufficiency of his available estate to the extent required by this act, shall adjudge such trader bankrupt."

[2] By sect. 102, 12 & 13 Vic. c. 106, "that forthwith after adjudication the court shall appoint an official assignee to act as thereinbefore provided in this behalf." As to the duties of the official assignee, see *ante*, p. 157.

[3] By s. 103, 12 & 13 Vic. c. 106, "if after adjudication of bankruptcy the debt of the petitioning creditor be found by the court to be insufficient to support such adjudication, it shall be lawful for the court, upon the application of any other creditor having proved any debt sufficient to support an adjudication, to order the petition for adjudication of bankruptcy to be proceeded in, and it shall by such order be deemed valid, which order may be in the form contained in the Schedule (T.) to this act annexed, or to the like effect."

Schedule (T.)

The Bankrupt Law Consolidation Act, 1849.

Order for Petition for Adjudication of Bankruptcy to be proceeded in, on a substituted Debt.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of] day of A.D.

In the matter of a bankrupt.

Upon application made to the court this day, by [of counsel *or* solicitor] for a creditor of the above-named bankrupt, and who has proved a debt of sufficient amount to support an adjudication, and the debt of the petitioning creditor having been found by the court to be insufficient to support the adjudication of bankruptcy against the above-named it is hereby ordered, that the petition for adjudication of bankruptcy filed against the said on the day of be proceeded in, and that the costs of, &c. [*stating such order as the costs of any of the parties concerned as the court thinks fit*].

A. B. Commissioner.

The 6 Geo. 4, c. 16, s. 18, contained a proviso that such substituted debt was incurred not anterior to the debt of the petitioning creditor. The effect of this omission upon the doctrine of relation, which is still applicable wherever there is notice of an act of bankruptcy within twelve months (*see* ss. 88, 133, 134), will be a question for legal controversy. *See* 1 Mont. & Ayr. *Bank.* 813, and cases cited there.

The petition for an order to substitute under this section must, it is presumed, be served upon the petitioning creditor. *Ex parte Ward*, 3 Mont. D. & D. 24.

The adoption of the form of order of substitution given in the schedule will probably get rid of the questions which have been raised as to the requisite statements in such order

(D) *Bankrupt to have Notice before Advertisement of Adjudication.*[1]

(E) *Bankrupt to deliver up Books to Official Assignee.*[2]

to show jurisdiction. *Christie v. Unwin*, 11 Ad. & E. 373. *Brancker v. Molyneux*, 4 Man. & G. 226. This case is not an authority, as has been supposed, that the order for substitution is proof of the debt, for it must, when put in issue, be proved in the ordinary way. *Fletcher v. Manning*, 12 Mee. & W. 571. *See* 3 Mont. D. & D. 341; 4 Man. & G. 226.

The proof by another creditor is in lieu of the original debt, or alleged trading and act of bankruptcy, and no proof will be necessary of such firstly alleged matters, although no order of substitution should have been made under sect. 103. See *Kynaston v. Davis*, 15 Mee. & W. 705; 10 Jur. 620; 15 L. J. Ex. 336.

According to the rule laid down by Sir J. Leach in *Ex-parte Cousins* (2 Glyn & J. 270), the first petitioning creditor would be liable for the costs, if the petition fails through his misconduct or fraud, but if through a mistake of law or fact, the costs would be paid out of the estate. *Ex-parte Whalley*, 3 Mont. & Ayr. 206. *Ex-parte Magnus*, 2 Mont. D. & D. 604; and *see* now sect. 114 and r. 114.

[1] *Bankrupt to have notice thereof before advertisement of Adjudication, and to be allowed seven days, or such extended time, not exceeding fourteen days, as the Court shall think fit, to show cause against Adjudication. Adjudication may, with Bankrupt's consent, be advertised before the expiration of the time allowed for showing cause.*—By sect. 104, id. "that before notice of any adjudication of bankruptcy shall be given in the *London Gazette*, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last-known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the court shall think fit, from the service of such duplicate, to show cause to the court against the validity of such adjudication; and if such person shall within such time show to the satisfaction of the court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication, in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters, which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the court, the court shall thereupon order (in the form contained in Schedule (U.) to this act annexed, or to the like effect), such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if at the expiration of the said time no cause shall have been shown to the satisfaction of the court for the annulling of such adjudication, the court shall, forthwith after the expiration of such time, cause notice of such adjudication to be given in the *London Gazette*, and shall thereby appoint two public sittings of the court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than thirty days, and not exceeding sixty days, from such advertisement, and shall be the day limited for such surrender: Provided always, that the court shall have power from time to time to enlarge the time for the bankrupt surrendering himself for such time as the court shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself: provided also, that if any person so adjudged bankrupt shall, before the expiration of the time allowed for showing cause, surrender himself, and give his consent, testified in writing under his hand, to such adjudication being advertised, the court, after such consent so given, shall forthwith cause the notice of adjudication to be advertised, and appoint the sittings for the bankrupt to surrender and conform."

If for any reason the commissioner think fit to extend the time for showing cause against an adjudication in bankruptcy, he may do so, provided the further time does not exceed fourteen days. *Re Castelli*, 21 L. J. Bank. 5; 1 De Gex, M. & G. 437.

Should the adjudication be disputed, the practice is, that the petitioning creditor must begin and establish the requisites disputed before calling on the bankrupt to show cause. *Re Clay*, 1 Fonbl. 212. An error in the copy of the adjudication served upon the bankrupt would not make the proceedings void if he really has notice of the adjudication, and does not oppose it. *Re Wilson*, id. 253. As to petitions to annul, *see* sect. 233, under which section alone can proceedings be taken after advertisement to obtain a reversal of the adjudication, the commissioner having no power to review his own decision. *Re Carter*, 1 De Gex, M. & G. 212; 21 L. J. Chanc. 23; 15 Jur. 1142; 22 L. J. Bank. 55. Assent to the advertisement is no acquiescence in the validity of the proceedings. *Ex-parte Gould*, 1 De Gex, 128; 15 Jur. 515; 22 L. J. Bank. 55.

[2] *Bankrupt to deliver up his Books of Account to the Official Assignee upon oath; to attend Assignees; to be at liberty to inspect Books, &c.; after Allowance of Certificate, to attend Assignees in settling accounts. Allowance for Attendance.*—By s. 105, 12 & 13 Vic. c. 106, "that forthwith after the insertion of the notice of adjudication in the *Gazette*, or, if the bankrupt before the expiration of the

(F) *Search Warrant may be granted.*[1]

(G) *Persons acting under Warrant to be protected.*[2]

time allowed for showing cause against the adjudication surrender himself and give consent to such insertion, forthwith after such surrender, the bankrupt shall (if thereto required by the official assignee) deliver up to the official assignee upon oath before the court, or before a master ordinary or extraordinary in chancery, or justice of the peace, all books of account, papers, and writings relating to his estate in his custody or power, and discover such as are in the custody or power of any other person; and every bankrupt, not in prison or custody, shall at all times after such surrender attend the assignees, upon every reasonable notice in writing for that purpose given by them to him, or left at his usual or last-known place of abode, and shall assist such assignees in making out the accounts of his estate; and such bankrupt, after he shall have surrendered, may at all reasonable times before the expiration of such time as shall be allowed to him to finish his examination, inspect his books, papers, and writings in the presence of his assignees, or any person appointed by them, and bring with him each time any two persons to assist him; and every such bankrupt, after he shall have obtained his certificate, shall, upon demand in writing given to him or left at his usual or last-known place of abode, attend the assignees to settle any accounts between his estate and any debtor to or creditor thereof, or attend any court of record to give evidence touching the same, or do any act necessary for getting in or protecting the said estate, for which attendance he shall be paid five shillings per day by the official assignee out of his estate."

A refusal to produce books would be punishable by commitment under sect. 260. *See* also sect. 251.

[1] By s. 106, id. "that in all cases where it shall be made to appear to the satisfaction of the court that there is reason to suspect and believe that any property of any bankrupt is concealed in any house or other place not belonging to such bankrupt, the court may grant a search warrant to the messenger and his assistants, or other person appointed by the court, and it shall be lawful for such messenger and his assistants, or other person, to execute such warrant according to the tenor thereof; and such messenger and his assistants, or other person, shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen or concealed; and every such search warrant shall be in the form contained in Schedule (V.) to this act annexed, or to the like effect."

The search warrant must be executed within the district of the court. Only the house specified can be entered, and in the daytime. Articles not specified in the warrant might be seized if likely to furnish evidence of the identity of the other goods. See *Crozier v. Cundey*, 6 B. & C. 232; 14 Jur. 1027; 9 id. 626. The obstructing a messenger in the execution of a warrant (*Ex-parte Page*, 1 Rose, 1), or indemnifying another against the consequences of turning him out of possession, is a contempt of court. *Ex-parte Dixon*, 8 Ves. 104; Wise, 108. The appointment of the messenger has been noticed, *ante*, p. 158. Although appointed by the commissioner, the assignees are not bound to continue his services. *Robson v. Jonnasohn*, 8 Scott, N. R. 30.

[2] *No Action to be brought against Persons acting in obedience to Warrant of the Court.*— By s. 107, id. "that no action shall be brought against any messenger or his assistants, or other person appointed by the court, for anything done in obedience to any warrant of the court, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such messenger or his assistants, or other person, by the party intending to bring such action, or by his attorney or agent, in writing signed by the party demanding the same, and unless the same hath been refused or neglected for six days after such demand; and if after such demand, and compliance therewith, any action be brought against such messenger or assistant, or person so appointed, without making the petitioning creditor defendant, if living, the jury, at the trial of such action, on the production and proof of such warrant, shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the court by which such warrant shall have been granted; and if such action be brought against the petitioning creditor, and the messenger or assistant, or person so appointed, the jury shall, on proof of such warrant, give their verdict for such messenger or assistant, or person so appointed, notwithstanding any such defect of jurisdiction; and if the verdict shall be given against the petitioning creditor, the plaintiff shall recover his costs against him, to be taxed so as to include such costs as the plaintiff is liable to pay to the messenger and his assistant, or person so appointed as aforesaid."

See *Sturch v. Clarke*, 4 B. & Ad. 113. This section is not applicable where the messenger does something not authorised by the warrant, although he *bonâ fide* believes it to be authorised; as where he seizes the goods of B. under a warrant to seize the goods of A. *Munday v. Stubbs*, 10 C. B. 432; 20 L. J. C. P. 59; 14 Jur. 1027; 9 id. 626. The intention of the statute is, that where a messenger only does that which is ordered by a warrant, and the warrant is wrong, the responsibility should rest upon the petitioning creditor; for the petitioning creditor having held out the warrant, and given it to the messenger, may properly be taken to have intended the warrant to be executed whether

(H) *Petitioning Creditor liable for Acts under Warrant.*[1]

(I) *Persons acting under Warrant may break open Doors, &c.*[2]

(J) *Execution of Warrant in Ireland or Scotland.*[3]

(K) *Bankrupt if not in Prison, free from Arrest, &c.; or if in Prison, may order Release.*[4]

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wrong or not, and ought to be made responsible rather than the ministerial officer acting in pursuance of his authority." *Per Maule, J.* (Id.)

[1] *Proof in such Actions that Defendant is Petitioning Creditor sufficient to render him liable.*—By s. 108, 12 & 13 Vic. c. 106, "that in any such action brought against the petitioning creditor, either alone or jointly with any messenger or assistant or other person so appointed by the court, for anything done in obedience to the warrant of the court, proof by the plaintiff in such action that the defendant or defendants, or any of them, is or are petitioning creditor or creditors, shall be sufficient for the purpose of making such defendant or defendants liable, in the same manner and to the same extent as if the act complained of in such action had been done or committed by such defendant or defendants.

If the action be for anything done not in obedience to the warrant, some direct evidence of participation in its execution will be necessary. His attorney would be liable if he directed or interfered in the execution of the warrant. *Green v. Elgie*, 5 Q. B. 99. *Rundle v. Little*, 6 id. 174. *See* sect. 159 as to actions for anything done in pursuance of the act.

[2] *Messenger may break open the Bankrupt's Doors, &c. and seize upon his Body or Property.*—By s. 109 id. "that it shall be lawful for any messenger of the court and his assistants acting under warrant of the court to break open any house, chamber, shop, warehouse, door, trunk, or chest of any bankrupt where such bankrupt or any of his property shall be reputed to be, and seize upon the body or property of such bankrupt; and if the bankrupt be in prison or in custody, it shall be lawful for the messenger and his assistants to seize any property *of the bankrupt* (his necessary wearing apparel only excepted) in the custody or possession of such bankrupt or of any other person, in any prison or place where such bankrupt is in custody.

Under the 6 Geo. 4, c. 16, s. 27, it was held that the messenger had no power to enter the premises of a third person to seize the property of the bankrupt. *Edge v. Parker*, 8 B. & C. 700. The proper course is to obtain a search-warrant under sect. 106.

[3] By s. 110 id. "that it shall be lawful for the messenger and his assistants acting under a warrant of the court to break open any house, chamber, shop, warehouse, door, trunk, or chest of the bankrupt in Ireland where any of his property shall be reputed to be, and seize the same; provided such warrant shall have been verified upon oath before, and backed and indorsed by the mayor or chief magistrate of the city, borough, or town corporate where or near to which the same is executed; and provided also that the messenger shall, before a justice of the peace residing in the county where such property shall be reputed to be, depose upon oath that he is the person named in such warrant.

The backing of this warrant would be only a ministerial act. See *Clarke v. Wood*, 2 Ex. 395.

By s. 111, id. "that if in the execution of any such warrant of seizure granted by the court it shall be necessary to break open any house, chamber, shop, warehouse, door, trunk, or chest of the bankrupt in Scotland, where any of the property of such bankrupt shall be reputed to be, or to seize and get possession of such property, such warrant, after having been verified upon oath, may be backed or indorsed by any judge ordinary or justice of the peace in Scotland, who are hereby required, within their respective jurisdictions, to back or indorse the same; and such warrant so indorsed shall be sufficient authority to the messenger or his assistant bringing such warrant, and to all officers of the law in Scotland, to execute the same within the county or burgh wherein it is so indorsed, and in virtue thereof to break open the house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt, and to seize and take possession of such property, to be distributed under the bankruptcy, or otherwise dealt with according to law."

[4] *If Bankrupt be not in Prison or Custody to be free from Arrest in coming to Surrender, &c., and if in Prison may be brought up by Warrant to be Examined or to Surrender, &c.; and if in Prison for Debt the Court may, except in certain cases, order his Release absolutely or conditionally.*—By s. 112, id. "that if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint; and whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence, the court may, by warrant directed to the person in whose custody he is confined, cause him to be brought before it at any sitting, either public or private, and if he be desirous to

(L) *Bankrupt, if Arrested, to be Discharged on producing his Protection.*[1]

(M) *Petitioning Creditor to proceed at his own Costs, until Choice of Assignees.*[2]

surrender he shall be so brought up, and the expense thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the court for bringing up such bankrupt; and where any person who has been adjudged bankrupt, and has surrendered and obtained his protection from arrest, is in prison or in custody for debt at the time of his obtaining such protection, the court may, except in the cases next hereinafter mentioned, order his immediate release, either absolutely or upon such conditions as it shall think fit: Provided always, that the court shall not order such release where it shall appear by any judgment, order, commitment, or sentence, under which the bankrupt is in prison or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Provided also, that such release shall in nowise affect any rights of the creditor at whose suit the bankrupt may be in prison or in custody against the bankrupt, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the court."

This protection from arrest extends to all arrests by creditors, whether the debt be provable or not, or on mesne or final process (see *Darby v. Baughan*, 5 T. R. 209), arrests under attachments for the non-payment of money (*In re Williams*, 1 Sch. & Lef. 169), or under an extent at the suit of the crown (*Ex-parte Russell*, 19 Ves. 163); but not against a debt by reason of a judgment obtained against a bankrupt for an assault committed by his wife. *Larkin v. Marshall*, 19 L. J. Ex. 161. The words "in custody" would refer to a trader who had been bailed, as he would in contemplation of law be in the custody of his bail, and they would therefore be entitled to take him. *Darby v. Baughan*, 5 T. R. 209; 1 Glyn & J. 26. So the sheriff could retake him upon an escape, notwithstanding this section. *Anderson v. Hampton*, 1 B. & A. 308. A copy of the record on which judgment has been obtained would be the proper evidence to negative the exceptions in the proviso. See *Re McCleod*, 1 Fonb. 27. *Re Valentine*, 18 L. T. 80.

If the court did order the discharge in any of the excepted cases, the gaoler or sheriff would be bound to release him, and no action would lie against him for an escape, as it would be an order within the general jurisdiction of the court, and made judicially. *Thomas v. Hudson*, 13 Mee. & W. 353, 816, 884; and see *Norton v. Walker*, 3 Ex. 480. The court would revoke the order if granted by mistake. See *Ex-parte Partington*, 13 Mee. & W. 684. The privilege extends to the end of the day to which the last examination is adjourned by the court (*Ex-parte Simpson*, 2 Wils. 127. *Ex-parte Jackson*, 15 Ves. 116); but not to the case where the last examination is adjourned *sine die*. *Ex-parte Wood*, 1 Glyn & J. 75. See *Re Gowgill*, 20 L. J. Q. B. 300; S. C. 16 Q. B. 336. *Walker v. Edmundson*, id. 186. *Ex-parte Stanton*, 21 L. J. Bank. 7. *Ex-parte Croll*, 26 id. 90. *Hooper v. Lane*, 27 L. J. Q. B. 75; 6 H. L. C. 6. The privilege does not extend to a bankrupt at large on bail.

A bankrupt's last examination was adjourned *sine die* and no protection given; then a new day was appointed for his examination, which he attended, but no protection was given; then he was arrested for debt, after which he attended to be further examined when a protection was given:— It was held, that he was not entitled to be discharged from the arrest. *Ex-parte and Re Bailey*, 3 Mont. & Ayr. 408.

[1] By sect. 113, 12 & 13 Vic. c. 106, "that if any bankrupt shall be arrested for debt, or on any escape warrant in coming to surrender, or shall after his surrender and while protected by order of the court be so arrested, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shown such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt, for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit.

[2] By s. 114, id. "that the petitioning creditor shall at his own cost file and prosecute his petition, until the choice of assignees by the creditors; and the court shall, at or after the sitting for such choice, make order for the payment thereof out of the estate of the bankrupt, in course of priority, to be settled by any general rule or order to be made in pursuance of this act."

General Rule.— If the petitioning creditor fail to carry on the proceedings, his costs will not be paid out of the estate. *Ex-parte Ullathorne*, 1 Mont. D. & D. 338. The order of payment is now settled by r. 114. The petitioning creditor is liable for the messenger's fees. In an action against him for

(N) *No Adjudication to be Annulled by reason of Concert.*[1]

(O) *Death of Bankrupt not to abate Proceedings.*[2]

XVII. Proceedings after Adjudication.

(A) *Official Assignee immediately to take Possession.*[3]

Official assignee to take and retain possession, unless creditor is of opinion doing so is not requisite.

By sect. 169, 24 & 25 Vict. c. 134, "immediately on adjudication, it shall be the duty of the official assignee to take possession of the bankrupt's estate, and to retain possession thereof until the appointment of a creditors' assignee; but if such official assignee, or if the court, upon the representation of any creditor, shall be of opinion that the keeping possession of the bankrupt's property is not requisite for the due protection of the creditors, such possession shall not be continued."

(B) *Notice to and Meeting of Creditors.*

Meetings of creditors after adjudication.

Proof of debts at meeting.

Official assignees to attend and give full information.

Transfer to County Court on resolution of creditors.

Majority of creditors to decide whether any and what allowance to bankrupt.

Option to creditors to accept proof of bankruptcy,

By sect. 109, id. "as soon as convenient as may be after adjudication shall have become absolute, the court shall appoint a meeting of the creditors, of which ten days' notice shall be given in the *London Gazette*, and which meeting shall be held at such time and place as the court shall appoint; and at such meeting a registrar, or such other person as the court shall appoint for that purpose, shall preside, and receive the proofs of the debts of the creditors. The official assignee shall attend and give to the meeting the fullest information in his power of the estate and effects of the bankrupt, and of the debts due from his estate; and it shall be lawful for the majority in number and value of the creditors present at such meeting or at any adjournment thereof, to resolve and determine that the proceedings in the bankruptcy shall be transferred to and thenceforth prosecuted in the County Court of any district, other than the metropolitan district, and the court shall order the same accordingly, upon being satisfied that such resolution was duly made. At this meeting a majority in value of the creditors present shall determine whether any or what allowance for support shall be made to the bankrupt up to the time of passing his last examination."

By sect. 110, id. "in case at such meeting or at any other meeting of creditors, any proposal shall be made by or on behalf of the bankrupt which it shall appear to the major part in value of the creditors then present ought to be accepted, or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority

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such fees, the production of the proceedings showing a petitioning creditor of the same name as the defendant, is sufficient *primâ facie* proof that he was the petitioning creditor. *Hamber v. Roberts*, 7 C. B. 861. Where petitioning creditor was a solicitor, his full costs were allowed out of the estate. 19 L. J. Bank. 10.

[1] By s. 115, id. "that no fiat in bankruptcy shall be annulled, nor any petition for adjudication of bankruptcy dismissed, nor any adjudication reversed, by reason only that the fiat, petition, or adjudication, or act of bankruptcy, has been concerted or agreed upon between the bankrupt, his solicitor or agent, or any of them, and any creditor or other person."

This section does not enable a creditor to treat a trust-deed executed by a trader with his concurrence as an act of bankruptcy. *Ex-parte Payne*, 1 De Gex, 534. Nor will it prevent the adjudication being annulled if obtained with a false or concealed object. *Ex-parte Phipps*, 3 Mont. D. & D. 505.

[2] By s. 116, id. "that if any bankrupt shall die *after* adjudication, the court may proceed in the bankruptcy as if such bankrupt were living." *See ante*, vol. i. p. 11.

Death *between the petition and adjudication* will still abate the proceedings. *Humfrey v. Scroope*, 13 Q. B. 509. Where one of the bankrupts died before the adjudication under a joint fiat, it was ordered to be amended by omitting his name. *Ex-parte Hall*, 1 De Gex, 332.

[3] This section alters in some respects the previous duty of an official assignee, who was previously appointed to act with the creditor's assignees, but to receive alone all the personal estates and effects, and the rents and profits of real estate, and the proceeds of sales, subject to the discretion of the court. *See* sect. 117.

shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days, in order that notice of such resolution may be given to every creditor by the official or creditors' assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct, and the bankrupt, having made a full discovery of his estate, shall be entitled to apply for an order of discharge."

and no further proceedings in bankruptcy taken.[1]

(C) *Summons and Examination of Bankrupt.*[2]

(D) *Summons and Examination of Bankrupt's Wife.*[3]

(E) *Warrant may be issued against Bankrupt keeping out of the way, or about to quit England, &c.*[4]

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[1] This is a great improvement on the 230th sect. 12 & 13 Vic. c. 106. It enables the creditors to terminate the proceedings in bankruptcy, and thus avoid all further expense to the estate or to the bankrupt.

[2] By s. 117, 12 & 13 Vic. c. 106, "the court may summon any bankrupt before it, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time appointed by the court (having no lawful impediment made known to and allowed by the court at such time), it shall be lawful for the court, by warrant, to authorise and direct any person or persons the court shall think fit to apprehend and arrest such bankrupt, and bring him before the court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the court, it shall be lawful for the court to examine such bankrupt after he shall have made and signed the declaration contained in the Schedule (W.) to this act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination so reduced into writing the said bankrupt shall sign and subscribe."

Sect. 245 gives a general power to take all evidence upon oath; but this and the following section would seem to render an oath unnecessary in the case of the bankrupt and his wife. Under s. 254, however, false answers will subject them to the punishment of perjury; and under s. 260, the answering unsatisfactorily is punishable by imprisonment.

The general rule of law, that no person can be compelled to criminate himself, has been said to be qualified with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects and the particulars relating to them, though in the course of giving information as to what his property consists, such information may tend to show that he has obtained property in violation of the law, as in the case of illegal trading, &c. *Ex-parte Cossens*, Buck, 540. A bankrupt has been held bound to answer a question relating to particular property, although an indictment was pending against him for concealing it (*In re Heath*, 2 Deac. & Chit. 214); and though his answer touching his estate might *tend* to convict him of perjury on a former occasion, and of concealing his effects. *In re Smith*, 2 Deac. & Chit. 230; *In re Feaks*, id. 226. (*See* 17 & 18 Vic. c. 125, s. 25, and id. s. 103.) The bankrupt cannot object to answer questions tending to establish the act of bankruptcy. *Pratt's case*, 1 Glyn & J. 58.

[3] By s. 118, 12 & 13 Vic. c. 106, "it shall be lawful for the court to summon before it the wife of any bankrupt, and to examine her, after she shall have made and signed the declaration contained in Schedule (W.) to this act annexed, either by word of mouth or interrogatories in writing, for the finding out and discovery of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person or by her own act, or by any other person, and she shall incur such danger or penalty for not coming before the court, or for refusing to be sworn and examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the court, as is hereinafter provided." *See* s. 260, *post*, p. 220.

The wife's examination, it is said, must be limited to the points specified, for it is a statutory power to be strictly limited, and she could, therefore, not be examined as to the act of bankruptcy. *Ex-parte James*, 1 P. Wms. 611. It was first given by 21 Jac. 1, c. 19, s. 6.

[4] By s. 119, 12 & 13 Vic. c. 106, "if in any case it shall be proved to the satisfaction of the court that any bankrupt is keeping out of the way, and cannot be personally served with a summons, and that due pains have been taken to effect such personal service, or that there is probable cause for believing that he is about to quit England, or to remove or conceal any of his goods or chattels, unless he be forthwith apprehended, it shall be lawful for such court, by warrant, to authorise and direct any person or persons it shall think fit to apprehend and arrest

(F) *Summons against Persons suspected of having Bankrupt's Property.*[1]

(G) *Service of Summons where Person keeps out of the way.*[2]

(H) *Power to Examine Persons summoned or present at any Sitting.*[3]

(I) *Any Person refusing to be Sworn, &c., or refusing to Answer, or not fully Answering, or refusing to sign Examination, or to produce Books, &c., may be committed.*[4]

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such bankrupt and bring him before the court, to be examined in like manner as if he appeared upon a summons."

This is a new provision; and see 14 & 15 Vic. c. 52.

[1] By s. 120, 12 & 13 Vic. c. 106, "that after adjudication it shall be lawful for the court to summon before it any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person the court may believe capable of giving information concerning the person, trade, dealings or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings; and the court may require such person to produce any books, papers, deeds, writings or other documents in his custody or power which may appear to the court necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the court is authorised to inquire into; and if such person so summoned as aforesaid shall not come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it), it shall be lawful for the court, by warrant, to authorise and direct the person or persons therein named for that purpose to apprehend and arrest such person, and bring him before the court for examination."

This section is substantially the same as 6 Geo. 4, c 16, s. 33. For the granting of a summons under 6 Geo. 4, c. 16, s. 33, to bring before commissioners a person "known or suspected" to have property of the bankrupt in his possession, it seems that the suspicion required is that of a party applying for such summons, and not of the commissioner. *Cooper v. Harding*, 7 Q. B. 928. It is the duty of a person summoned to attend and to wait until examined, or until his attendance for that purpose is dispensed with. The commissioners may issue a warrant both for the examination of the party, and for the production of any deeds in his custody or power, that may appear essential. *Wright v. Maude*, 10 Mee. & W. 527. Any person refusing to be sworn, or to answer or not fully answering or refusing to produce documents, may be imprisoned. *See* s. 260. Under a commission against a bankrupt mortgagor, the mortgagee of the bankrupt's property was compelled to produce his mortgage deed, under 6 Geo. 4, c. 16, ss. 33, 34. *Ex-parte Caldecott*, Mont. 55. See *Ex-parte Beeston*, Mont. & Mac. 244.

A person summoned as a witness, and suspected of having property of the bankrupt in his possession, is entitled to his expenses in the first instance, where it appears he is only servant or agent of the party suspected. *Re Bell*, 1 Bank. & Insol. R. 168.

This section limits the power of the commissioner to put such questions only as relate to the person, the trade, the dealings, or the estate of the bankrupt, and does not authorise a question to ascertain the truth of a *plene administravit* to an action commenced by the assignees against an executrix. *Ex-parte Solarte, re Abzedo*, 1 Mont. 495.

[2] By s. 121, 12 & 13 Vic. c. 106, "where it shall be shown by affidavit to the satisfaction of the court that any person to whom any such summons is directed as aforesaid is keeping out of the way, and cannot be personally served therewith, and that due pains have been taken to effect such personal service, it shall be lawful for the court to order, by indorsement upon the summons, that the delivery of a copy of such summons to the wife or servant or some adult inmate of the house or family of the person at his usual or last-known place of abode or business, and explaining the purport thereof to such wife, servant, or inmate, shall be equivalent to personal service, and in every such case the service of such summons in pursuance of such order shall be and be deemed and taken to be of the same force and effect, to all intents and purposes, as if the party to whom such summons was directed had been personally served therewith."

The proof required under this section is limited to proof by affidavit; not, like s. 119, proof generally. *Ante*, p. 219 n.

[3] By s. 122, 12 & 13 Vic. c. 106, "that upon the appearance of any person summoned or brought before the court upon any warrant as aforesaid, or if any person be present at any sitting of the court, it shall be lawful for the court to examine every such person upon oath, either by word of mouth or by interrogatories in writing, concerning the person, trade, dealings, or estate of any bankrupt, or concerning any act or acts of bankruptcy by any bankrupt committed, and to reduce into writing the answers of every such person, and such answers so reduced into writing such person examined is hereby required to sign and subscribe." This authority may be exercised by district commissioners. 12 Mee. & W. 271; 13 L. J. Ex. 165; 15 id. Q. B. 233; 3 D. & L. 756.

As to the penalty for refusing to be sworn or not answering satisfactorily, *see* s. 260. See *Ex-parte Solarte*, *supra*, as to the limited powers given by the words "concerning the person, trade, dealings, or estate of any bankrupt."

[4] By s. 260, 12 & 13 Vic. c. 106, "that if

(K) *In Warrant of Commitment, Questions need not be stated.*[1]

any bankrupt, or the wife of any bankrupt, shall refuse to make and sign the declaration contained in the Schedule (W.) to this act annexed, or if any other person shall refuse to be sworn, or shall refuse to answer any lawful question put by the court, or shall not fully answer any such question to the satisfaction of the court, or shall refuse to sign and subscribe his examination when reduced into writing (not having any lawful objection allowed by the court), or shall not produce any books, papers, deeds, and writings, or other documents in his custody or power, relating to any of the matters under inquiry, which such bankrupt, wife of the bankrupt, or person is required by the court to produce, and to the production of which he shall not state any objection allowed by the court, it shall be lawful for the court, by warrant, to commit such bankrupt, wife of such bankrupt, or other person, in London to the Queen's prison, or in the country to such prison as such court shall think fit (as the case may be in London or in any district in the country), there to remain without bail until he shall submit himself to such court to be sworn, and full answers make to the satisfaction of such court to all such lawful questions as shall be put by the court, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents in his custody or power, to the production of which no such objection as aforesaid has been allowed."

Although a person attends at the appointed time, in pursuance of a summons, but does not wait to be examined, or if he neglects or refuses to produce a document as directed, a warrant may, it seems, issue under this section. *Wright v. Maude*, 10 Mee. & W. 527. *Re Lord*, 16 id. 462; 16 L. J. Ex. 118. But a refusal on the part of a witness to read an entry in an account-book put into his hands is not such a refusal to answer a question as is within the section. *Isaac v. Impey*, 10 B. & C. 442; 3 Y. & J. 38; 4 C. & P. 113. As to refusing to take the oaths, see *Ex-parte Laurence*, 20 L. T. 16. And as to declarations instead of oaths, *see* 4 Q. B. 668; 12 L. J. Q. B. 239.

The question how far matters communicated to a solicitor are exempted from disclosure, not unfrequently arises under this section. The general principles on this subject apply just as much after the client's bankruptcy as before, and the assignees have no right to compel an attorney to disclose matters which are privileged communications, nor can he rightfully disclose them without the bankrupt's consent. *Bowman v. Norton*, 5 C. & P. 177. *Re Phillips*, 20 L. T. 16.

From *Russell v. Jackson* (21 L. J. Ch. 146) it seems doubtful that the existence of an illegal purpose would prevent the privilege from attaching. It has been decided, where the question was whether the bankrupt had committed an act of bankruptcy by having made a fraudulent conveyance, that the bankrupt's attorney, though, as attesting witness to the deed, he was bound to disclose what took place at the time of its execution, was privileged from stating what occurred during its concoction and preparation, and could not be asked whether it had not been subsequently destroyed, if the only knowledge he had as to these matters was acquired from his confidential character as an attorney. So, in *In re Phillips* (20 L. T. 15), a commissioner refused to compel the clerk of the attorney (who is within the rule as much as the attorney himself; *Taylor v. Forster*, 2 C. & P. 195), who had been employed by the bankrupt in the preparation of a deed, which was alleged to be a fraudulent preference, to give evidence as to the circumstances under which it was made, in support of an opposition to the bankrupt obtaining his certificate. See *Turquand v. Knight*, 2 Mee. & W. 98. *Ex-parte Lord*, Buck, 110.

But a bankrupt cannot refuse to discover his estate and effects and the particulars relating to them, though by giving such information his answers may tend to show that he has been guilty of fraudulent concealment, or that he owns property which he has obtained illegally, or the possession of which will render him liable to penalties. *Ex-parte Cossens*, Buck, 531. *Ex-parte Caldecott*, Mont. 55. *Ex-parte Stone*, 1 Glyn & J. 7. It would seem to follow that the solicitor can have no greater right to withhold information than the bankrupt himself. See *In re Elliott*, 1 Fonb. 74. A bankrupt has, however, been protected from answering questions as to a distinct criminal act. See *Ex-parte Cossens*, Buck, 531. *Ex-parte Kirby*, 1 Mont. & Mac. 212. *In re Smith*, 2 Deac. & Chit. 239; and in *Ex-parte Hawley*, 20 L. T. 258; 1 Deac. & Chit. 415; 2 id. 465.

But the legal adviser must disclose all questions put to him by his client, together with his answers thereto, provided such questions were asked in order to gain information respecting matters of fact, as distinguished from those put with a view of obtaining advice. *Bramwell v. Lucas*, 2 B. & C. 743.

[1] Under s. 261, 12 & 13 Vic. c. 106, the questions were to be particularly specified in the warrant. There have been several decisions upon the corresponding sections in 5 & 6 Vic. c. 122, and 8 & 9 Vic. c. 48. See *Ex-parte Bull*, 15 L. J. Q. B. 235. The questions upon a former examination need not be set out, but only those in that which are considered unsatisfactory. *Ex-parte Dauncey*, 4 Q. B. 668; 3 Per. & D. 640; 12 L. J. Q. B. 239; 12 Mee. & W. 271. *Ex-parte Bull*, 1 B. C. R. 132. Where upon the questions and answers reference was made to documents contained in a previous examination, but which were not set forth in the warrant (*Price's case*, 2 Glyn & J. 211), and to some previous examinations not set forth (*Horton's case*, 2 id. 215; *In re Martin*, 4 D. & L. 768; 16 L. J. Q. B. 286; 1 De

Form of warrant for commitment of bankrupt.

By sect. 112, 24 & 25 Vic. c. 134, "in any warrant of commitment issued by any court under this act it shall not be necessary to set forth or specify any question or any part of the examination of the person so committed, but it shall be sufficient to refer in the warrant to the examination or deposition of the person as remaining on the file of proceedings, and to specify in the said warrant the precise date of the examination or deposition so referred to; and such warrant shall be in the form contained in Schedule (C) to this act: Provided, however, that in every case in which any person shall be so committed for refusing to answer, or for not fully answering any question put to him, every such question shall be specified in the examination or deposition of the person committed remaining on the file of proceedings, and so referred to as aforesaid: and provided, also, that a copy of the said examination or deposition so referred to shall be delivered personally to the person committed within twenty-four hours next after his actual committal to prison; and in default of the said copy being delivered the person committed shall be discharged from custody, either by the court or by the judge before whom such person may be brought by *habeas corpus*, with such costs, if any, as the said court or judge may deem just."

Copy of his examination to be delivered to person committed.

(L) *If Answers satisfactory, Party committed to be Discharged.*

Discharge of person committed.

By sect. 113, id. "if any person so committed shall sue forth any writ of *habeas corpus* in order to be discharged from such commitment, he shall not be discharged by reason of any mere matter of form, but if the court or judge before whom he shall be brought, upon inspection and consideration of the whole of the examination or deposition of such person, shall be of opinion that the answer or answers of such person is or are satisfactory, the court or judge may order the person so committed to be discharged." *See* id. s. 261; now repealed.

(M) *False Evidence by Bankrupt, &c., Perjury.*[1]

(N) *Concealing Bankrupt's Effects; Allowance to Persons making Discovery.*[2]

Gex, 485), the warrants were held defective. It is sufficient that the answers on the whole are unsatisfactory (*Ex-parte Lord*, 11 Jur. 186; 16 Mee. & W. 462; S. C. 16 L. J. Ex. 118); as where they were so clearly of an improbable character that they could not be believed. *Re Martin.* On return to the *habeas*, affidavits may be used on behalf of the prisoner. (Id.) A warrant directed "To the messenger of," &c., without naming him, is sufficient. *Ex-parte Lord*, 16 Mee. & W. 462. As to the necessity of a second warrant upon a remand, see *In re Martin*, 11 Jur. 461; 1 De Gex, 185; 26 L. J. Bank. 6; or taking office-copies, 1 D. & L. 608; 12 Mee. & W. 271; 13 L. J. Ex. 165.

[1] By s. 254, 12 & 13 Vic. c. 106, "that any bankrupt or bankrupt's wife who shall, upon any examination upon affirmation, or after making and signing the declaration authorised or directed by this or any other act relating to bankrupts, and any person who shall upon any examination upon oath or affirmation, or in any affidavit or deposition or solemn affirmation so authorised or directed, or in any affidavit or deposition or solemn affirmation wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury." *See* s. 221, 24 & 25 Vic. c. 134, *post.*

An indictment under this section must aver, and be supported by, proof of the bankruptcy, petitioning creditor's debt, and all the essential preliminary steps down to the examination upon which the perjury is alleged to have been committed. See *Reg. v. Ewington*, 2 M. C. C. R. 223; 1 Car. & M. 319. *See* s. 225, 24 & 25 Vic. c. 134. And although, where the bankruptcy has not been disputed or annulled, the advertisement in the *London Gazette* would, under s. 233, be evidence of the bankruptcy when the bankrupt is the party indicted, that would not be evidence against third parties. See *R. v. Harris*, 4 Cox C. C. 140. It has, however, been intimated that the adjudication of the Court of Bankruptcy is sufficient evidence of the bankruptcy. See *Rex v. Raphael*, Manning's *Index*, 232; *Reg. v. Hilton*, 2 Cox C. C. 352.

[2] By s. 269, 12 & 13 Vic. c. 106, that "any person who shall wilfully conceal any real or personal estate of the bankrupt, and who shall not, within forty-two days after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, discover such estate to the court or to the assignees, shall forfeit the sum of one hundred pounds, and double the value of the estate so concealed; and any person who shall after such time voluntarily discover to the court or to the assignees any part of such bankrupt's estate not before come to the knowledge of the assignees shall be allowed five per centum thereupon, and such further reward as the assignees, with the consent of the court,

XVIII. Consequences of Adjudication as relates to certain Property and Transactions.

(A) *Goods in the Possession, Order, and Disposition of the Bankrupt to be deemed his Property;*[1] *Proviso as to Transfer or Assignment of Vessels.*

shall think fit, to be paid out of the estate recovered on such discovery." *See* s. 221, 24 & 25 Vic. c. 134, *post.*

Only one penalty can be recovered against the same party under this section, though there are different acts of concealment. *Brooks v. Glencross*, 2 M. & Rob. 62.

It is doubtful whether this section would apply to a creditor who has obtained goods from the bankrupt by way of fraudulent preference, the section being intended to apply to persons assisting a bankrupt in the concealment of his goods on behalf of the bankrupt himself, but not to a case of debtor and creditor, although such a case may be within the terms of the section. *Per Patteson, J.*, id. *See* s. 221, 24 & 25 Vic. c. 134.

[1] By s. 125, 12 & 13 Vic. c. 106, "if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy: Provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered, according to the provisions of an act made in the parliament holden in the eighth and ninth years of the reign of her Majesty, intituled 'An Act for the Registering of British Vessels,' or any of the acts therein mentioned.

This is nearly in the same language as the 6 Geo. 4, c. 16, s. 72; but it was decided in *Heslop v. Baker* (6 Ex. 350; 20 L. J. Ex. 350; 20 L. T. 191), that the assignees acquire no title to deal with the property in the bankrupt's reputed ownership until an order has been made by the court, and when such an order is made its operation is retrospective, and will vest the property in the assignees from the time of the act of bankruptcy, so as to enable them to maintain trover for them against the real owner, if he has retaken possession subsequent to and with knowledge of the act of bankruptcy. *See* Shelford, B. A. 172.

A mere general order by the commissioner for the sale of the goods in the order and disposition of the bankrupt is not sufficient. It must point specifically to the goods which are the subject of the order. *Quartermaine v. Bittleston*, 13 C. B. 133; 17 Jur. 281; 22 L. J. C. P. 105; 20 L. T. 236.

The real owner in *Heslop v. Baker* had notice of the act of bankruptcy, and could not be protected by the 133d section; and it seems clear from *Ex-parte Styan* (1 Phil. 105), and *Paricnte v. Pennell* (2 M. & Rob. 517), that the seizure of the goods by the real owner before the petition for adjudication, and without notice of the act of bankruptcy, will deprive the court of the power to make the order. See *Re Atkinson*, 1 Fonb. 270. The dividing point, subject to the effect of the 133d section, is the act of bankruptcy, and goods coming into the bankrupt's possession after the act of bankruptcy are not within this section. *Lyon v. Weldon*, 2 Bing. 334; *Faucett v. Fearne*, 6 Q. B. 20. The doctrine as to reputed ownership is not to be extended. See *Belcher v. Bellamy*, 2 Ex. 306. The true owner means the person who has the legal right to the possession and the power of dealing with the property. But *Lord Redesdale* said, in *Joy v. Campbell*, 1 Sch. & Lef. 336 (see *Whitfield v. Brand*, 16 L. J. Ex. 103; 16 Mee. & W. 286):—"The statute refers to chattels, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits, unconscientiously as the act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of property to which he was not entitled; but in the construction of the act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another, *with consent of the true owner.* There must, therefore, *be a real owner, distinct from an apparent owner, and the real owner must consent to the apparent ownership of such.*" Therefore, goods obtained by fraud by the trader, by a pretended purchase without any intention of payment, were held not to pass. *Load v. Green*, 15 Mee. & W. 216; 15 L. J. Ex. 113. The bankrupt was the real owner, subject to the right of the vendor to annul the contract for the fraud. *Ex-parte Horwood*, Mont. & Mac. 169. So, goods are not to be in the possession of the bankrupt, with the consent of the true owner, if the latter takes such steps as are in his power to obtain possession of them, as by forwarding notice to a distant port. *Belcher v. Bellamy*, 2 Ex. 303; 17 L. J. Ex. 219. *See* 2 Nev. & M. 421; 5 B. & Adol. 674; 4 Ad. & E. 58.

A Scotch firm had a branch in London, which was wholly conducted by an agent and manager, at a salary, but in their name. By contract he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bankrupt in Scotland:—*Held*, that the goods under the manager's control at the time were within the order and disposition of the bankrupts, and passed to their assignees unaffected by his lien. *Hoggard v. Mackenzie*, 25 Beav. 493.

A trader executed a bill of sale of his stock in trade, and all his other effects, to the defendant, an auctioneer, on the 17th of June;

in pursuance of an arrangement between the parties, the defendant came on the premises of the trader, and attempted to sell the goods, but there were no buyers, and nothing was sold; the defendant then left the premises, and the trader remained there, and continued to carry on business till the 22d, when he committed an act of bankruptcy. The sale had been advertised, but it did not appear that the goods were advertised to be sold as the goods of the defendant:—*Held*, that notwithstanding the attempted sale, the goods were in the possession of the bankrupt as reputed owner, with the consent of the true owner at the time of the bankruptcy, and therefore passed to his assignees. *Reynolds v. Hall*, 4 H. & N. 519; 28 L. J. Ex. 257.

A bankrupt had given a bill of sale of the furniture in his hotel to A., for valuable consideration; he still continued to retain the furniture and use it in the hotel; and A. did not interfere with the furniture, or with the management of the hotel:—*Held*, that the furniture came within the reputed ownership clause, and should be ordered to be sold for the benefit of the creditors. *In re Hams*, 10 Ir. Ch. Rep. 100.—Bank.

The mere fact that the dealings between the bankrupt and A., with regard to the bill of sale, were beneficial to the general estate, and assented to by several of the parties interested, does not raise an equity sufficient to bar the operation of the statute. (Id.)

Where the bankrupt was in possession of a factory, steam-engine, and fixtures, under a contract for the purchase of them, and the day before he committed an act of bankruptcy he requested the vendor to re-sell and pay himself, and the vendor accordingly retook possession, and the man then in charge for the bankrupt agreed to continue the charge of the property for the vendor; the steam-engine and fixtures were held not to be in the order and disposition of the bankrupt. *Ex-parte Watkins*, 1 Deac. 296. *See* also *Price v. Groom*, 2 Ex. 538; 17 L. J. Ex. 346. *Smith v. Topping*, 5 B. & A. 674. And a mortgagor in possession cannot, by leasing goods to another, render them liable to be taken by the assignee of the latter. *Frazer v. Swansea Canal Company*, 1 Ad. & E. 354. So, the delivery of a bill of lading of goods at sea is a sufficient transfer (*Lempriere v. Pasley*, 2 T. R. 485); or of a bill of sale of a ship, if duly registered. Goods in a bonded warehouse sold and paid for, and marked by the purchaser, but for the delivery of which an order from the vendor was still requisite, passed to the assignees of the vendors. *Knowles v. Horsfall*, 5 B. & A. 134. So, also, where some of the goods remained in the vendor's own vaults. (Id.) *See*, however, *Ex-parte Dovor*, 2 Mont. D. & D. 259; in which case, however, the decision might have been supported on the ground that the real owner had demanded the possession of the goods. But goods sold to a bankrupt, and afterwards stopped *in transitu*, are not within the section. *Townley v. Crump*, 4 Ad. & E. 58. Goods sent on sale or return are. *Livesay v. Hood*, 2 Camp. 83. *See* 1 Fonb. B. C. 258; 1 Moore, 519; 8 Taunt. 76. Where a ship is being built for a person under a contract for payment by instalments, so that each portion becomes his property, it does not pass to the assignees of the builder becoming bankrupt before its completion. *Clarke v. Spence*, 4 Ad. & E. 448. These extend to goods which are in his order and disposition at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded. *Stansfeld v. Cubitt*, 2 De Gex & J. 222; 4 Jur. N. S. 395; 27 L. J. Ch. 266.

This section does not apply where the bankrupt is in possession as trustee, factor, broker, or in conformity to the known usages of the particular trade; *e. g.* a bookseller who sells upon commission. *Mace v. Cadell*, Cowp. 232. *Whitfield v. Brand*, 16 Mee. & W. 282. The possession is here rightful, and under a bare authority to sell, and the bankrupt has not the right to deal with them *as owner*. And the proceeds of the goods if sold, so long as they can be identified, would belong to the principals (*Taylor v. Plumer*, 3 M. and S. 562); and so if not received at the time of the bankruptcy. *Scott v. Surman*, Willes, 400. So, where B. assigned his furniture in contemplation of marriage to trustees, to stand possessed of it in trust for the sole and separate use of his wife, during the joint lives of himself and her, and the furniture was in the house where he resided at the time of the bankruptcy, it was held not be in his reputed possession, because the possession had been according to the deed and consistent with it. *Simmons v. Edwards*, 16 Mee. & W. 838. *Horn v. Baker*, 9 East, 215. *Load v. Green*, 15 Mee. & W. 223.

Property in the bankrupt's possession for a specific purpose, as negotiable instruments or goods sent to meet particular acceptances, will not pass to the assignees under this section. *Collins v. Forbes*, 3 T. R. 316. *Took v. Hollingworth*, 5 id. 215. *Belcher v. Campbell*, 8 Q. B. 1. So, money deposited in the hands of an overseer for the purposes of the parish. *R. v. Eggington*, 1 T. R. 369.

The London manager of a firm had an express lien on all the goods assigned to London by the firm, to cover liabilities which might be incurred by him for the firm. The London business was carried on in the name of the firm, in premises taken by them. The firm afterwards became bankrupt, and the London manager claimed a lien upon the goods which were in his hands at the time of the bankruptcy, to cover liabilities incurred by him on behalf of the firm:—*Held*, that the goods remained in the order and disposition of the bankrupts, although the London manager had absolute control over the warehouse, and the goods contained therein; and the bill was dismissed accordingly, but without costs. *Hoggard v. Mackenzie*, 4 Jur. N. S. 1008.—R.

A., being registered proprietor of a newspaper, mortgaged the copyright, and the

type and machinery used in printing it, to B. After the mortgage to B., A. continued to be the sole registered proprietor of the newspaper, and was generally known and recognised as its proprietor. On the 16th February, 1857, the sheriff seized the type and machinery under a *fieri facias*, upon a judgment obtained by a creditor. On the 18th February, 1857, when the sheriff was in possession of the type and machinery, A. was declared bankrupt:—*Held*, first, that A.'s right to publish the newspaper came within the term "goods and chattels" in s. 125 of the 12 & 13 Vic. c. 106. *Baldwin, In re Foss, Ex-parte*, 2 De Gex & J. 230; 4 Jur. N. S. 522; 27 L. J. Bank. 17:—*Held*, secondly, that such right was in the order and disposition of the bankrupt at the time of his bankruptcy. (Id.)—*Held*, thirdly, that the type and machinery were not in the order and disposition of the bankrupt at the time of his bankruptcy. (Id.)

When bills placed in the hands of a banker are entered short (that is, lodged for the purpose of collection merely, and not to the credit of the customer until paid), if they remain in the banker's hands (*Giles v. Perkins*, 9 East, 12. *Ex-parte Rowton*, 1 Rose, 15. *Ex-parte Smith*, Buck, 355); or are pledged by him with a third person (*Collins v. Martin*, 1 B. & P. 648), they belong to the customer, although indorsed by him, unless the bills are treated as cash. *Ex-parte Sargeant*, 1 Rose, 153. *Ex-parte Thompson*, Mont. & Mac. 102. *Ex-parte Sollers*, 18 Ves. 229. So if a bill of exchange, indorsed and remitted with cash to bankers, who credit the customer with the amount, the bill remaining in specie at the time of their bankruptcy. *Ex parte Atkins*, 3 Mont. D. & D. 103. *Thompson v. Giles*, 2 B. & C. 422. *Ex-parte Benson*, 1 Deac. & Chit. 435. If country bankers, with whom bills are deposited and entered short, send them to their London bankers, the bills continue the property of the customer, but the London bankers acquire a lien thereon for the balance due to them by the country bankers; if the securities of the bankrupts deposited with the London bankers exceed the balance due to them, the customer has a right to be paid the amount of the bills so passed to the London bankers out of the surplus securities in their hands (*Ex-parte Armistead*, 2 Glyn & J. 371; and see *Ex-parte Waring*, 19 Ves. 345; *Jombart v. Wollett*, 2 Mylne & C. 389); but if such surplus securities are insufficient the assets in the hands of the London bankers are marshalled, and the residue, after satisfying the lien of the London bankers, is payable to the several owners of such bills *pari passu*. *Ex-parte Froggatt*, 3 Mont. D. & D. 322. Where bills are paid by a customer to his bankers, and even entered into the account as cash, with a distinct interest account, and the customer has credit for the amount so entered, but never overdrawing his account, the bills not due at the time of the bankruptcy of the bankers, or the proceeds received by the assignees, belong to the customer. *Ex-parte Benson*, Mont. & Bligh, 120. *Ex-parte Edwards*, 2 Mont. D. & D. 265. *Ex-parte Bond*, 1 id. 10.

A. was the owner of a ship which, in March, 1857, sailed for the coast of Africa, and in May and July she was supposed by him to be upon that coast, completing her cargo of palm-oil, &c.; and it was also expected that she would be home again about the month of October. On the 11th Nov. 1857, the ship had not arrived, and A. assigned the cargo to the defendant; and on the 23d January, 1858, the defendant sent by post to the captain notice of such assignment. This notice never reached the captain. The ship remained on the coast of Africa till the 12th February, 1858, when she set sail and arrived at Bristol on the 14th April. A. had become bankrupt on the 1st March, 1858, and when the ship arrived his assignees claimed the cargo:—*Held*, that they were not entitled to it, as there had been no default upon the part of the defendant, and as, therefore, the cargo could not be said to be in the possession of A. at the time of his bankruptcy, as reputed owner, by the consent and permission of the true owner, within the meaning of s. 125 of the Bankrupt Law Consolidation Act, 1849. *Semble*, that under the circumstances the defendant was not bound to give any notice at all to the captain. *Acraman v. Bates*, 29 L. J. Q. B. 78; 6 Jur. N. S. 294; 1 L. T. (N. S.) 322.

Order and Disposition—Sale of Ship's Cargo—What sufficient primâ facie Evidence.—Mortgagees of a cargo on board a ship on the coast of Africa sent no notice of their security to the captain till two months after the date of the mortgage, during all which time and more the ship was lying off that coast, nor was any notice received by the captain till after the mortgagor had become bankrupt:—*Held*, that affidavits of these facts, and of there having been opportunities of earlier communication with the vessel, constituted a sufficient *primâ facie* case for an application *ex-parte* for an order for a sale of the cargo, as being in the reputed ownership of the bankrupt, with the consent of the true owner, according to the practice adopted in *Ex-parte Heslop*, 1 De Gex, M. & G. 447. *Ex-parte Lucas, re Gwyer*, 3 De Gex & J. 113.

Order and Disposition—Reputed Ownership—Right of Assignees.—The defendant having bought hay of a farmer, and left it on the farm, it not being fit to remove, and the bankruptcy occurring before it was fit to remove, he then agreed with the assignees to take their interest in the farm and stock at a valuation. The hay was, without his knowledge, included in the valuation, and in an action by the assignees for the amount:—*Held*, that it was not a case of reputed ownership, and that, if included in the valuation by error, they were not entitled to recover. *Pennell v. Fox*, 1 F. & F. 617, *Crowder, J.*

The Bills of Sale Act (17 & 18 Vic. c. 36, s. 1), which provides for the registration of bills of sale, has no operation upon the 125th

section of the 12 & 13 Vic. c. 106, which enables the Court of Bankruptcy to order the sale and disposition of goods which a bankrupt, by consent and permission of the true owner thereof, had in his possession, order, and disposition at the time he became bankrupt, and whereof he was reputed owner. Therefore, where bankrupts were, by consent and permission of the plaintiffs, at the time of their bankruptcy, in possession of certain goods which they had before mortgaged to the plaintiffs, and the mortgage-deed had been duly registered under 17 & 18 Vic. c. 36, s. 1, it was held, that the mere fact of such registration did not entitle the plaintiffs to recover the goods from the defendants, who, as assignees of the bankrupts, had taken possession of the goods. *Badger v. Shaw*, 29 L. J. Q. B. 73; 6 Jur. N. S. 377; 1 L. T. (N. S.) 323. *See* 27 L. J. Ch. 266.

The "consent and permission" of the true owner being required, it follows that there must be an owner capable of consenting, therefore the property of infants is not within the statute. *Viner v. Cudell*, 3 Esp. 88. *Load v. Green*, 15 Mee. & W. 216. By "the true owner" is intended the person who has the legal right to the possession and the power of dealing with the property; and therefore, where the trustee for the sale of a brewing-house and plant, the *cestui que trust* being infants, contracted to sell them, and let the purchaser into possession, it was held, upon his bankruptcy, that the property passed to his assignees, without being subject to the lien for the purchase-money. *Ex-parte Dale*, Buck, 365. See *Ex-parte and re Horwood*, Mont. & Mac. 169; Mont. 24. So stock which was transferred by the accountant-general, without the privity of the mortgagee, to the mortgagor, and was standing in his name, was holden not to pass. *Ex-parte Richardson*, Buck, 480. See *Carruthers v. Payne*, 5 Bing. 270.

Goods allowed to be in the order and disposition of a bankrupt, as reputed owner, by the consent of his assignee, are liable to be seised, upon a subsequent insolvency, by the assignee of the Insolvent Debtor's Court. *Butler v. Hobson*, 4 Bing. N. C. 290. See *Butler v. Hobson*, 5 Scott, 824; S. C. 5 Bing. N. C. 128. See *Troughton v. Gitley*, Amb. 630. *Ex-parte Martin*, 15 Ves. 116. *Walker v. Burnell*, Dougl. 317. *Ex-parte Jungmichel*, 2 Mont. D. & D. 471. *Ex-parte Butler*, id. 731. *Ex-parte Storks*, 2 Rose, 179; 3 Ves. & B. 106. *Ex-parte Brown*, 2 Ves. jun. 68.

The Possession must have been while a Trader.— The bankrupt's possession, in order to be within the statute, must have been whilst he was a trader. *Gordon v. East India Company*, 7 T. R. 228. The words "at the time he becomes bankrupt" were decided to have reference to the act of bankruptcy. *Lyon v. Weldon*, 2 Bing. 334; 9 Moore, 629. *Smith v. Topping*, 5 B. & Ad. 674; and not to the time of the fiat; and the first section of the stat. 2 & 3 Vic. c. 29 (*see* sect. 133), made no alteration in that respect. *Fawcett v. Fearne*, 6 Q. B. 20. See *Young v. Hope*, 2 Ex. 105. *Graham v. Turber*, 23 L. J. C. P. 10.

This section extends to *personal* chattels only, and does not include real property or terms of years (*Ryall v. Rolle*, 1 Atk. 167; 7 T. R. 234. *Roe v. Galliers*, 2 id. 133), as they do not come within the mischief against which the enactment is directed (*Stephens v. Sole*, cited 1 Ves. sen. 352. *Roe v. Galliers*, 2 T. R. 183; 13 Ves. 122. *Ex-parte Taylor, re Campbell*, 1 Mont. 240. *Jones v. Gibbons*, 9 Ves. 407); nor to things affixed to the freehold, which become part and parcel of the freehold. Fixtures are not in reputed ownership, because, with regard to real property, the possession is considered as nothing, but the title only is looked to. *Boydell v. M'Michael*, 1 C., M. & R. 179. The tenant's right to remove them continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. *Minshall v. Lloyd*, 2 Mee. & W. 460. *Weeton v. Woodcock*, 7 id. 14. See *Leader v. Homewood*, 27 L. J. C. P. 316; id. Ex. 83. A dyer's plant, let to a dyer, raises a reputation of ownership in him. *Brysen v. Wylie*, 1 B. & P. 83. See *Collins v. Forbes*, 3 T. R. 322. Where the engines or articles necessary for carrying on a business are known to be let out to the several manufacturers employed upon them, the possession of such engines or articles will not carry the reputed ownership. *Horn v. Baker*, 9 East, 215. *Sinclair v. Stevenson*, 2 Bing. 514. *Lingard v. Messiter*, 1 B. & C. 308. *Storer v. Hunter*, 3 id. 368. Machinery affixed to the freehold of ironworks is not considered to be within the order and disposition of the bankrupt trader; where, by the custom of the country, when ironworks are let, such articles are furnished by and continue to be the property of the lessor, the mere possession of the bankrupt in such a case does not necessarily infer the property in them, so as to gain him a false credit by the fact of possession. *Rufford v. Bishop*, 5 Russ. 346. *Hubbard v. Bagshaw*, 4 Sim. 326.

A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees. *Coombs v. Beaumont*, 5 B. & Adol. 72. See *Steward v. Lombe*, 1 B. & B. 511. Where the lessee for years of a house, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt, his assignee, who had removed them, was held liable in trover by the mortgagee to pay the value of them while fixed on the demised premises. *Boydell v. M'Michael*, 3 Tyrw. 974; 1 C., M. & R. 177.

An equitable mortgage of leasehold premises will carry all the fixtures, although not erected for the purposes of trade, and therefore removable as between landlord and tenant, and although they are not speci-

fied in the lease deposited or in the memorandum of deposit. *Ex-parte Broadwood*, 1 Mont. D. & D. 631. *Ex-parte Heathcote*, 2 id. 711. A lessee annexed tenant's fixtures, and then deposited the lease, by way of mortgage, with a memorandum, not noticing the fixtures:—It was held, that on his becoming bankrupt the security extended to the fixtures. *Ex-parte Tayart, re Mackie*, 1 De Gex, 531. See *Ex-parte Hunt*, 1 Mont. D. & D. 139; and id. 119; 2 id. 725. Where a mill and the machinery therein had been mortgaged, and the mortgagor continued in possession until the time of the bankruptcy, it was held that the machinery was not in the order and disposition of the bankrupt within the meaning of the bankrupt acts. *Fletcher v. Manning*, 1 Car. & K. 350. A worsted-dyer, by deed, mortgaged fixtures used by him in his business, which were in a house occupied by him as a tenant, and which he had a right to remove, to B. He continued to be in possession of the fixtures after the mortgage, and was in possession of them at the time of his bankruptcy. A petition by B. to have the benefit of his security was dismissed with costs upon B.'s declining to file a bill in equity to have the question tried in a suit. *Ex-parte Sykes, re Clarke*, L. J. Bank. 16.

The clause extends to all personal chattels in possession, as furniture (*Lingham v. Biggs*, 1 B. & P. 308); and to choses in action (*Ryall v. Rowles*, 1 Ves. sen. 348; 1 Atk. 165. *Row v. Dawson*, id. 331. *Falkener v. Case*, cited 2 T. R. 491. *Gordon v. East India Company*, 7 T. R. 228. *Ex-parte Ruffin*, 6 Ves. 128. *Jones v. Gibbons*, 9 Ves. 410); to stock in the public funds (*Ex-parte Richardson*, Buck, 480); to ships (*Stephens v. Sole*, cited 1 Atk. 157. *Bourne v. Dodson*, 1 Atk. 154); or a share of a ship (*Ex-parte Stadgroome*, 1 Ves. jun. 163; Cooke, B. L. 363, 4th edit.); to debts (*Hornblower v. Proud*, 2 B. & A. 327); or book debts (*Ryall v. Rowles*, 1 Ves. sen. 348); to a share of stock in trade, profits and debts, due or to become due (Id. *Ex-parte Ruffin*, 6 Ves. 128); to a policy of insurance (*Falkener v. Case*, cited 2 T. R. 491; 1 Bro. C. C. 125); to a bond (Id. 494. *Lingham v. Biggs*, 1 B. & P. 86. *Ex-parte Monro*, Buck, 300; to a promissory note not negotiable (*Belcher v. Campbell*, 8 Q. B. 1); to a share in a newspaper (*Longman v. Tripp*, 2 B. & P. (N. S.), 67).

As to furniture in a coal-mine, see *Coombe v. Beaumont*, 2 Nev. & M. 255; 5 B. & Adol. 72; as to the interest in a patent, see *Ex-parte Granger*, 4 Evans, Stat. 363, n.; and as to mortgage debts, see *Jones v. Gibbons*, 9 Ves. 467. *See* Shelford, 181.

Shares in a Public Company.—Shares in a public company, whose funds arise wholly from the rents of real estate, are not within the clause of reputed ownership. *Ex-parte Vauxhall Bridge Company*, 1 Glyn & J. 101. Where, however, the shares are expressly declared by the act of incorporation to be personal estate and transmissible as such, they are the subject of reputed ownership. *Ex-parte Lancaster Canal Company*, Mont. 116; 1 Deac. & Chit. 411. *Nelson v. London Assurance Company*, 2 Sim. & Stu. 292. *Ex-parte Lawrence*, 1 De Gex, 269. It seems that shares in a commercial company possessing lands in a foreign country for the purposes of trade are not to be considered as real property. *Ex-parte Richardson*, 3 Deac. 496.

Debts, &c.—Debts, and other choses in action, *e. g.* policies of insurance, shares, &c., which have been assigned, remain in the reputed ownership of the trader until notice has been given to the person from whom the payment is to be received, for until then he would hold the debt at the order and disposition of the trader, and be released by payment to him. *Buck v. Lee*, 1 Ad. & E. 806. *Gardner v. Lachlan*, 4 Mylne & C. 129. That which is equivalent to delivery of movable goods must be done where practicable, as the delivery of a bond or other security (*Jones v. Gibbons*, 9 Ves. 410); but such delivery will not dispense with notice. *Ex-parte Monro*, 1 Buck, 300. *Gibson v. Overbury*, 7 Mee. & W. 555. No notice is, however, requisite as to bills of exchange or other negotiable instruments, or documents passing by delivery, such as dock warrants. *Ex-parte Price*, 3 Mont. D. & D., 586. *Ex-parte Davenport*, 1 Deac. & Chit. 397. Notice of the deposit of a warrant of attorney, though given to secure the payment of bills of exchange, is requisite. *Ex-parte Price*, id. Notice of the assignment of debts by a retiring to a continuing partner must be given, and a notice in the *Gazette* is not sufficient unless it can reasonably be inferred that the debtor had seen it. *Ex-parte Osborne*, 1 Glyn & J. 356.

A formal deed of assignment is not necessary to change the property in a debt, whether secured by a written instrument or not; any writing amounting to an equitable transfer is sufficient. *Row v. Dawson*, 1 Ves. sen. 331; see *Tibbets v. George*, 5 Ad. & E. 107. *Best v. Ayles*, 2 C. & M. 394.

In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund. A. having goods in the hands of B., as his agent at a foreign port, and being under liabilities to C., by letters to C. promised that he would direct, and by a subsequent letter to B. did direct, B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods a commission of bankruptcy issued against A., under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy:—It was held, that C. had a good title, in equity, to the goods. *Burn v. Carvalho*, 4 Mylne & C. Rep. 690. *See* 1 Ad. & E. 883. *Watson v. Duke of Wellington*, 1 Russ. & Mylne, 632. *Ex-parte South*, 3 Swans. 393.

Notice of Transfer.—A formal notice is not essential, if the fact of the assignment be com-

municated. *Smith v. Smith*, 2 C. & M. 231. *Tibbets v. George*, 3 Ad. & E. 107. The knowledge of the solicitor to the assignees, without any express communication to the assignees, is sufficient. *See* also *Ex-parte Smyth*, 3 Mont. D. & D. 687. So where the mortgagee is himself the person to whom notice should be given, the transaction itself is sufficient notice. *Smith v. Smith*, 2 C. & M. 231. *Ex-parte Smart*, 2 Mont. & Ayr. 69. Notice of the assignment or mortgage of a policy of assurance must be given to the office, but the sufficiency of the notice is a question of fact upon the circumstances in each case. *Edwards v. Scott*, 1 Man. & G. 962. A letter to the secretary of an insurance office, saying, "I am holder of the undermentioned policies," stating the particulars of them, and inquiring what sum the office would give for them, has been held sufficient notice. *Ex-parte Stright*, Mont. 502. *Ex-parte Wood*, 3 Mont. D. & D. 315. *Ex-parte Arkwright*, id. 129. *Ex-parte Barnet*, 1 De Gex, 194. The same principles, as to notice, apply to policies in a mutual assurance society, such as the Equitable. *Ex-parte Arkwright*, 3 Mont. D. & D. 129. *Thompson v. Spiers*, 13 Sim. 469. The principle is, that it must be such notice as would make it morally impossible for the assignor to have dominion of the policy without the assent of the assignee. *Thompson v. Spiers*, 13 Sim. 473. Where an attorney, who was also agent for the company, and authorised to receive notices of assignments, arranged the assignment of a policy, his knowledge was held to be notice to the company. *Gale v. Lewis*, 9 Q. B. 730. But the mere payment of the premiums by the assignee is not sufficient notice (*Burridge v. Row*, 1 You. & C. 183); nor an agent mentioning the assignment in a conversation with the clerk of the office when paying the premium (*Ex-parte Curtis*, 4 Deac. & Chit. 354); and where the same person is secretary to two companies, it would not be safe to rely upon notice to him as secretary to one company being notice to the other. *Ex-parte Bignold*, 3 Deac. 151. The private knowledge of a director or actuary of the company would not operate as notice. *Ex-parte Watkins*, 2 Mont. & Ayr. 348. *Ex-parte Bignold*, 3 id. 477. Shares in a public company, until transferred in the manner prescribed by the act of parliament, will in general pass to the assignees, either as not having ceased to belong to the bankrupt (see *Bosanquet v. Shortridge*, 4 Ex. 699; *see*, however, S. C. 16 Jur. 919), or as in his order and disposition. *Ex-parte Lancaster Canal Company*, 1 Deac. & Chit. 411. Notice given after the act of bankruptcy, and before the petition for adjudication, would suffice. *Ex-parte Dobson*, 2 Mont. D. & D. 685. So where, by the deed of settlement, the company is to have a lien upon the shares for calls or advances, and the consent of the directors is requisite for a transfer, the possession of shares by a bankrupt who, at the time of his bankruptcy, is indebted to the company, will not be a reputed possession so as to defeat the lien. *Ex-parte Plant*, 4 Deac. and Chit. 160.

Partnership Transactions.—Where two persons are joint-owners of property, and one of them becomes bankrupt, the joint property in his possession is not within the clause of reputed ownership. But where there is a dormant partner, all the property and effects, and the debts due to the concern, will be held to be in the order and disposition of the ostensible partners. *Ex-parte Enderby*, 2 B. & C. 389. So also where a retiring partner allows the continuing partner to remain in possession, although under a lease. *Horn v. Baker*, 9 East, 215.

So where the property of one partner is in the possession of the firm, as furniture in the house where the business of the firm is carried on, it will pass to the assignees of the firm. *Ex-parte Hare*, 1 Deac. 16.

In the case of a secret partnership, all the property and effects, as well as the debts due to the concern, must be deemed to be in the order and disposition of the ostensible partner, and pass to his assignees. *Ex-parte Enderby*, 2 B. & C. 389. *Vide* also *Smith v. Watson*, id. 401. *Ex-parte Wood, re Todd*, 1 De Gex, 134. Shelford, B. A. 184. Two partners had carried on business and dissolved partnership, they gave notice of the dissolution in the *Gazette*, and by circulars to the debtors required the debts to be paid to one of the firm, and by the deed of dissolution the plant, &c., were assigned to the same partner, and it was stipulated that he should pay the partnership debts, and pay to the other the value of his share of the plant, &c., to be ascertained by arbitration. The partner who was thus declared entitled to the debts became bankrupt, and he had not paid the price of the other's share of the plant, &c.:—It was held, reversing the decision of the commissioners, that the debts remained the property of the firm, notwithstanding the agreement that they should belong to one. It was also held, affirming the decision of the commissioner, that the whole plant, &c., was in the use, order, and disposition of the partner to whom they were assigned, notwithstanding that he had not paid the price of the other partner's share which had been awarded on the arbitration. *Ex-parte Brewsters' Assignees*, 22 L. J. Bank. 62. H. takes a house in his own name, and puts his own furniture therein, for the use of the firm of H. and I.; the rent and other expenses are paid by the partnership, the apprentices are boarded and lodged there, and the house is occupied entirely for the purposes of the trade, I. living in the house, and H. himself residing elsewhere:—It was held, that the furniture must be considered as in the reputed ownership of H. and I., and as forming part of the joint capital and stock of the partnership. *Ex-parte Hare, re Fear*, 1 Deac. 16. *See* 13 L. J. Bank. 17; 2 B. & C. 369.

Money was paid into a bank, through the clerk of the bank, on Saturday evening, after office hours. On the same evening one of the partners of the bank made a declaration of insolvency, in the absence and without the knowledge of his partner. The bank

(B) *Power of Court over certain Conveyances made by Bankrupt.*[1]

never again opened for business, and the other partner concurred in allowing it to remain closed. Both partners were subsequently adjudicated bankrupts. It was held that the money so deposited passed to the assignees. *Ex-parte Clutton*, 1 Fonb. Bank. C. 167.

J. B., a grocer and wine merchant, was possessed of certain stock in trade and furniture on the premises where he carried on his business; and being so possessed, he, in April, took into partnership C. B. and D. B., and thenceforth the business was carried on by the partnership under the style of B. B. and Co., and goods were bought in the name of the partnership until the following August, when the firm was declared bankrupt. No deed of transfer of J. B.'s property, and no articles of partnership had been executed, nor had C. B. or D. B. paid any money to J. B., or brought any money into the business:—It was held that, under the circumstances, the stock in trade on the premises at the date of the bankruptcy was partnership property, but that the furniture was the separate property of J. B. *Ex-parte Owen*, 15 Jur. 983; 20 L. J. Bank. 14.

Jus tertii.—It has been much discussed whether goods in the possession of third parties for the bankrupt would be within this section; that is, whether the possession must not be actual, and not merely constructive. See *per Rolf, B.*, in *Price v. Groom*, 2 Ex. 547; 17 L. J. Ex. 346. As against the assignees, the right of a third party cannot be set up, where goods in the reputed ownership of the bankrupt at the time of the bankruptcy have been dealt with without the authority of the assignees. The owner of goods suffered them to be in the possession of C., and died intestate. After his death, C. retained them in his order and disposition until he became a bankrupt. The intestate's goods having remained unadministered, and the ordinary having made no claim to them, it was held that the goods were in the order and disposition of the bankrupt with the consent of the true owner, and that the defendant, in an action of trover by the assignees of the bankrupt for the goods, was not at liberty to set up the title of the ordinary as the true owner. *White v. Mallett*, 20 L. J. Ex. 291.

Possession by Executors, &c.—An executor or administrator has his estate as such *en autre droit* merely. Wise, B. L. 131. *Pinchon's case*, 9 Co. 88 b.; 2 Inst. 236; by *Ashhurst, J.*, 4 T. R. 645. If, therefore, he become bankrupt, with any property in his possession belonging to the testator or intestate, distinguishable from the general mass of his own effects, it is not distributable under the bankruptcy. *Ludlow v. Browning*, 11 Mod. 138. *Ex-parte Ellis*, 1 Atk. 101. *Ex-parte Marsh*, id. 159. *Viner v. Cadell*, 3 Esp. 88. *Serle v. Bradshaw*, 2 C. & M. 148; 4 Tyrw. 69. Even money which can be specifically distinguished and ascertained to belong to the deceased, and not to the bankrupt himself, cannot be seised. *Howard v. Jemmett*, 3 Burr. 1369. *Farr v. Newman*, 4 T. R. 648. *See* Wms. on Executors, 533–535, 4th ed.

The Court of Chancery, on a bill being filed, will secure effects belonging to a bankrupt as executor possessed by the assignees, and appoint a receiver, to whom they must account. *Ex-parte Tupper*, 1 Rose, 179. *Ex-parte Butler*, 1 Atk. 213; Shelford, 257.

A person entitled to take out letters of administration neglected to do so, but remained in possession of the goods for twelve years, and then became bankrupt:—It was held that the goods were in his order and disposition. *Fox v. Fisher*, 3 B. & A. 135.

[1] By 12 & 13 Vic. c. 106, s. 126, "that if any bankrupt, being at the time *insolvent*, shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or into any other person's name, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him."

Being insolvent means a general inability to pay debts in the ordinary course of business. *Bayley v. Schofield*, 1 M. & S. 338. *Biddlecomb v. Bond*, 4 Ad. & E. 332. Under an earlier statute, which only contained the words "convey or procure, or cause to be conveyed or procured," a gift of money was not within it. *Kensington v. Chantler*, 2 M. & S. 36. And in *Abell v. Daniell* (M. & M. 370), the same construction was put upon the 4 Geo. 4, c. 16, s. 73. Under the 67th section, however, a gift of money is included in the words goods and chattels. See *Ex-parte Shortland*, 7 Ves. 88. *Ex-parte Simpson*, 1 De Gex, 9.

A trader, being in insolvent circumstances, covenanted by an antenuptial settlement to pay 500*l.* to trustees, to be held by them upon trust for such persons as the intended wife should appoint, and subject thereto upon trust for the intended wife for life for her separate use, then for the husband for life, and then as to the capital in trust for the survivor. The settlement also extended to certain property belonging to the intended wife, who was wholly unaware of the intended husband's insolvency. It was held, on the husband's bankruptcy, that the settlement was valid against the assignees, and entitled the trustees to prove for the 500*l.* It not appearing that the wife was implicated in any design to defraud the creditors, and the settlement being fair and proper in reference

(C) *Court may proceed when the Bankrupt by* FRAUD *makes himself accountable to the Crown.*[1]

(D) *Where Bankrupt is beneficially entitled to Stock, the Court may make Order for Transfer.*[2]

(E) *Distress not to be available for more than One Year's Rent due; the Landlord to prove for the Residue.*[3]

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to the station and circumstances of the husband. *Ex-parte M'Burnie's Trustees, re M'Burnie*, 5 De Gex, M. & G. 441; 1 id. B. C. 41.

A conveyance expressed to be made in consideration of five shillings and other valuable considerations, does not oblige the court to hold it, at all events, to be for a valuable consideration; but can, at most, only let in evidence that there were other valuable considerations. *Walker v. Burrows*, 1 Atk. 93.

Hence evidence would be admissible of valuable consideration, although the deeds expressed only the consideration of natural love and affection. *Gale v. Williams*, 8 Mee. & W. 405. *Pott v. Todhunter*, 2 Coll. 76. *Glaister v. Hewer*, 8 Ves. 195. *Ryland v. Smith*, 1 Mylne & C. 53. And therefore a deed of settlement, in form voluntary, but appearing from extrinsic evidence to have been made for a valuable consideration, was, in *Pott v. Todhunter, supra*, supported against creditors. *See* 11 Ves. 377. *Pringle v. Hodgson*, 3 id. 617. *Campion v. Cotton*, 17 id. 263. *Manning v. Chambers*, 16 L. J. Ch. 245; 1 De Gex, 282. And a settlement made by a trader upon his wife after marriage, of property belonging to the wife in the possession of her trustees, and never in his order or disposition, will be good notwithstanding the subsequent bankruptcy of the trader. *Glaister v. Hewer*, 8 Ves. 195; 11 id. 377. *Pringle v. Hodgson, supra.*

[1] By s. 127, 12 & 13 Vic. c. 106, "that if any real or personal estate or debts of any bankrupt be extended, after he shall have become bankrupt, by any person, under pretence of his being an accountant of or debtor to the Queen, the court may examine upon oath whether the said debt was due to such debtor or accountant upon any contract originally made between such accountant and the bankrupt; and if such contract was originally made with any other person than the said debtor or accountant, or in trust for any other person, the court may order such real and personal estate or debts to be sold, for the benefit of the creditors under the bankruptcy, and such sale shall be valid against the said extent, and all persons claiming under it; and any person to whom the said real and personal estate or debts shall be bargained, sold, granted, or assigned by the court, shall have and may recover the same against any person who shall detain the same."

In cases between subjects, priority of events which have occurred on the same day may be inquired into when it becomes material; but in the case of the crown the rule is different (*Russell v. Ledsam*, 14 Mee. & W. 582), as the Sovereign is not bound by the bankruptcy laws. *See* 2 Mod. 248; 14 Ves. 8; 19 id. 165.

A debt due to the crown is entitled to a preference (4 Ves. 752). Besides its right to the writ of extent, it has a lien under the excise acts upon the article liable to duty and the utensils used in its manufacture. 2 Dougl. 416; 6 T. R. 436. As to assessed taxes, *see* s. 166.

[2] By s. 128, 12 & 13 Vic. c. 106, if any bankrupt shall have any Government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his name, in *his own right*, it shall be lawful for the court, by writing, to order all persons whose act or consent is thereto necessary, to transfer the same into the names of the assignees, and to pay all dividends upon the same to the official assignee; and all such persons whose act or consent is so necessary are hereby indemnified for all things done or permitted pursuant to such order. *See* 3 Madd. 28.

[3] *See* s. 150, 24 & 25 Vic. c. 134, which enables landlords to prove for proportional part of rent, although the period for its payment has not arrived, does not seem to affect s. 129, 12 & 13 Vic. c. 106, by which it is enacted, "that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of the filing of such petition, but the landlord or person to whom the rent shall be due shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available."

This section only relates to rent due before the petition, and for rent afterwards accruing distress may be levied even whilst the messenger is in possession. *See* 6 Geo. 4, c. 16, s. 74, and *Briggs v. Sowry*, 8 Mee. & W. 729. The landlord has a right, in replevin, to avow for a return, because the certificate does not release the debt. *Newton v. Scott*, 10 Mee. & W. 471. *Phillips v. Sherville*, 9 Jur. 179. Payment of rent to a landlord about to distrain cannot be recovered back. *Lee v. Lopes*, 15 East, 230; *Lackington v. Elliott*, 7 Man. & G. 538. 1 Atk. 103; 5 Esp. 200; 8 Jur. 695; S. C. 13 L. J. C. P. 153. *Ex-parte Bayley*, 22 L. J. Bank. 26.

A landlord must distrain, in order to enforce his claim for arrears against the assignees (*Gethin v. Wilks*, 2 Dowl. P. C. 189);

(F) *Where Bankrupt is Trustee, the Lord Chancellor may order Conveyance or Assignment to another Trustee.*[1]

(G) *Titles to Property sold not to be Impeached, unless Proceedings taken to Annul, and duly Prosecuted.*[2]

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but the right to distrain remains after the messenger has taken possession (*Ex-parte Plummer*, 1 Atk. 103. *Ex-parte Dillon*, id. 104; cited 2 T. R. 600); and until the removal of the goods. *Ex-parte Deschames*, 1 Atk. 103. The landlord cannot distrain and prove for the same rent. *Ex-parte Grove*, id. A landlord distrained for rent in arrear before the bankruptcy of his tenant, and when the goods were appraised, left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison. After the bankruptcy, the landlord distrained again for the very same arrears of rent:—It was held, that the second distress was void, and that the goods passed to the assignees, as being in the order and disposition of the bankrupt at the time of his bankruptcy. *Ex-parte Shuttleworth*, 1 Deac. & Chit. 223.

[1] By s. 130, 12 & 13 Vic. c. 106, "that if any bankrupt shall as trustee be seised, possessed of, entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent thereto is necessary to convey, assign, or transfer the said estate, interest, stock, funds, or annuities, to such person as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct."

This is the same as stat. 6 Geo. 4, c. 16, s. 79.

The jurisdiction as to the appointment of new trustees, in the room of trustees who have become bankrupt, and the transfer of the trust funds, have by statute (12 & 13 Vic. c. 106), been transferred to the Court of Chancery. *Ex-parte Walker*, 19 L. J. Bank. 3. *Ex-parte Cartwright*, 3 De Gex & S. 648; 19 L. J. Bank. 3.

It is a matter of course to appoint a new trustee under this section, if asked for by the parties beneficially interested in the trust property (*Ex-parte Smith*, 4 Deac. 214); and upon a petition to appoint a new trustee under this section, the court will not decide any question as to who are or are not interested, as *cestui que trusts*. In case of doubt, all parties must be served. *Ex-parte Congreve*, 1 De Gex, 267.

The residence of a party interested in trust funds being out of the jurisdiction, does not authorise the court to appoint new trustees, without notice being given to such party (*Ex-parte Hardman*, 3 Mont. D. & D. 559), where the will creating the trust contained a gift of the residue of the testator's estate, upon trust to pay two annuities to two ladies, and subject thereto upon other trusts for the testator's four daughters, upon the petition of the four daughters, for a new trustee in lieu of the bankrupt:—It was held, that, as the annuitants were persons entitled in possession, they ought to be petitioners (*In re Lonsdale's Trust*, 14 Jur. 1101); where the bankrupts were entitled in possession to the income of some of the trust funds, of which one of the bankrupts was trustee, the court declined to appoint a new trustee without the assignees joined as petitioners. *Ex-parte Cousen*, 1 De Gex, 451.

A testator bequeathed his residuary estate to two trustees, whom he appointed executors; one of them renounced, and after the death of the other who had proved, the trust funds came into the possession of his legal personal representative, who became bankrupt. The *cestui que trusts* presented a petition for the appointment of a new trustee. On it appearing that the original testator had been dead for twenty years, and that the interest of the trust fund had ever since been applied according to the trust, and on the petitioner's deposing that, to the best of his belief, all the original testator's debts, &c., had been paid:—*Held*, that a new trustee might be appointed, without it appearing that any personal representative of the original testator was before the court. *Ex-parte Hardman*, 3 Mont. D. & D. 559.

An estate of which the bankrupt is seised as a bare trustee does not pass to his assignees; but if there be a reasonable doubt as to whether the bankrupt takes any interest in the property, an application can be made under this section for the assignees to join in the conveyance. *Ex-parte Gennys*, Mont. & Mac. 258. *See* 2 Glyn & J. 132; 2 Mont. & Ayr. 214; id. 230; 6 Jur. 956. The clause does not extend to remove an executor who has become bankrupt, but where the bankrupt was executor and trustee, and the executorship had in effect determined, a new trustee can be appointed. 2 Deac. 151; 3 Mont. & Ayr. 145.

[2] By s. 131, 12 & 13 Vic. c. 106, "that no title to any real or personal estate sold under any bankruptcy shall be impeached by the bankrupt, or any person claiming

(H) *The Court, after Adjudication, may order any Treasurer, &c. or Agent of the Bankrupt, to deliver all Monies, &c.*[1]

(I) *Transactions not affected by Bankruptcy; Payments, Conveyances, Contracts, &c., Executions against* LANDS *(if executed by* SEIZURE*), and against Goods by* SEIZURE *and* SALE*, valid, if no Notice of prior Act of Bankruptcy: but Payments, &c. by way of Fraudulent Preference invalid.*[2]

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under him, in respect of any defect in the fiat or petition for adjudication, or in any of the proceedings under the same, unless the bankrupt shall within the time allowed by this act have commenced proceedings to dispute, dismiss, or annul the fiat, petition, or adjudication, and duly prosecute the same."

This section protects *bonâ fide* purchasers of the bankruptcy property from vexatious actions by the bankrupt, or those claiming under him, but it does not extend to protect the purchaser of property under a bankruptcy which has been superseded from the claims of the assignees under a subsequent bankruptcy (*Gould v. Shoyer*, 6 Bing. 738); but although the sale is under an order of the Court of Bankruptcy, the court has no jurisdiction to compel the vendee to complete his purchase. *Ex-parte Cutts*, 3 Deac. 342. *See* 1 Glyn & J. 321.

[1] By s. 132, 12 & 13 Vic. c. 106, "that after the adjudication of bankruptcy in any case shall have been advertised in the *London Gazette*, it shall be lawful for the court to order any treasurer or other officer, or any banker, attorney, or solicitor, or other agent of the bankrupt, to pay and deliver over to the official assignee, or to the Bank of England, to the credit of the Accountant in Bankruptcy, according to the rules which may be in force with respect to payment into the Bank of England of monies due to any bankrupt's estate, all monies or securities for moneys in his custody, possession, or power as such officer or agent, and which he is not by law entitled to retain as against the bankrupt or his assignees."

[2] The 12 & 13 Vic. c. 106, provides, with respect to transactions with the bankrupt, and executions against his property, up to the time of the bankruptcy, or within a limited time previously thereto:

By sect. 133, "that all *payments* really and *bonâ fide made by* any bankrupt, or by any person on his behalf, *before date of the fiat* or *the filing of a petition* for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bonâ fide made to* any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the date of the fiat or the filing of such petition, and *all contracts, dealings, and transactions by and with any bankrupt*, really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, and *all executions and attachments* against the *lands* and tenements of any bankrupt, *bonâ fide executed by seizure*, and all executions and attachments against the *goods and chattels* of any bankrupt, *bonâ fide* executed and levied by *seizure and sale* before the date of the fiat or the filing of such petition, shall be deemed to be *valid, notwithstanding any prior act of bankruptcy* by such bankrupt committed, *provided* the *person so dealing* with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, *had not at the time* of such payment, conveyance, contract, dealing or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, *notice of any prior act of bankruptcy* by him committed: Provided also, that *nothing* herein contained shall be deemed or taken to *give validity* to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a *fraudulent preference* of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, *or to any execution* founded on a *judgment, on a warrant of attorney, or cognovit actionem*, or *judge's order*, obtained by consent, given by any bankrupt by way of fraudulent preference."

This clause is nearly identical with ss. 81, 82, 6 Geo. 4, c. 16. *See* 2 & 3 Vic. c. 29. It supersedes these provisions. It extinguishes the unjust doctrine that all transactions with a bankrupt related back to the act of bankruptcy, which was deemed to create a total incapacity in him to dispose of any of his property, or to pay or receive any of his debts. Subsequently to that disqualifying event all dealings might be annulled. None of these protective enactments extended to persons who had notice of a prior act of bankruptcy, or sought to avail themselves of a fraudulent preference. *See* 12 Mee. & W. 111; 13 id. 104; S. C. 8 Jur. 697. Indeed, it may be assumed that transactions, in themselves acts of bankruptcy, will not be protected in any degree by this section; *e. g.* an execution procured by the bankrupt (*Bevan v. Nunn*, 9 Bing. 107. *Hall v. Wallace*, 7 Mee. & W. 356); for the effect is only to do away with the consequences of a prior act of bankruptcy, which would otherwise be the time of the accruing of the assignee's title.

Payments really and bonâ fide made by or to Bankrupt.—Payments made by goods (*Cannan v. Wood*, 2 Mee. & W. 465. *Stewart v. Aberdein*, 4 id. 211), or by settlement in account (*Sinclair v. Baggaley*, 4 id. 314, *per Alderson, B.*), or with that which the parties have agreed to treat as money. See *Re Harries*, 13 id. 8. *Fearnley v. Wright*, 6 Bing. N. C. 446. *Cannan v. Denew*, 10 Bing.

292. *Hovil v. Browning*, 7 East, 154, are valid.

Bonâ fide payments mean such as are honestly and fairly *made* in the course of an honest transaction, and not intended to be reclaimed. *Devas v. Venables*, 3 Bing. N. C. 503. *Gibson v. Muskett*, 4 Man. & G. 170. A payment before the delivery of the goods would, in the absence of an express usage or bargain, be open to suspicion. See *Bishop v. Crawshay*, 3 B. & C. 418. If there be not *bonâ fides* in the party paying, the section does not apply, mere payment not being a contract, dealing, or transaction. *Turquand v. Vanderplank*, 10 Mee. & W. 180.

The payment which is contemplated by the act is by the *bankrupt himself*, or his *authorised agent*. Therefore, a payment made by a *third person* without the knowledge of the bankrupt, or a payment extorted by compulsion of legal process (by foreign attachment, for example, even after judgment) from a *third person*, who happened to have effects of the bankrupt in his hands at the time, cannot be said to be a payment by the *bankrupt*, or by a person on his behalf, when the bankrupt was not even conscious that his property was in the hands of such third person. *Hovil v. Browning*, 7 East, 154.

If payment of a bill be made after an act of bankruptcy, the burden of showing that it was a *bonâ fide* payment was cast upon the receiver. *Bagnall v. Andrews*, 4 Moore & P. 839; 7 Bing. 217. A payment by a partner, who had committed an act of bankruptcy, of a partnership debt due before the bankruptcy, was not protected by 6 Geo. 4, c. 16, s. 82. *Craven v. Edmonson*, 6 Bing. 734; 4 M. & P. 623.

Contracts, Dealings, and Transactions bonâ fide with Bankrupts.—All contracts, whether express or implied, are within this section. *Bowman v. Malcolm*, 11 Mee. & W. 835. Where a trader took possession of goods under an agreement that he should keep possession for a twelvemonth, on payment of a certain sum, with liberty to the owner to retake them if the money was not paid on a certain day, and the money not being paid on that day the owner took possession and sold them, after the trader had committed a secret act of bankruptcy, it was held to be a protected "transaction." *Young v. Hope*, 2 Ex. 105. So is a claim of lien. *Bowman v. Malcolm*, *supra*. It has been discussed as to how far a distress for rent was a transaction within the statute, and whether notice of an act of bankruptcy to the broker's man would be sufficient to bind the landlord. *Lackington v. Elliott*, 7 Man. & G. 538; 8 Scott, N. R. 275. In *Kynaston v. Crouch*, 14 Mee. & W. 266; 9 Jur. 584, a trader committed a secret act of bankruptcy by leaving his house, and on going away desired his foreman to carry on the business in his absence. The foreman accordingly continued the business, and received various sums of money for goods sold and for debts due to his master; he also made several *bonâ fide* payments to creditors for the expenses of housekeeping, and for wages due to himself. Most of these receipts and payments were before the foreman had any notice of the act of bankruptcy. A fiat having been subsequently issued, the assignees sued the foreman in an action for money had and received, for the whole amount received by him from the time of the act of bankruptcy to the date of the fiat:—It was held, first, that the action was maintainable. Secondly, that the defendant was not entitled to set off those payments against the assignees. But, as to the payments made to him before notice of the act of bankruptcy, he might have protected himself by a special plea, founded on the 6 Geo. 4, c. 16, or 2 & 3 Vic. c. 29. *See* 7 Ex. R. 301.

Execution and Attachments bonâ fide executed by Seizure, or by Seizure and Sale.—As to executions, the law has been thus described in *Whitmore v. Greene*, 13 Mee & W. 104:—"Reading the two statutes (6 Geo. 4, c. 16, s. 108, and 2 & 3 Vic. c. 29), then, together, the result is that all executions, whether on judgments, on warrants of attorney, or confessions, or not executed by seizure after an act of bankruptcy, but without notice to the execution creditor, are rendered valid, so far as they are affected by an act of bankruptcy committed before seizure. The effect of the priority of the act of bankruptcy is done away with, though the act is still operative to support the commission. And the question in each case is, whether the particular execution is one that, but for a prior act of bankruptcy, would have entitled the execution creditor to a preference. If the fiat intervenes before a sale the execution plaintiff is not entitled, because he was still a creditor of the bankruptcy at the time of the fiat (which must now be considered as identical with the time of the bankruptcy, the priority of the act of bankruptcy to the seizure being done away with); and, consequently, is within the proviso of the 108th section, and is only to be relieved rateably. If the fiat is after the sale, the execution plaintiff is not a *creditor* of the bankrupt at the time of the bankruptcy, that is, the fiat, and is therefore entitled to the preference which the execution gives him."

In accordance with this exposition, the court held that the notice being required to be at the time of seizure, such notice afterwards was immaterial, provided the sale took place before the fiat. But now, to the words "executed and levied," which would mean seizure (*Cheston v. Gibbs*, 12 Mee. & W. 111), are added "by seizure and sale;" and therefore no execution, unless completed by sale before the petition, can be good. *Bona fides* mean *bona fides* on the part of the execution creditor. *Belcher v. Magnay*, 12 Mee. & W. 102. The old doctrine of relation applies to all executions, until there is a change of property by the sale. *Hutton v. Cooper*, 6 Ex. 159; 20 L. J. Ex. 123. And where the sale took place in lots, and deposits were paid on each lot, but before the goods were separated from the bulk a fiat issued, the sale was held to be only inchoate,

and the assignees to be entitled. *Ward v. Dalton*, 7 C. B. 643. See *Whitmore v. Robertson*, 8 Mee. & W. 463. *Skey v. Cortes*, 11 id. 571; and 13 id. 112: *per Pollock, C.B.*

If the sheriff, under a writ of *fi. fa.*, do not take actual and adverse possession of a bankrupt's goods, or if he allow the bankrupt afterwards to deal with them as his own up to the time of the bankruptcy, the goods will pass to the assignees notwithstanding the execution. Thus, where the sheriff made out his warrant to the trader's shopman and another, who took possession and carried on the business as usual, but without the interference of the trader, and the trader on the next day committed an act of bankruptcy, it was holden that the possession of the servant could not be deemed adverse to the master, and that the goods, thus remaining in the possession, order, and disposition of the bankrupt, passed to his assignees. *Jackson v. Irvine*, 2 Camp. 58. So, where a plaintiff levied execution on the goods of a trader, but desired the officer to leave a man in possession with the warrant, and not to sell; the trader was allowed to carry on his trade as usual, and in five months afterwards became bankrupt: it was holden that, notwithstanding the execution and possession of the officer, the goods passed to the trader's assignees. *Caldwell v. Gregory*, 1 Price, 119. *See* 2 Rose, 252; Buck, B. C. 48; 1 Deac. 16; 2 Mont. & Ayr. 475.

Notice of Act of Bankruptcy. — Notice means actual knowledge, or wilfully abstaining from acquiring such knowledge. Thus, a letter delivered at the office of the creditor's attorney would not operate until read, unless there was a wilful abstaining from reading it. *Bird v. Bass*, 6 Man. & G. 143. Notice to one of two co-plaintiffs is *primâ facie* notice to both (*Edwards v. Cooper*, 11 Q. B. 33), and it would be notice to both, even though the other was proved to have been ignorant of it. (Id.) In *Fawcett v. Fearne* (6 Q. B. 20), the purchaser from the sheriff was held not protected by reason of having notice, although the execution creditor had none, and the execution would have been valid against the assignees. But in *Green v. Steere* (1 Q. B. 710), it was said, that the knowledge or ignorance of the person who actually, not constructively, deals with the bankrupt, as to any prior act of bankruptcy, is the material question. *See* 1 Smith, *Lead. Cas.* 237, and *Edwards v. Gabriel*, 30 L. J. Ex. 245.

Notice of a docket having been struck was held not "notice of a prior act of bankruptcy" within the meaning of the 2 & 3 Vic. c. 9. (*Hocking v. Acraman*, 12 Mee. & W. 170; 3 Dowl. N. S. 434. See *Ramsay v. Eaton*, 10 Mee. & W. 22); but a notice that a party had executed a conveyance of all his property for the benefit of his creditors is sufficient. *Lackington v. Elliott*, 8 Scott, N. R. 275. So is a knowledge by a creditor that a bill of sale comprised all the debtor's property. *Lindon v. Sharpe*, 7 id. 730. A notice by a bankrupt to an execution creditor, that "he had committed several acts of bankruptcy," is sufficient. The notice need not state the nature or particulars of any act of bankruptcy (*Udal v. Walton*, 14 Mee. & W. 254. *Ramsey v. Eaton*, 10 id. 22), but it must show the act has been committed; therefore a letter from the bankrupt to a creditor, saying, he had resolved not to open his bank on Monday, is not notice of an act of bankruptcy, but only notice of an intention to commit such an act. *Ex-parte Hallifax*, 2 Mont. D. & D. 544.

Payments, &c. by way of Fraudulent Preference invalid. — A legal preference is where property is duly and regularly transferred (*Per Mansfield, C. J.*, Cowp. 123); illegal where it is delivered by the bankrupt in contemplation, and on the eve of bankruptcy, *voluntarily* to a particular creditor, with a view of conferring on him a preference over the other claimants. Two things must concur: insolvency in the debtor,—*voluntary* payment or transfer by him. *Crosby v. Crouch*, 2 Camp. 166; 11 East, 256. *Alderson v. Temple*, 4 Burr. 2235; 1 W. Black. 660. Hence, where bankers fraudulently sold out stock belonging to one of their customers, but afterwards, on the evening before their bankruptcy, sent him certain bonds to indemnify him, stating at the same time that they should be obliged to suspend their payments on the following morning, this was holden to be a fraudulent preference in contemplation of bankruptcy, and void, even although it appeared that the bonds had long before, and whilst the bankrupts were solvent, been put by them into an envelope with the customer's name upon it, and a memorandum of their being so deposited as a collateral security for the stock until replaced, but which circumstance was unknown to the customer. *Wilson v. Balfour*, 2 Camp. 579. So where a trader, intending to commit an act of bankruptcy, made out a bill of parcels of certain goods to one of his creditors, to whom he wished to give a preference, and sent it to him, together with an order upon the person in whose possession the goods then were, to deliver them to him, and he got them accordingly, it was holden that this, although in form of a sale, being merely colourable, for the purpose of giving a preference to the particular creditor, was void, and that the assignees of the debtor, upon his bankruptcy, were entitled to recover the value of the goods from the creditor. *Rust v. Cooper*, Cowp. 629; and see *Nixon v. Jenkins*, 2 H. Black. 135.

This preference must have been given in contemplation of bankruptcy; and therefore, if it do not appear that the bankruptcy was contemplated at the time, although it actually did take place afterwards, the property assigned and transferred to the creditor will not be recoverable by the assignees of the debtor. *Wheelwright v. Jackson*, 5 Taunt. 109. *Fidgeon v. Sharp*, 1 Marsh. 196. *Yeatts v. Groves*, 1 Ves. 280. And it is upon the assignees seeking to avoid the payment, or a transfer of goods, to show that it was made in contemplation of bankruptcy (*Morgan v.*

(J) Bonâ fide *Purchases not to be Impeached by Notice of Act of Bankruptcy, unless Fiat, &c. be sued out within Twelve Months after the Act of Bankruptcy.*[1]

Brundrett, 5 B. & Adol. 289; 2 Nev. & M. 280); it must be proved that the payment or transfer was made under a belief, by the bankrupt, that bankruptcy was the necessary (*Gibson v. Boutts*, 3 Scott, 229. *Gibson v. Muskett*, id. 419), and not merely that it was the probable (*Atkinson v. Brindall*, 2 Scott, 369; 5 Bing. N. C. 225. S. V. *Poland v. Glyn*, 2 Dowl. & R. 310; 4 Bing. 22; and S. C. 12 Moore, 109, n.) result of his condition. And whether a particular payment has been made in contemplation of bankruptcy is purely a question for a jury (*Flook v. Jones*, 12 Moore, 96. *Abbott v. Burbage*, 2 Scott, 656): but it may be inferred from circumstances, without proof that any distinct act of bankruptcy was contemplated.

If the payment were made in contemplation that a bankruptcy might take place, and with an intention of giving a preference to the creditor in that event, and thus preventing a distribution of his effects according to the bankrupt laws, that would be contemplation of bankruptcy, although the bankrupt might hope and expect to prevent a bankruptcy taking place. *Brown v. Kempton*, 19 L. J. C. P. 109.

Payment of a debt by a trader by cheque may be a fraudulent preference (as a gift, delivery, or transfer of his goods and chattels), within 6 Geo. 4, c 16, s. 3 (12 & 13 Vic. c. 106, s. 67). Where such a payment was made without pressure, and after a resolution come to by the debtors to suspend payment of their debts generally, it was held to be a case of fraudulent preference, whether the debtors contemplated actual bankruptcy or not. *Ex-parte Simpson*, 8 Jur. 1150; 1 De Gex, 9.

It must be done with a view of giving the creditor a preference over the other creditors of the debtor. And it must be voluntary; but, in order to render a preference on the eve of bankruptcy valid, it is not necessary that legal proceedings should be resorted to (*Green v. Bradfield*, 1 Car. & K. 449); or even that there should be a threat or pressure, with an immediate power of rendering it available by taking legal steps. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it be made in consequence of the act of the creditor, it is not voluntary. *Van Casteel v. Booker*, 2 Ex. 691.

If a party voluntarily make a payment by which the equal distribution of his property under the fiat will be defeated, such payment is a fraudulent preference, though the bankrupt in making it did not intend to benefit, and did not in fact benefit the particular creditor; as where the bankrupt paid off a mortgage on property settled to the use of his wife, who had joined in such mortgage, without previous notice to, or request by, the creditor, to whom it would have been equally beneficial to retain the mortgage, the bankrupt intending only by such payment to liberate his wife's property for his own and her benefit; this is nevertheless a fraudulent preference. *Marshall v. Lambe*, 5 Q. B. 115; 7 Jur. 850; 1 Dav. & M. 315; 13 L. J. Q. B. 75.

But if the transfer be made from an apprehension of being prosecuted for forgery (*De Tastet v. Carroll*, 1 Stark. 88. *Ex-parte De Tastet*, Mont. 138, 153. *Atkins v. Seward*, Manning's *Index*, 62, pl. 181); or under an apprehension of legal process for debt, however groundless (*Thompson v. Freeman*, 8 T. R. 155); or even through the importunity of the creditor (*Crosby v. Crouch*, 2 Camp. 166; 11 East, 256. *Yeates v. Groves*, 1 Ves. 280. *Smith v. Payne*, 6 T. R. 152. And see *Bayley v. Ballard*, 1 Camp. 416; but see *Davies v. Chippendale*, 2 B. & P. 282); unless, indeed, the assignment be of all the trader's effects (*Thornton v. Hargreaves*, 7 East, 544): or if it take place under any other circumstances sufficient to overcome the freewill of the debtor at the time, as upon the request of the bankrupt's son, who, at the time, had the means of enforcing the payment (*Belcher v. Prittie*, 10 Bing. 408), the assignees will not be entitled to recover. And in these cases it is immaterial whether the creditor's debt be payable at the time he procures the transfer or not. *Hartshorn v. Slodden*, 2 B. & P. 582. *Crosby v. Crouch, ubi supra.*

[1] By s. 134, 12 & 13 Vic. c. 136, "that no purchase from any bankrupt, *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy."

This section, like the 6 Geo. 4, c. 16, s. 86, refers to purchasers alone, but it may well be doubted whether, inasmuch as by s. 88 no person can be made a bankrupt after twelve months from the act of bankruptcy, the title of the assignees could, in any case, be carried back to a more remote act of bankruptcy, even with notice. The 21 Jac. 1, c. 19, s. 14, enacted that no purchaser for good and valuable consideration should be affected by an act of bankruptcy, unless the vendor should become a bankrupt within five years; but it was held that the lapse of eight years did not protect the assignment where the purchaser had notice. *Montford v. Ponten*, 1 Mont. 79, affirmed on appeal by *Lord Lyndhurst*. A purchaser, with notice of an act of bankruptcy, will not have a safe title until the expiration of the twelve months, although no fiat or petition for adjudication shall have been sued out or filed within that time. *Lowes v. Lush*, 14 Ves. 547. *Franklin*

XIX.—As to Warrants of Attorney, Cognovits, and Judges' Orders.

(A) *Warrants of Attorney*, Cognovits, *and Consents to Judge's Order, given within Two Months of filing Petition, to be null and void.*[1]

(B) *Warrants of Attorney and* Cognovits Actionem *given by any Trader to be void, unless the same or a Copy thereof be filed, &c., within Twenty-one Days after the Execution thereof.*[2]

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v. Lord Brownlow, id. 550. *Hartley v. Smith*, Buck, 368. *See Granville v. Danvers*, 7 Sim. 121. *Ex-parte Mountford*, Mont. 70. A release by the bankrupt, after an act of bankruptcy, to a releasee who knew his insolvency, was held invalid, although more than two months before the fiat. *Mavor v. Pyne*, 3 Bing. 285; 11 Moore, 2; 1 Car. & P. 91. A notice to the effect that A. has committed an act of bankruptcy by filing a petition for a private arrangement with his creditors, and that the sheriff must not sell the goods of A. seized under an act of *fi. fa.*, delivered to the sheriff on the day of filing the petition (such petition having been subsequently dismissed and A. adjudged a bankrupt), is notice of an act of bankruptcy committed by A. at the date of filing the petition. *Edwards v. Gabriel*, 30 L. J. Ex. 245.

[1] By s. 135, 12 & 13 Vic. c. 106, "that every warrant of attorney to confess judgment in any personal action, given by any bankrupt after the commencement of this act, and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of, wholly or in part, an antecedent debt or money demand; and every *cognovit actionem*, or consent to a judge's order for judgment given by any bankrupt, at any time after the commencement of this act, and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt; and not adversely, or purporting to have been given in an action, but having been, in fact, given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, *cognovit actionem*, or consent, as the case may be, shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not."

Where, upon taking a guarantee for repayment of advances to one of their customers, certain bankers also took from their principal debtor a warrant of attorney to cover the debt, and at the same time agreed with the guarantor that they would at any time, at his request, enter up judgment and levy execution on the warrant of attorney against the principal debtor; but by their neglect to file the warrant of attorney, or a true copy thereof, in compliance with the requisitions of the Bankrupt Law Consolidation Act, 1849, the warrant of attorney became void:—*Held*, that this neglect on the part of the bankers operated as a discharge to the surety. *Watson v. Alcock*, 17 Jur. 568; 22 L. J. Ch. 858.

H. D. being possessed of 299*l.*, lent it to W., whom she was about to marry. He, as a security for the loan, gave to her and one S. a warrant of attorney, in 1837, to confess judgment for 600*l.* By the defeasance, which stated that the loan was made in contemplation of marriage, W. was to hold the money as long as H. D. and S. should please, paying interest to S. for her, and, on her request, S. might on a week's notice require payment of the principal, judgment was to be entered up forthwith, and execution was to issue in default of payment after notice. The marriage took place, judgment was entered up, and in 1845 S., at the wife's request, gave the week's notice demanding payment, and, as it was not paid, issued execution and levied on W.'s goods. W. in a few days afterwards became bankrupt, and his assignee applied to set aside the judgment and execution, on the grounds, first, that the execution was irregular, the judgment not having been revived by *scire facias*, and being more than a year old; and, secondly, that the marriage between H. D. and W. had discharged the judgment. The court refused the application. *Dolling v. White*, 17 Jur. 505; 22 L. J. Q. B. 427; 1 Bail. C. C. 170: *Coleridge, J.*

[2] By s. 136, 12 & 13 Vic. c. 106. "And be it enacted, that if after the commencement of this act any warrant of attorney to confess judgment in any personal action, or any *cognovit actionem* in any personal action, shall have been given by any such trader, and such warrant of attorney or *cognovit actionem*, or a true copy thereof, shall not have been filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, in manner and form provided by an act passed in the third year of the reign of his late Majesty King George IV., intituled 'An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment,' every such warrant of attorney and *cognovit actionem* shall be deemed fraudulent, null, and void, to all intents and purposes whatever; and if any such warrant of attorney or *cognovit actionem* which shall be so filed as aforesaid shall have been given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or *cognovit actionem* shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such warrant of attorney or *cognovit actionem* shall be null and void to all intents and purposes whatever."

(C) *Judge's Order obtained by Consent given by any Trader Defendant to be void, unless the same or a Copy thereof be filed within Twenty-one Days, in like manner as Warrants of Attorney and* Cognovits Actionem.[1]

XX. Deeds and other Instruments relating to Bankruptcy not liable to Stamp Duty.[2]

The non-observance of these enactments does not render the warrant of attorney, *cognovit*, or judge's order, void as against the trader himself, but only as against his assignees, in case of bankruptcy. *Bryan v. Child*, 5 Ex. 369; 19 L. J. Ex. 264. As against the latter, however, the judgment and execution are void, even though completed by sale by the sheriff to the execution creditor before the act of bankruptcy; and they may maintain money had and received against the execution creditor for the appraised value. *Bittleston v. Cooper*, 14 Mee. & W. 399. *Biffin v. Yorke*, 5 Man. & G. 428. The 3 Geo. 4, c. 39, s. 2, which renders the filing unnecessary if judgment be signed within twenty-one days, is not incorporated in this section, but an affidavit of the time of the execution of the warrant of attorney must be in all cases filed at the same time as the warrant. *Acraman v. Hernaman*, 20 L. J. Q. B. 355.

[1] By s. 137, 12 & 13 Vic. c. 106. "And be it enacted, that every judge's order made by consent given after the commencement of this act by any such trader defendant in any personal action, and whereby the plaintiff in such action shall be authorised forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeasance or condition or not, in case the action in which such order shall be made shall be in the Court of Queen's Bench, or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action and a *cognovit actionem* given by any defendant in any personal action, or copies thereof and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or *cognovit actionem* shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever; and the provisions respectively contained in the said act passed in the third year of the reign of his late Majesty King George IV., intituled 'An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment,' and in an act passed in the Parliament holden in the sixth and seventh years of the reign of her Majesty, intituled 'An Act to enlarge the Provisions of an Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment,' for liberty to file warrants of attorney and *cognovits actionem*, or copies thereof, with the clerk of the docquets and judgments, and for the said clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search and filing and taking office copies, shall extend and be applicable to every such judge's order, in like manner as the warrant of attorney and *cognovits actionem* would in the said act."

This section applies only to *personal* actions, not to ejectments. *Doe v. Kingston*, 1 Dowl. P. C. (N. S.) 263. It also, s. 136, does not avoid a judge's order, not filed pursuant to its directions, as against the trader, but only as against his assignees, if he afterwards should become bankrupt. *Bryan v. Child*, 5 Ex. 568; 14 Jur. 510; 19 L. J. Ex. 264. See *Janson v. Mayer*, 17 Jur. Q. B. 132. By Reg. Gen. H. T. 16 Vic., 1 E. & Bl. vii., the costs of filing a judge's order against a trader defendant should not be allowed, unless specially ordered by a judge. Judgment, under such an order, is a judgment by confession within 6 Geo. 4, c. 6, s. 108. *Andrews v. Deaks*, 4 Ex. 827; 20 L. J. Ex. 127. See *Bell v. Bidgood*, 8 C. B. 763; 7 D. & L. 760; 19 L. J. C. P. 15.

[2] As to fees payable by stamps, &c. *see ante*, p. 160.

By s. 138, 12 & 13 Vic. c. 106. "And be it enacted, that no deed, conveyance, assignment, surrender, admission, or other assurance of, or to, or relating solely to any freehold, leasehold, copyhold or customary messuages, lands or tenements, or to any mortgage, charge, or other incumbrance upon, or any estate, right or interest of and in any messuages, lands, tenements, or personal estate, being the estate of or belonging to any bankrupt, or part or parcel thereof, and which after the execution of such deed, conveyance, assignment, surrender, or assurance respectively, shall, either at law or in equity, be or remain the estate and property of such bankrupt, or of the assignee appointed or chosen under any bankruptcy, and no power of attorney, writ of *supersedeas* and *procedendo*, order, certificate of conformity, affidavit, or other instrument or writing whatsoever relating solely to the estate or effects of any bankrupt, or to any part thereof, or to any proceeding under any bankruptcy, and no affidavit, bond, or other proceeding under this act, and no advertisement inserted in the *London Gazette*

XXI. As to Choice of Creditors' Assignees; When and how Chosen; Court may Reject or Remove any Person chosen as Unfit.

(A) *Definition of,*[1] *when and how Chosen.*[2]

(B) *Who may Vote in Election of.*[3]

(C) *Who may be Elected.*[4]

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relating solely to matters in bankruptcy, shall be liable to any stamp-duty, or to any other duty whatsoever, save and except such stamp-duty as is mentioned in Schedule (C.) to this act annexed."

This corresponds with s. 98, 6 Geo. 4, c. 16. A contract by the purchaser at an auction to complete the purchases on the term of the conditions of sale is exempt from duty. *Flather v. Stubbs*, 2 Q. B. 614. So when auction duty existed, a sale by the order of the assignees, with the consent of the trustees to whom the bankrupt had assigned an equity of redemption, was held exempt from duty. *R. v. Winstanley*, 1 C. & J. 434; 5 Bligh. N. S. 130.

[1] Definition of assignees in 23 & 24 Vic. c. 134, *see ante*, p. 144.

[2] *When and how to be chosen.*—The 116th sect. id. provides, "that at the first meeting of creditors, or any adjournment thereof, it shall be competent to the majority in value of the creditors who have proved debts to choose an assignee or assignees of the bankrupt's estate and effects, and to be called the creditors' assignee: Provided that the court shall have power to reject any person so chosen who shall appear to such court unfit to be such assignee, and upon such rejection a new choice of creditors' assignee shall be made."

By s. 139, 12 & 13 Vic. c. 106, it is directed, "that at the first public sitting appointed by the court under any bankruptcy, or at any adjournment thereof, assignees of the bankrupt's estate and effects shall and may be chosen and appointed, and all creditors who have proved debts to the amount of ten pounds and upwards shall be entitled to vote in such choice, and also any person authorised by letter of attorney from any such creditor, upon proof of the execution thereof, either by affidavit or by oath before the court *vivâ voce;* and the choice and appointment shall be made by the major part in value of the creditors so entitled to vote: Provided that the court shall have power to reject any person so chosen who shall appear to such court unfit to be an assignee, or to remove any assignee, and upon such rejection or removal a new choice and appointment of another assignee shall be made in like manner."

The choice of assignees should, in general, be proceeded with, however few creditors may have proved (*Ex-parte Butterfill*, 1 Rose, 196), and the time for choice will not be enlarged upon an *ex-parte* application by a creditor. *Ex-parte Lawdon*, 1 Mont. D. & D. 583.

[3] The public officer of a company may vote by attorney. *Ex-parte Ackroyd*, 1 Mont. D. & D. 555. By s. 164, bodies politic and public companies incorporated or authorised to sue or bring actions may prove by an agent, swearing he is such and authorised to prove. A creditor who has assigned his debt may vote in the choice of assignees. *In re Hart*, 1 Fonb. N. R. 57.

A person appointed by the court to prove and receive dividends, cannot vote in the choice of assignees. *Ex-parte Shaw*, 1 Glyn & J. 127. One partner is allowed to act for another in executing powers of attorney for voting in the choice of assignees, &c. *Ex-parte Mitchell*, 14 Ves. 597. When once executed the power is extinct. 1 Fonb. 517.

Where an order of the court is necessary to enable a party to prove, he cannot vote in the choice of assignees, and a trustee will not be allowed to interfere in the choice of assignees so as to bind his *cestui que trust. Ex-parte Wyatt*, 2 Deac. & Chit. 211. *See* 1 De Gex, 111.

A creditor having a security may have his security valued, and prove for the difference before the security is sold. *Ex-parte Nunn*, 1 Rose, 322.

Joint Creditor entitled to prove under separate Estate, for the purpose of Voting in the choice of Assignees.—By s. 140, 12 & 13 Vic. c. 106, "that if one or more of the partners of a firm be adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall be entitled to prove his debt, for the purpose only of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificates, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt until all the separate creditors shall have received the full amount of their respective debts." *See* 2 Rose, 389.

[4] The parties elected should generally be present to accept the trust. *Ex-parte Heath*, 4 Deac. 294. As the object of the election is for the benefit of the general body of creditors, a person whose interest is adverse to theirs will be rejected, *e. g.* the bankrupt himself (*Ex-parte Jackson*, 2 Rose, 221); the solicitor to the bankruptcy, or his partner (*Ex-parte Badcock*, 1 Mont. & Mac. 231); a banker, who is receiving the money under the bankruptcy (*Ex-parte Lacey*, 6 Ves. 625). It is not essential that the party elected should be a creditor (*see* 1 Atk. 90; 4 East, 330); but the bankrupt cannot be assignee of his own estate (2 Rose, 221), nor should he interfere in the elections. *Ex-parte Molineux*, 3 Mont. & Ayr. 703. Fraud in conducting the choice will vitiate it. 1 Deac. 603.

(D) *Security may be required from Parties elected.*[1]

(E) *Removal of Assignees, and Choice of New.*[2]

XXII. Certificate of Appointment of Assignee, and Effect thereof.

By sect. 123, 24 & 25 Vic. c. 134, "when the election of an assignee shall have been accepted by the person elected and confirmed by the court, the court shall, by certificate under the hand of the commissioner and the seal of the court (to be called 'the certificate of appointment'), declare such creditors' assignee to have been duly elected, and appoint him to the said office accordingly. Such appointment shall be final, and not to be subject to review or appeal, except as hereinafter provided."

XXIII. Rights and Duties of Assignees in general, under 24 & 25 Vic. c. 134. *See post, p.* 252.

(A) *All Real and Personal Estate to vest in Assignees.*

By sect. 117, 24 & 25 Vic. c. 134, "upon the appointment of the creditors' On appointment of cre-

[1] By s. 122, 24 & 25 Vic. c. 139, "the majority in value of the creditors present at the meeting for choice of a creditors' assignee shall determine whether any security shall be given by such assignee, and if so, the amount and nature thereof, and such security may, if the creditors so determine, be by way of bond given to any registrar of the court or his successors, who are hereby authorised to sue thereon. At the same meeting, or at any other meeting called for the purpose, the majority in value of the creditors present may also determine whether a manager shall be appointed to collect and wind up the estate, under the inspection of the creditors' assignee, or of a committee of creditors, and may appoint such person, with such remuneration out of the estate, and generally upon such terms, for such period, and with such directions, as the majority shall think fit."

[2] By s. 124, 24 & 25 Vic. c. 104, "a majority in number and value of the creditors may, at any meeting duly called for the purpose, remove the creditors' assignee or manager, or accept of his resignation; and one-fourth in value of the creditors who have proved may at any time apply to the court, by petition, for the removal of the creditors' assignee or manager, and if on the hearing of such petition the court shall be of opinion that sufficient reason has been shown, it may remove such creditors' assignee or manager, and appoint a meeting of the creditors to be held for electing a new creditors' assignee; and if the assignee shall die, resign, or be removed, or remain abroad for three months at any one time, any creditor may apply to the court to appoint a meeting for electing a new creditors' assignee, and the court may accordingly appoint a meeting, whereof at least seven days' previous notice shall be given in the *London Gazette*, and such meeting may elect a new creditors' assignee accordingly."

By s. 125, id. "in all cases of the election of a new creditors' assignee the proceedings shall take place in the like manner as is hereinbefore provided in the case of the first election, and the new creditors' assignee shall have the same powers and perform the same duties as the creditors' assignee first chosen, and shall call to account such creditors' assignee, his heirs, executors, administrators, or assigns, as the case may require."

Objections to the assignees chosen should be made within a reasonable time; and creditors authorising the assignees to act, having knowledge of any objection to their unfitness or appointment, would be estopped from making the objection afterwards. *Ex-parte Nash*, 1 Mont. 501. Poverty is no ground for removal (*Ex-parte Copeland*, 1 Mont. & Ayr. 306), but insolvency or bankruptcy is (*Ex-parte Bonsor*, 1 Mont. D. & D. 194), or that the choice was not the free election of the creditors. *Ex-parte Surtees*, 12 Ves. 10. *Ex-parte Hawkins*, Buck, 520. *Ex-parte De Chapeau Rouge*, Mont. & Mac. 174. The bankrupt may petition for the removal of an assignee. *Ex-parte Oakes*, 2 Mont., D. & D. 60. There will be a new choice if any one of the assignees elected refuse to act, or is rejected. *Ex-parte Wilson*, 1 id. 34. *Ex-parte Shaw*, 1 Glyn & J. 155. If an assignee has accepted the office, he can only retire on payment of costs (*Ex-parte Watts*, 1 Deac. & Chit. 322); but if he be removed for the benefit of the estate he is entitled to his costs. *Ex-parte James*, 1 id. 272.

The assignees of a bankrupt mortgagor who had no assets disclaimed, and asserted that they would have disclaimed before suit if any application had been made. It was held, nevertheless, that they were not entitled to costs. *Ford v. White*, 16 Beav. 520.

The removal of assignees is a matter within the discretion of the commissioner with which the Court of Appeal will not interfere, unless it is clearly established that such discretion has been wrongly exercised. *Ex-parte Bates*, 21 L. J. Bank. 20; 16 Jur. 459.

On an adjudication against an uncertificated bankrupt new assignees ought to be chosen. *Re Dennis*, 1 Fonb. 207.

ditors' assignee bankrupt's estate vested in the same.

assignee, all the estate, both real[1] and personal,[2] of the bankrupt, shall be devested out of the official assignee, and vested in the creditors' assignee."

(B) *From what Time vest.*[3]

(C) *Real Estate, Fee Simple, &c.*[4]

[1] By s. 142, 12 & 13 Vic. c. 106, "that when any person shall have been adjudged a bankrupt, all lands, tenements and hereditaments, except copy or customaryhold, in England, Scotland, Ireland, or in any of the dominions, plantations or colonies belonging to her Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations or colonies, have disposed, and all such lands, tenements and hereditaments as he shall purchase, or shall descend, be devised, revert to or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers and writings respecting the same, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

[2] By s. 141, 12 & 13 Vic. c. 106, "that when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt."

[3] Formerly the assignees had no title whatever in the bankrupt's property, real or personal, until the assignment or bargain and sale, when such conveyances were necessary, were actually executed. As to personal property, their title related back to the act of bankruptcy; but as to real estate, although the assignees were beneficially entitled to, and might claim and recover, all lands of which the bankrupt was seised at the time of the act of bankruptcy or afterwards, yet the legal interest remained in the bankrupt until actually conveyed to the assignees by the bargain and sale. This, we have seen, is now altered by the 12 & 13 Vic. c. 106, ss. 161, 162; and s. 117, 24 & 25 Vic. c. 134, *supra*.

[4] *Real Estate, Fee Simple, &c.*—The sect. 142 of course includes not only estates in possession, but also estates in remainder and reversion. By the terms of a settlement, an estate was limited to trustees to permit the same to be occupied and used by the bankrupt for his life; and it was provided, that the person who should be entitled to the use and occupancy of the mansion-house should reside and dwell therein, and use the name and arms of the donor, upon pain of forfeiting all benefit under the settlement. The interest of the bankrupt passed to his assignees, but liable to be defeated by the bankrupt's default in complying with the condition of the settlement. *Ex-parte Goldney*, 3 Deac. 570.

Even a mere possibility of right will pass. As, for instance, where property is devised to a person for life, remainder to such of his children as shall be living at the time of his death, and one of the children in the lifetime of the father becomes a bankrupt and obtains his certificate, and then the father dies, the bankrupt's share of the property will have passed to his assignees by their appointment. *Higden v. Williamson*, 3 P. Wms. 132. But a possibility that lands will come to the bankrupt as heir-at-law by descent, if they do not actually descend to him before he obtains his discharge, will not pass to the assignees. *Moth v. Frome*, Amb. 394. *Carleton v. Leighton*, 3 Mer. App. 667.

It also includes incorporeal hereditaments. Thus, if a bankrupt be the patron of an advowson, it is held to pass to the assignees under the deed of bargain and sale; but if the church be void at the time the advowson is sold, the bankrupt, it seems, and not the assignee, shall present. *Ex-parte Meymot*, 1 Atk. 196; 1 Burn. *Ecc. L.* 138; and *see* 12 & 13 Vic. c. 106, s. 147, *post*. So, the commissioners may sell any office of inheritance, &c., which the bankrupt lawfully might have sold (*Ex-parte Butler*, 1 Atk. 210, 215; Amb. 8. *Ex-parte Joynes*, Cook, 316. *Ex-parte Gilbee*, id.); but if it concern the administration of jus-

(D) *Life Estate in Remainder,*[1] *&c.*

(E) *Estate Tail and Base-Fees.*[2]

(F) *Leaseholds and Freeholds subject to Rents; Election to take Lease.*[3]

(G) *Conditional Estates.*[4]

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tice, or be otherwise within the stat. 5 & 6 Edw. 3, c. 16, they cannot (*Bristow's case*, 2 Atk. 212. *Schellinger v. Blackerby*, 1 Ves. 347. *Ex-parte Lyons*, Amb. 89); nor could the half-pay of a military officer before 24 & 25 Vic. c. 134, *post*, 243 (see *Flarty v. Odlum*, 3 T. R. 681. *Littledale v. Duke of Montrose*, 4 id. 248. *Stone v. Littledale*, 2 Anst. 533. *Barwick v. Reade*, 1 H. Black. 627), or the pension of an officer of the East India Company. *Gibson v. East India Comp.* 7 Scott, 74; 5 Bing. N. C. 262. But annuities, the property of a bankrupt, pass to the assignees. *Brandon v. Robinson*, 1 Rose, 197.

[1] By s. 115, 24 & 25 Vic. c. 134, "where, under any settlement or will, a bankrupt non-trader shall be entitled to a life estate, in remainder expectant upon the death or deaths of any previous tenant or tenants for life, with any remainder over to the bankrupt's issue, or the heirs of his body or any of them as purchasers, the life-estate of such bankrupt non-trader shall not be sold before it falls into possession without an express direction of the court."

[2] *See* 12 & 13 Vic. c. 106, s. 208, as to copyholds: *see* s. 209, id.; and 3 & 4 Wm. 4, s. 74; and by s. 114, 24 and 25 Vic. c. 134, "the court shall have power to dispose, for the benefit of the creditors, of any estate or interest at law or in equity which at adjudication or afterwards, before order of discharge, a bankrupt has in any copyhold or customary land, and to make an order vesting the land or such estate or interest as the bankrupt has therein in such person and in such manner as the court shall think fit."

[3] Terms for years pass to the assignees (12 & 13 Vic. c. 106, ss. 141, 142); and by s. 131, 24 & 25 Vic. c. 134, they may elect to take for a limited period: it enacts, "in every case of a lease or an agreement for a lease it shall be lawful for the assignees to elect to take the same and the benefit thereof, and to keep possession of the premises up to some quarter or half-yearly day on which rent is made payable by the same lease or agreement, such day not being more than six months from the adjudication of bankruptcy, and upon such day to decline such lease or agreement for a lease."

This clause merely gives the choice to the assignees whether they will take the lease or agreement for it, with the resulting benefits by sale or otherwise. If they decline, then (by s. 145 of 12 & 13 Vict. c. 106) the bankrupt will not continue liable to the conditions of it, if within fourteen days after notice of their intention he deliver it to the person entitled to it. If the assignees do not determine either to accept or decline it when required so to do, the court may order them to elect or give up possession of the premises held under the lease or agreement. *See post*, s. 145, 12 & 13 Vic. c. 106, p. 245, and cases there cited.

The interest of a bankrupt in leaseholds is not finally divested until the creditors' assignees are chosen. *Turner v. Nichols*, 16 Sim. 565; 13 Jur. 293; 18 L. J. Ch. 278.

[4] Estates given by deed or will to the bankrupt, but of which he is to become possessed upon the happening of a certain contingency, pass to the assignees; and the same rule applies to all estates created to commence upon the performance of a condition expressed. And where an estate has passed from the bankrupt, defeasible upon the performance of a condition, such as that created by a mortgage, or by his lands being extended under an elegit, the assignees have what may be termed the equity of redemption; and by stat. 12 & 13 Vic. c. 106, s. 149, "if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deed, such grant, conveyance, assurance, pledge, or deposit being upon condition or power of redemption at a future day by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment, or performance, such real or personal estate may be sold and disposed of for the benefit of the creditors."

Between a mortgage of land, and a mortgage or pledge of goods, this distinction must be observed—that the mortgagor of lands may retain the possession of them without affecting the security; but a mortgage or pledge of goods will be deemed a nullity, as against assignees, if the goods have been allowed to remain in the possession of the mortgagor or party who pledged them. *Jones v. Gibbons*, 9 Ves. 407. And if the mortgage be of lands and goods, it will be deemed valid as to the lands and things fixed to the freehold, but bad as to moveable chattels. *Ryall v. Rolle*, 1 Atk. 165; 1 Ves. 348. *Stephens v. Sole*, id. 752. *Bourne v. Dodson*, 1 Atk. 154. *Horn v. Baker*, 9 East, 215. *Ex-parte Austin*, 1 Deac. & C. 207. Where the proprietor of a newspaper assigned his interest in it to a creditor as a security, but still continued to carry it on, and his name remained at the Stamp Office as the proprietor of it, it was holden that, upon his becoming bankrupt, his interest in the paper vested in his assignees. *Longman v.*

(H) *Personal Estate.*[1]

(I) *Officers' Half-pay, Pension,*[2] *&c.*

Trip, 6 N. R. 72. However, there are many cases in which, although the mortgagor of moveable chattels does not remain in possession of them, it may be impossible to give the actual manual occupation of them to the mortgagee: as, for instance, in the case of a ship at sea, which, however, may be transferred, in the manner pointed out by the statutes on the subject; in the case of goods in transit on board of a ship at sea, in which case a transfer of the bill of lading will be deemed a legal transfer of the goods (see *Meyer v. Sharpe*, 5 Taunt. 74); of sugars in the West India Docks, in which case a transfer of the warrants will be deemed a legal transfer of the sugars. *Lucas v. Dorien*, 1 Moore, 29. This section does not enable the assignees to revest in them the legal estates in mortgaged premises by payment or tender of what is due on the mortgage after the estate of the mortgagee has become absolute by non-payment on the day limited by the proviso of redemption. *Dun v. Massey*, 1 Nev. & P. 578; 6 Ad. & E. 479. And in the cases of mortgages by a bankrupt, equity will supply a defect in the conveyance, as against the assignees, in the same manner as in other cases. See *Russell v. Russell*, 1 Bro. 269.

But equity has refused to make good the mortgage of a ship, which was defective, the regulations in the register acts not having been complied with. *Ex-parte Bulteel*, 2 Cox, 243.

A mortgage or other conveyance of a conditional estate to be valid must have been executed so as to affect the estate before the bankruptcy. 1 P. Wms. 62. See *Meyer v. Sharpe*, 5 Taunt. 74. Where the bankrupt has executed several distinct mortgages of different estates to the same mortgagee, the assignee cannot redeem one mortgage without also redeeming the others. 2 Vern. 286; 2 Mont. D. & D. 328.

If an annuity be given to a trader for life, but limited over, or to cease altogether in case of his bankruptcy, it will not pass to his assignees. So, where an annuity was given by will to a trader for life, payable to him only upon his own receipt, and no other, and to cease and determine immediately upon alienation, it was holden that it ceased upon his bankruptcy and the assignment of his effects. 3 Ves. 149; 6 T. R. 684. But it is otherwise when the forfeiture depends upon alienation by the act of the party, in which case bankruptcy would not be a forfeiture, and the assignees would consequently be entitled. Wight. 306. So, powers, *see* s. 147, 12 & 13 Vic. c. 106, *post*, p. 247.

[1] The assignees are entitled, under s. 141, 12 & 13 Vic. c. 106 (*ante*, p. 240), to the whole of the personal property of the bankrupt in which he has a legal or equitable interest for his own benefit, whether in possession or in action. Although the bankrupt's wearing apparel in strictness belongs to his assignees, yet by s. 221, 24 & 25 Vic. c. 134, he is allowed to retain the necessary wearing apparel of himself, his wife, and children (see *Ex-parte Ross*, 1 Rose, 33; 17 Ves. 374); but property obtained by a debtor by fraud will not pass to the assignees, but will remain the property of the party defrauded. Hence, where D. by false pretences obtained a bill of exchange from A. B., and his assignees upon his bankruptcy received the amount, it was held that the money was to be deemed money had and received by the assignees to the use of A. B. *Harrison v. Walker*, Peake, 111; *see* 1 Stark. 109; 5 T. R. 231; 12 East, 656; 1 M. & Scott, 517; 10 Moore, 46; 2 Bing. 514.

Property under Contract, but not accepted.—The assignees are not entitled to goods delivered by the bankrupt before the bankruptcy, although not in fact accepted until afterwards (see *Bartram v. Farebrother*, 4 Bing. 579); nor to *goods* ordered or purchased by the bankrupt, if he has not the right of possession as well as the property: thus a vendee acquires a right of property by the contract of sale, but no right of possession until he pays or tenders the price, and therefore the assignees could not in such case maintain trover for the goods, although they might adopt the contract, which is still *in fieri*, and sue for its non-performance on their performing all that the bankrupt was bound to perform as precedent or contemporary conditions. *Bloxham v. Sanders*, 4 B. & C. 941. *Gibson v. Carruthers*, 8 Mee. & W. 321.

Goods in Transitu.—Assignees have no right to goods stopped *in transitu*, because the buyer has not the indefeasible right to the possession, although he has the right of property, and his insolvency without payment puts an end to his right of possession, or rather clothes the vendor with the right of resuming the possession. See *Bloxham v. Sanders*, 4 B. & C. 949; Smith, *Lead. Cas.* 432 e. The transfer of shares to the assignees is provided for by the 8 Vic. c. 16, s. 18; but until acceptance (and *semble* in that mode) by the assignees the bankrupt will be liable for calls. See *South Staffordshire Railway Company v. Burnside*, 5 Ex. 129; 20 L. J. Ex. 120, *infra*, ss. 177, 178.

Fraudulent Transfer.—Transfers which are fraudulent preferences as against the assignees, do not vest the property so transferred at once in the assignees by the bankruptcy, but remain in the transferee until the assignees have done some act to show that they elect to avoid the transfer, and the mere commencement of an action of trover is no such election. *Newnham v. Stevenson*, 10 C. B. 713; 20 L. J. C. P. 111; and in the Exchequer Chamber, H. T. 1853.

[2] We have seen offices or pensions which are not legally saleable, such as offices re-

(J) *Debts due to, and Rights of Action.*

(*a*) *In general.*[1]

lating to the administration of justice (*see* 5 & 6 Edw. 6, c. 16; *Sterry v. Clifton*, 9 C. B. 110; 19 L. J. C. P. 237), or (before s. 134, 24 & 25 Vic. c. 82, *infra*), the half-pay of a military or naval officer, either in the Queen's service or that of the East India Company (see *Gibson v. East India Company*, 5 Bing. N. C. 262. *Morris v. Manisty*, 7 Q. B. 674), did not pass. A compensation granted to a public officer on the reduction of officers in his department under 4 & 5 Wm. 4, c. 24, has been held not assignable by him (*Wells v. Foster*, 8 Mee. & W. 149), and would therefore not pass to the assignees. In general it may be said, that a pension granted entirely as a compensation for past services is assignable; but if a continuing duty or service be part of the consideration, it is not. See *per Parke, B.*, id. 152. The compensation paid to a commissioner of bankrupts passes to his assignees on his insolvency.

Portion of Pay, Half-pay, Salary, or Pension of Bankrupt to be applicable for Creditors.—By s. 134, 24 & 25 Vic. c. 134, "the court may order such portion of the pay, half-pay, salary, emolument, or pension of any bankrupt as, on communication from the court, the Secretary of State for War, or the Secretary of State for India, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such bankrupt may belong or may have belonged, or under which such pay, half-pay, salary, emolument, or pension may be enjoyed by such bankrupt, may officially sanction to be paid to the assignees, to be applied in payment of the debts of such bankrupt; and such order and sanction being lodged in the office of her Majesty's Paymaster-General, or of the Secretary of State for India, or of any other officer or person appointed to pay or paying any such pay, half-pay, salary, emolument, or pension, such portion of the said pay, half-pay, salary, emolument, or pension as shall be specified in such order and sanction, shall be paid to such assignees until the court shall make order to the contrary."

[1] As "every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors," the right to bring a real action passes to the assignees (*Smith v. Coffin*, 2 H. Black. 451); so a right of entry vested in husband and wife in right of the latter (*Mitchell v. Hughes*, 6 Bing. 689; 4 M. & P. 577); or claim to recover money lost at play, under 9 Anne, c. 14 (*Brandon v. Pate*, 2 H. Black. 308; 2 Ves. jun. 514); *Carter v. Abbott*, 1 B. & C. 444; 2 D. & R. 575); or to sue for a breach of a contract, which accrued before the bankruptcy; nor is it any objection that the damages are unliquidated (*Wright v. Fairfield*, 2 B. & Adol. 727. *Hill v. Smith*, 12 Mee. & W. 630); and where a right of action in a bankrupt or insolvent is of such a nature that, if vested in the bankrupt or insolvent, it would pass to his assignees, the interest of the bankrupt or insolvent in such right of action passes to his assignees. A right of action for the conversion before the marriage of the wife's goods falls within this rule. It should be brought in the name of the wife and the assignees. *Richbell v. Alexander*, 30 L. J. C. P. 268.

In *Rogers v. Spencer*, 12 Clark & Fin. 701, and *Beckhorn v. Drake*, 2 H. L. C. 579 (and *see* 8 Mee. & W. 856; 12 id. 315), the passing of choses in action to assignees was elaborately discussed. In the court below it had been held, that where the bankrupt had entered into agreement to serve for seven years, at fixed wages at three guineas a-week, the party making default to pay 500*l.* by way or in nature of specific damages, and he was dismissed before his bankruptcy, the assignees were entitled to sue and not the bankrupt. *Wightman, J.*, stated the general rules: "There are some exceptions to the generality of the right of the assignees. In cases where the personal estate is only affected through some wrong or injury to the person or the feelings of the bankrupt, and the loss or gain to the personal estate would be greater or less, according to the compensation given for such injury, whether by breach of contract or otherwise, the right of action would not pass to the assignees. Rights of action for breach of promise to marry, for torts to the person, for libel or slander, are instances of exceptions to the general rule. It may be also that the right to enforce unexecuted contracts will only pass to the assignees in cases where the assignees themselves could perform that which the bankrupt himself was to perform, as held in the case of *Gibson v. Carruthers*" (8 Mee. & W. 321). *Cresswell, J.*, thus expressed his view: "It has been decided (see *Rogers v. Spence*, 13 Mee. & W. 571; 12 Clark & Fin. 701) that the rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if he becomes a bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt independently of his rights of property, and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action. On the one hand, therefore, we have it established, that, by the bankrupt laws, it was intended, that every right vested in the bankrupt of which *profit* could be made, including rights of action, should pass to the assignees; and on the other, that the right to recover a satisfaction in damages for a personal injury is to be excepted out of that general rule." In the opinion delivered by *Parke, B.*, the following passage occurs: "Actions for inju-

(*b*) *Damages for Personal Injuries.*[1]
(*c*) *Wages and Earnings of Bankrupt.*[2]
(*d*) *Property of Wife.*[3]

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ries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignees, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this. On the other hand, rights of action for injuries to the person or reputation, or the possession of real estate, do not pass. Actions of assault, for example, and for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quare clausum fregit* (*Rogers v. Spence*, 13 Mee. & W. 571, affirmed, in error, in the Exchequer Chamber and Dom. Proc.), actions for criminal conversation with the wife, for seduction of the servant or daughter of the bankrupt, are not transferred to the assignee, even though some of these causes of action may be followed by a consequential diminution of the personal estate; as where, by reason of a personal injury, a man has been put to expense, or has been prevented from earning wages or subsistence, or where by the seduction the plaintiff has been put to expense (*Howard v. Crowther*, 8 Mee. & W. 601). So with respect to contracts; rights of action for the breach of such as directly affect the personal estate, whereby the assignee is prevented from receiving part of it, or its value is diminished, are certainly transferred. For example, rights of action on a beneficial contract, whereby one engaged to sell and deliver goods to the bankrupt, and which, if performed, would have put him in the possession of the goods; or a contract with another to carry or take care of the goods of the bankrupt, which are lost or injured, and thereby diminished in value. On the other hand, actions for the breach of contracts personal to the bankrupt, unaccompanied by an injury to the personal estate — as a contract to carry him in safety, to cure his person of a wound or disease, or a contract with a person, who subsequently becomes bankrupt, to marry — are certainly not assigned."

[1] See *Yates v. Hoppe*, 19 L. J. C. P. 180. *Sherrington v. Yates*, 12 Mee. & W. 855. *Kynaston v. Croads*, 16 id. 266. *Wright v. Linfield*, 2 B. & Adol. 727. *Hancock v. Coffin*, 8 Bing. 358. *Porter v. Varley*, 9 id. 93. An injury to the body or feelings of a trader, arising from a tort independent of contract, do not pass to the assignees; as for an assault and battery, or for slander, or for the seduction of a child or servant. *Howard v. Crowther*, 8 Mee. & W. 601. *Beckham v. Drake*, 2 H. L. 626. And the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or marry: *per Lord Denman, C. J. Drake v. Beckham*, 11 Mee. & W. 319; but, see *Beckham v. Drake*, 2 H. L. 645. Assignees cannot maintain an action for a libel, although the injury thereby to the man's reputation may have been the sole cause of his bankruptcy: *per Alderson, J., Howard v. Crowther*, 8 Mee. &W. 604. Where the principal cause of action is a personal injury to the bankrupt it will not pass to his assignees, as where the injury complained of was entering the bankrupt's house, seizing his goods, and exposing them to sale, without his leave, and preventing him from carrying on his lawful business. *Rogers v. Spence*, 13 Mee. & W. 571; 12 Clark & Fin. 700. *Brewer v. Dew*, 11 Mee. & W. 625; 1 Dowl. & L. 383. A. being sued by B., retained an attorney to defend him, by whose negligence a judgment was obtained against A., upon which he (being in custody) was charged in execution for a large sum, and was put to expense in endeavouring to procure his release, and to reverse the judgment by writ of error:—It was held that this was not a cause of action which passed to his assignees upon his insolvency. *Wetherell v. Julius*, 10 C. B. 267. *Vide supra*, p. 243 n.

[2] The profits of the *personal* industry of the bankrupt, between the bankruptcy and the certificate, do not pass. *Williams v. Chambers*, 10 Q. B. 337. But where he is substantially carrying on a trade for profit the proceeds will belong to the assignees; as, where a furniture-broker was employed by defendant to remove his goods, in the course of which business he employed several men and vans, and supplied packing-cases, repaired furniture, and provided materials for this purpose, and other articles to a trifling amount:—It was held that the debt which thereby accrued to plaintiff was not in respect of personal labour, but was claimable by the assignees. *Crofton v. Poole*, 1 B. & Adol. 668. So where a general medical practitioner, being an uncertificated bankrupt, by arrangement with a friend who had purchased his stock of medicines, continued in possession of them and carried on his business as before, and also purchased fresh medicines, a debt accruing to him for attendance and medicines was held to belong to the assignees. *Elliott v. Clayton*, 20 L. J. 217.

[3] *Property of Wife of Bankrupt passes to Assignee.*—The property of a bankrupt's wife, whether legal or equitable, and whether coming to the husband upon or after marriage, passes to his assignees. They take the rents and profits of her real estate during coverture, her personal chattels in possession absolutely, her chattels real, and choses in action, mortgages, debts, and legacies, so far as they vested in him or could be disposed of by him. Thus, a contingent remainder in personality bequeathed to the wife passes, although it be subject to a life-interest which does not fall in until after the bankrupt obtains his certificate. *Doe v. Steward*, 1 Ad.

(*e*) *Crops and Farming Stock.*[1]

XXIV.—Where Conveyance of the Property of a Bankrupt would require to be Registered, the Certificate of Appointment of the Assignees shall be Registered.[2]

XXV.—Bankrupt not Liable to Rents or Covenants in Conveyances, Leases, &c.; and if Assignees decline to determine whether they will accept Conveyance, etc., any Person entitled may apply to the Court.[3]

& E. 300. *Ripley v. Woods*, 2 Sim. 165. If, however, the property be settled, or a gift enures to the separate use of the wife, then the assignees take nothing, because the bankrupt had no equitable interest therein. See *Tullett v. Armstrong*, 4 Mylne & C. 377. *Doe v. Steward.* But the Court of Chancery will exercise the same jurisdiction to obtain a settlement for the wife and children against the assignees as against the husband, and there is no rule of law or practice to prevent the whole residue of a wife's fortune being settled upon her and her children, it being a matter purely at the discretion of the court. *Dunkley v. Dunkley*, 16 Jur. 767. *See* further on this, Bright, *Husband and Wife*, 77 *et seq.*, and 233. If, however, the assignees do not reduce a chose in action belonging to the wife into possession during the husband's life, her right of survivorship is not affected by the bankruptcy (*Hornsby v. Lee*, 2 Madd. 16. *Ryland v. Smith*, 1 Mylne & C. 53); and this though the husband's death take place pending a suit by the assignees to reduce it into possession. *Pierce v. Thornely*, 2 Sim. 167.

The wife's right of survivorship to choses in action, not reduced by the assignees into possession during the husband's lifetime, is not defeated by his bankruptcy. *Hornsby v. Lee*, 2 Madd. 16. *Purdew v. Jackson*, 1 Russ. 1. The general assignment in bankruptcy had not the effect of reducing into possession a legacy of stock, in trust for the bankrupt's wife, whose right by survivorship was established against the assignees. *Mitford v. Mitford*, 9 Ves. 87. If the wife of a bankrupt has an interest in a legacy, and the assignees file a bill to compel payment, and the husband dies before any decree is made, the widow, and not the assignees, is entitled to the legacy. *Pearce v. Thornley*, 2 Sim. 167. See *Ryland v. Smith*, 1 Mylne & C. 53.

[1] *Assignees not to take Crop in any other way than Bankrupt would have been entitled to do.*—By s. 144, id. "that no assignee of any bankrupt's estate, nor any purchaser from any such assignee of any goods, chattels, stock, or crop, being part of the estate of any bankrupt engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner or for any other purpose than such bankrupt so employed in husbandry ought to have taken, used, or disposed of the same if he had not been adjudged bankrupt." *See* 56 Geo. 3, c. 50, s. 11. In *Ex-parte Maundrell*, Buck, 83, the assignees were held entitled to the offgoing crop, under a covenant that the lessee, "at the expiration or sooner determination of the term, should take off growing crops," the lease being determined by the Lord Chancellor. *See* 14 & 15 Vic. c. 25, s. 3; 2 Madd. 315; 7 Bing. 154.

[2] By s. 143, 12 & 13 Vic. c. 106, "that where, according to law, any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry-office in England, Wales, or Ireland, or in any registry-office, court, or other place in Scotland, or in any of the dominions, plantations, or colonies belonging to her Majesty, then in every such case the certificate of the appointment of assignees of the estate and effects of the bankrupt shall be registered in the registry-office, court, or place wherein such conveyance or assignment would require to be registered, enrolled, or recorded; and such registry shall have the like effect to all intents and purposes as the registry, enrolment, or recording of such conveyance or assignment would have had; and the title of any purchaser of any such property for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase-deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of assignees, or of the vesting of such property in them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following; that is to say, as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment, and as regards all other places within twelve months from the date thereof."

See 6 Geo. 4, c. 16, s. 64, and 1 & 2 Wm. 4, c. 56, s. 27, and *ante*, p. 239.

[3] By s. 145, 12 & 13 Vic. c. 106, "that if the assignees of the estate and effects of any bankrupt having or being entitled to any land, either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement,

or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent nonobservance or nonperformance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees *shall decline to take such land*, or *the benefit of such conveyance* or agreement, *or lease* or agreement for lease, the bankrupt *shall not be liable* if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not, upon being thereto required, elect whether they will accept or decline such land or conveyance, or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit."

Election to take Leases for a limited time.—By s. 131, 24 & 25 Vic. c. 134, "in every case of a lease, or an agreement for a lease, it shall be lawful for the assignees to elect to take the same and the benefit thereof, and to keep possession of the premises up to some quarter or half-yearly day on which rent is made payable by the same lease or agreement, such day not being more than six months from the adjudication of bankruptcy, and upon such day to decline such lease or agreement for a lease."

Parole Leases are within the Statute.—*Slack v. Sharpe*, 8 Ad. & E. 366; 3 Nev. & P. 390. *Ex-parte Hopton*, 2 Mont. D. & D. 347; *sed vide Briggs v. Sowry*, 8 Mee. & W. 729. So is a covenant with a bankrupt to procure a lease to be granted to him (*Ex-parte Benecke*, 2 Mee. & W. 292). *Semble, does not apply to assignee* of a lease, for the effect is not to put an end to the lease, but merely to discharge the bankrupt. *See* 3 B. & Adol. 211.

Assignees may be compelled to Elect.—The lessor may call upon the assignees to elect, although the lease has been deposited by way of equitable mortgage with a third person. *Ex-parte Vurdy*, 3 Mont. D. & D. 340. Until election the term does not vest in the assignees. *Copeland v. Stephens*, 1 B. & A. 593. The remedy for the landlord is by petition, or by motion, and s. 249 enables the court to give him costs (see *Ex-parte Hopton*, 2 Mont. D. & D. 347; and *Ex-parte Bright*, 2 Glyn & J. 79); for it authorises the court "to award costs in all matters before it." The assignees have a right to do reasonable acts for ascertaining the value of the lease, for they are not bound to take any interest of the bankrupt which is not beneficial (*Hope v. Booth*, 1 B. & Adol. 505); as, for instance, merely advertising the lease without stating themselves to be owners, and putting the premises up to sale without any bidding being offered, is not an election (*Turner v. Richardson*, 7 East, 335); nor allowing the effects of the bankrupt to remain on the premises for nearly a year after the bankruptcy, and paying the rent due to prevent a distress, giving notice, at the same time, to the landlord, of their intention not to take the lease unless it could be advantageously disposed of. *Wheeler v. Bramah*, 4 Camp. 368. But a deliberate taking possession by the assignees will be an election to be tenants, although the bankrupt's effects remain on the premises, and after they are sold the keys are given up to the landlord. *Hanson v. Stevenson*, 1 B. & Adol. 303. So where they assume the management of the farm (*Thomas v. Pemberton*, 7 Taunt. 206), or enter the premises to complete contracts entered into by the bankrupt. *Ansell v. Robson*, 2 C. &. J. 610. *Clarke v. Hume*, 1 R. & M. 207. So where a bankrupt had a lease of the premises and a reversionary interest, the sale of his estates and reversionary interest by the assignees amounted to an election. *Page v. Godden*, 2 Stark. 309. The bankrupt is discharged from the covenants from the time of the assignee's election, and not from the date of the adjudication; and a surety for the lessee would also be liable up to that time for breaches of covenant committed by the bankrupt. *Tuck v. Tyson*, 6 Bing. 321. A condition giving a right of re-entry on assignment without consent does not prevent the lease from passing by or entitle the lessor to enter on the bankruptcy of the lessee. *Goring v. Warner*, 2 Eq. Cas. Abr. 100. Nor does it bind the assignees of the bankrupt, an assignment by whom is no forfeiture. *Doe v. Bevan*, 3 M. & S. 353. It is clear, that unless there be an express clause in the lease making an act of bankruptcy a determination of the lease, the bankrupty of the lessee and the consequent assignment under it, being proceedings *in invitum*, are not within the proviso against the assignment without license. *Ex-parte Sherman*, Buck, 462. *Doe d. Mitchinson v. Carter*, 8 T. R. 57. Parties may stipulate, by a special proviso, that the lease shall determine upon the bankruptcy of the lessee (*Roe d. Hunter v. Galliers*, 2 T. R. 133; 15 Ves. 268; 19 id. 92); or upon the lease being taken in execution against the lessee. *Doe d. Mitchinson v. Carter*, 8 T. R. 57. See *Doe d. Lloyd v. Ingleby*, 15 Mee & W. 465. In *Doe d. Wyndham v. Carew*, 2 Q. B. 317, an insensible proviso of this kind was contained in a lease. The assignees may assign the lease to any person, however irresponsible, and even for the very purpose of getting rid of their own liability (*Onslow v.*

XXVI. Vendor of Estate in Lands may compel Assignees to Elect whether they will abide by or decline the Agreement for Sale.[1]

XXVII. Assignees may execute Powers previously vested in Bankrupt.[2]

XXVIII. Court may order Bankrupt to join in Conveyance.[3]

XXIX. Conditional Estates granted by the Bankrupt may be Redeemed by the Assignee.[4]

Corrie, 2 Madd. 330); and if *the bankrupt himself becomes their assignee, he will only be liable as such, and not as the original lessee. Doe d. Cheeres v. Smith*, 5 Taunt. 795. By their refusal to elect the term may be determined, and they will have the same rights as to the offgrowing crop, &c. as the lessee would have had under the conditions of the lease. *Ex-parte Maundrell*, 2 Madd. 315. But as they are discharged of the covenants, they have no rights which depend upon a mutual covenant, and cannot sue the lessor upon a covenant to repurchase the fixtures at an appraisement to be made by two persons, one to be named by the lessor and one by the lessees. *Kearsey v. Carstairs*, 2 B. & Adol. 716.

The defendant, who was a tenant to T., a bankrupt, sent the key of the premises to the office of C., the official assignee under T.'s bankruptcy, where it was given to C.'s clerk, with information to what premises it belonged. The defendant immediately quitted possession, and the key was never returned, but there was no other evidence of any assent by C. to the determination of the tenancy:—It was held, in an action by the assignees for subsequently accrued rent, that the above facts did not amount to a surrender of the tenancy by operation of law. *Cannan v. Hartley*, 14 Jur. 577; 19 L. J. C. P. 323.

The mortgagor and mortgagee of one undivided moiety, and the owner of the other, joined in a demise of the whole premises to G. for twenty-one years, covenanting with the three, jointly and severally, to pay (not saying to whom) the reserved rent; G. entered, and having become bankrupt, his assignees accepted the lease:—It was held, on the authority of *Wakefield v. Brown*, 9 Q. B. 209, 15 L. J. Q. B. 373, that the assignees were liable, in an action at the suit of the three lessors, for rent which became due since their acceptance of the lease. *Magnay v. Edwards*, 17 Jur. 839; 22 L. J. C. P. 171.

[1] By s. 146, 12 & 13 Vic. c. 106, "that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees shall not (upon being thereto required) elect whether they will abide by and execute such agreement or abandon the same, may apply to the court, and the court may thereupon order them to deliver up the agreement and the possession of the premises to the vendor or the person claiming under him, or may make such other order therein as the court shall think fit." *See* 1 Deac. 581.

[2] By s. 147, id., "that all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same." See *Bodham v. Hill*, 1 M. & Scott, 14; 7 Bing. 695, and 10 Sim. 150; 2 Keen, 444; 4 Mylne & C. 187.

A bond to the crown, under the 33 Hen. 8, c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond. The giving such a bond is a voluntary act upon the part of the obligor, and where he has an estate and power of appointment he cannot, by exercising the power, defeat the right of the crown. *Ellis v. Key*, 20 L. J. Ex. 348; 15 Jur. 917.

[3] By s. 148, id. "that it shall be lawful for the court, upon the application of the assignees, or of any purchaser from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the adjudication, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in any conveyance of such estate or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt, and all persons claiming under him, shall be stopped from objecting to the validity of such conveyance; and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order as if such conveyance had been executed by him."

The order will be made of course, unless the bankrupt disputes the validity of the adjudication. *See* 1 Mont. D. & D. 118; id. 667; 2 Deac. 479.

[4] By s. 149, id. "that if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge or deposit, being upon condition or power of redemption at a future day by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment or performance, such real or personal estate may be sold and disposed of for the benefit of the creditors."

(A) *Assignees may appoint the Bankrupt or Creditor, or other Manager, to Superintend the Management of the Estate.*[1]

(B) *Assignees to be subject to Orders of the Court.*[2]

(C) *In case of a Member of a Firm becoming Bankrupt, the Court may authorise Action or Suit in Name of the Assignees and of the remaining Partners; Partner to have Notice, and be at liberty to show Cause; Court may direct Partner to have part of Proceeds.*[3]

XXX. Assignees may Institute or Defend Actions or Suits, and Compound for Debts due to the Estate, or submit Disputes to Arbitration.[4]

This section extends both to legal and equitable mortgages. The assignees have also the same right of redemption as the bankrupt. A mortgagee, it seems, before an act of bankruptcy is entitled to take advances made after an act of bankruptcy without notice. *See* cases, Sugden's *Vendors and Purchasers*, 1049–1151.

That is, the assignees, for the purpose of speedy distribution of the assets, may anticipate the performance of the contract, but they have no right to redeem after the time has passed. *Dunn v. Massy*, 6 Ad. & E. 479.

[1] By s. 150, 12 & 13 Vic. c. 106, "that in every case the assignee may, with the approbation of the court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in all or any other respects they may think fit to aid them in administering the bankrupt's estate and effects, in such manner and on such terms as they may think best for the benefit of the persons interested in the estate." And by s. 122, 24 & 25 Vic. c. 134, "at the same meeting, or at any other meeting called for the purpose, the majority in value of the creditors present may also determine whether a manager shall be appointed to collect and wind up the estate, under the inspection of the creditors' assignee, or of a committee of creditors, and may appoint such person, with such remuneration out of the estate, and generally upon such terms, for such period, and with such directions as the majority shall think fit."

[2] By s. 151, id. "that the assignees shall be subject to the orders of the court in their conduct as assignees; and it shall be lawful for the court at all times to summon the assignees, and require them to produce all books, papers, deeds, writings, and other documents relating to the bankruptcy in their possession, and to direct them to pay and deliver over to the official assignee all monies, books, papers, deeds, writings and other documents which may have come to their possession or custody as such assignees."

[3] By s. 152, id. "that if any person adjudged bankrupt shall at the time of the adjudication of bankruptcy be a member of a firm, it shall be lawful for the court to authorise the assignees, upon their application, to commence or prosecute any action at law or suit in equity, in the name of such assignees and of the remaining partner, against any debtor of the partnership, and such judgment, decree or order, may be obtained therein as if such action or suit had been instituted with the consent of such partner, and if such partner shall execute any release of the debt or demand for which such action or suit is instituted such release shall be void: Provided that every such partner shall have notice given him of such application, and be at liberty to show cause against it, and if no benefit be claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as the court may direct; and that it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct."

[4] By s. 153, 12 & 13 Vic. c. 106, "that the assignees, with the leave of the court first obtained, upon application to such court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended, and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt; and with like leave of the court, after notice to such creditors, and subject to such condition (if any) as to obtaining the consent of creditors, or any proportion of them, as the court shall think fit to direct, the assignees may take such reasonable part of any debts due to the bankrupt's estate as may by composition be gotten, or may give time or take security for the payment of such debts, and may submit to arbitration any difference or dispute between the assignees and any other person for or on account or by reason of anything relating to the estate and effects of the bankrupt."

This section differs from the 6 Geo. 4, c. 16, s. 88. It would seem not to be a good plea that the leave of the court had not been obtained (see *Piercy v. Roberts*, 1 Mylne & K. 4. *Jones v. Yates*, 3 Y. & J. 373), although, if no leave had been granted, the assignees would incur the risk of not having their costs allowed out of the estate. *See* 8 Scott, 280; 6 Bing, N. C. 174.

Where the bankrupt is beneficially as well

as legally interested in the performance of a contract made before the act of bankruptcy, the action should be brought in the name of his assignees (*see* 8 T. R. 146; 7 East, 53; 2 H. Black. 308, 444; 7 T. R. 259; 3 B. & P. 467); or before they are appointed the action may be brought in the name of the official assignee. 5 Geo. 2, c. 30, ss. 30, 31; 6 Geo. 4, c. 16, s. 45.

As to the affidavit of debt to assignees, see *ante*, vol. i. p. 250, Affidavit of Debt; and as to hold to bail, id. p. 525, Arrest. The process, &c. is the same as in ordinary cases.

Where defendant has been arrested in an action brought in the name of a bankrupt by the authority of his assignees, he cannot be afterwards arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued and the costs paid. *Carter v. Hart*, 1 Chit. Rep. 276.

Action will lie by the assignee against a creditor who has levied his debt by *fieri facias* subsequent to the act of bankruptcy (*Hitchen v. Campbell*, 3 Wils. 304; S. C. 2 Black. Rep. 827); or against a person who, after the arrest, and before the expiration of the limited time of imprisonment, having had notice that an adjudication could be obtained against the trader, sold his goods, and paid him the produce (*King v. Leith*, 2 T. R. 141); or against a creditor residing in England, who, knowing of the assignment of the bankrupt's estate (*Hunter v. Potts*, 4 T. R. 182; affirmed in *Phillips v. Hunter*, 2 H. Black. 402); or knowing of an act of bankruptcy committed, but before an assignment, attaches money belonging to the bankrupt abroad. *Still v. Worswick*, 1 H. Black. 665.

So if bankers pay the draft of a trader keeping cash with them, after knowledge of an act of bankruptcy, the assignees may recover the money. *Vernon v. Hankey*, 2 T. R. 113.

So where A., before his bankruptcy, draws a bill, and gets it discounted, and gives an order to B., a creditor, to receive it from C., C. transmits the bill to B., but whilst the money is in the hands of the carrier, A. commits an act of bankruptcy, B., who afterwards receives the money, is liable to A.'s assignees. *Hervey v. Liddeard*, 1 Stark. 128. But the assignees having recovered the money from the banker, cannot also bring an action against the creditor to whom the banker paid the draft. *Vernon v. Hanson*, 2 T. R. 287. Nor can they support an action for money had and received to their use against a person who has received a sum of money from a bankrupt before his bankruptcy for the purpose of putting off a trial for perjury, and held that such ought not to be considered an illegal and corrupt agreement. *Harvey v. Morgan*, 2 Stark. 17.

So where A. deposited insurance policies with his bankers as security for a debt which B., a creditor, afterwards obtained upon an undertaking to settle with the underwriters, and collect for them, B. received the amount, but A. becoming bankrupt, and indebted to him a larger sum, he refused to pay over the money:—*Held*, that A.'s assignee (even with the consent of the banker) could not sue B. for the breach of his undertaking. *Chalmers v. Page*, 3 B. & A. 697.

An assignee, as such, may maintain an action for money lent. *Richardson v. Griffin*, 2 Chit. Rep. 1815; S. C. 5 M. & S. 325.

The assignees may support an action of covenant, and are entitled to the benefit of the same estoppels as the bankrupt would have been. *Parker v. Manning*, 7 T. R. 537.

The assignees may maintain an action of debt on the stat. 9 Ann. c. 14, against the winner of money lost at play by the bankrupt (*Brandon v. Pate*, 2 H. Black. 308); or for the penalty against a person for swearing to a false debt. *Holmes v. Walsh*, 7 T. R. 458. And they may sue in the *debet* and *detinet*. *Winter v. Kretchman*, 2 id. 46.

Trover may be supported by the assignees against a sheriff who levies and sells the bankrupt's goods after an act of bankruptcy, but before the commission (*Cooper v. Chitty*, 2 Burr. 20; S. C. 1 Black. Rep. 65. *Baitey v. Bunning*, 1 Lev. 173; S. C. 1 Sid. 271, *contrà*); or against the party suing out the execution, provided he can be proved to be a party to the conversion, or by receiving the money (*Rush v. Baker*, 2 Stra. 996; S. C. Bull. N. P. 41. S. P. *Coppindale v. Bridger*, 2 Burr. 814; S. C. 2 Kenyon, 542); or accompanying the officer. *Menham v. Edmonson*, 1 B. & P. 369. And they may support trover against a servant receiving goods for his master after an act of bankruptcy committed by the owner, although he has accounted with his master for the produce. *Perkins v. Smith*, Sayer, 40. S. C. *Coles v. Davies*, 1 Ld. Raym. 724.

Query. If the assignees of a bankrupt can sue for a *tort* committed to property in the possession of the provisional assignee? *Freen and another v. Cooper*, 6 Taunt. 358; S. C. 2 Marsh. 59.

In trover by the assignees to recover goods delivered to the defendant by the bankrupt in order to give a preference, it has been decided that the plaintiff before the action must prove demand and refusal. *Nixon v. Jenkins*, 2 H. Black. 135. The assignees we have seen, *ante*, p. 243, cannot sue for *personal* injuries to *bankrupt*.

The assignees may support an action of ejectment, but not before the title is completely vested in them. *Doe v. Mitchell*, 2 M. & S. 446.

Trespass will not lie at the suit of assignees against the sheriff who executes a *fieri facias* upon the goods of the bankrupt after an act of bankruptcy. *Smith v. Miller*, 1 T. R. 475. S. P. *Cooper v. Chitty*, 1 Burr. 20; 1 Black. Rep. 65. S. P. *Lechmere v. Thoroughgood*, 1 Show. 12. *Baily v. Bunning*, 1 Lev. 173.

The assignees may in general elect whether to sue in *assumpsit* or in trover. *Hussey v. Fidell*, 3 Salk. 59; S. C. 12 Mod. 324; Holt, 95. Hence they may either affirm or disaffirm the act of a party who, after an act of bankruptcy, has converted the trader's

(A) *Reference to Arbitration may be made a Rule of Court.*[1]

effects into money, either by bringing an action for money had and received to their use, which affirms the contract, or by bringing trover, which disaffirms it. *King v. Leith*, 2 T. R. 141. But if they bring one species of action, and fail, they cannot resort to the other. *Hitchen v. Campbell*, 2 Black. Rep. 827. S. C. by the name of *Kitchen v. Campbell*, 3 Wils. 204. And they cannot affirm the same transaction in part, and disaffirm it for the remainder. *Wilson v. Poulter*, 2 Stra. 859; S. C. 1 Barnard, 77. The assignees must all join in an action on a *contract*, and the omission of one of them is ground of nonsuit. *Snellgrove v. Hunt*, 1 Chit. Rep. 71; S. C. 2 Stark. 425.

Assignee removed by Lord Chancellor must be joined in action brought by other assignees, unless there be a release or a new assignment. *Bloxam v. Hubbard*, 5 East, 407; 1 Smith, 487.

A new assignee may, in his own name, maintain an action upon a judgment obtained by a former assignee displaced by the Chancellor, and it is sufficient for him to declare in a general form, as having been *duly* constituted and appointed assignee, &c. *De Cosson v. Vaughan* (in error), 10 East, 61. If the Chancellor's order for a change of assignees direct that the old assignees should join in the new assignment, the new assignee cannot sue in his separate character till all the former assignees have executed the assignment. *Aldritt v. Kittridge*, 6 Moore, 569.

Where assignees have been changed by order of the Lord Chancellor, and the new assignee declares for goods sold, &c. by himself, as, &c. and it is proved that they were sold by a former assignee, it is no variance. Id. 1 Bing. 355.

If an assignee of a bankrupt assign his interest to the remaining assignees, they can sue him for the money received during the time he was such assignee. *Smith v. Jameson and another*, Peake, 278; S. C. 1 Esp. 114.

When one of several partners becomes bankrupt, the action must be in the name of the solvent partner and the assignees of the bankrupt (*Thomason v. Frere*, 10 East, 418); and in such case, if it be in the name of all the partners, the bankruptcy may be pleaded in bar. *Anon.* 12 Mod. 446. *Eckhardt v. Wilson*, 8 T. R. 140; see *Smith v. Sloper*, 1 East, 363; and *Teed v. Elworthy*, 14 id. 211.

Where the bankrupt himself could have recovered, the *assignees must declare as assignees*, and derive their title through him; but where the *right of action* accrues *after* the act of *bankruptcy*, so that the bankrupt could not have recovered, the *assignees may bring an action in their own names*. *Evans v. Mann*, Cowp. 569. S. P. *Maltby v. Christie*, 1 Esp. 341.

When an action is brought by assignees to recover back money paid by a bankrupt after he has committed an act of bankruptcy, and before the commission is opened, it is not necessary to declare as assignees. *Thomas v. Riding and another*, Wightw. 65. The petitioning creditor's debt, adjudication, &c. need not be stated in the declaration. *Lawson v. Lamb*, 1 Lutw. 162. S. P. *Sladhill v. Pierpoint*, 1 id. 160. S. P. *Tully v. Sparkes*, 2 Ld. Raym. 1548. *Pepys v. Low*, Carth. 29.

Where A. and B., who were assignees of C. and D., bankrupts, under separate commission, sued in one action for debts due individually to C. and D., the court held that the action could not be supported. *Hancock v. Haywood*, 3 T. R. 433. S. P. *Strethfield v. Halliday*, id. 779.

Where one of two partners became bankrupt before the other, and the assignees under a joint commission, in an action for money paid to the defendant after the first, but before the second act of bankruptcy, declared for money had and received to the use of the partners before their bankruptcy, and for money had and received to their own use, as assignees, after the bankruptcy: — *Held* that they could not recover. *Smith v. Goddard*, 3 B. & P. 465. *Semble*, that if they had declared as assignees of A. they might have recovered a moiety. (Id.)

If plaintiffs claim as assignees of several parties, against whom separate commissions have issued, they must, in their declarations, set out their several interests as assignees under such several commissions. *Ray v. Davies*, 2 Moore, 3; S. C. 8 Taunt. 134.

Assignees of A. & B. may sue a debt due to the separate estate of A. without naming B. *Stonehouse v. De Silva*, 3 Camp. 399; S. P. *Harvey v. Morgan and another*, 2 Stark. 17.

The debtor to a bankrupt may plead the Statute of Limitations in an action by the assignees, in the same manner as he could to the claim of the bankrupt himself. *Grey v. Mendez*, 8 Mod. Rep. 171: S. C. 1 Stra. 556. S. C. *Cases in Equity*, 171. S. P. *Ashbrooke v. Manby*, Comb. 70.

Nil habuit in tenementis cannot be pleaded to an action of covenant by the assignees of a bankrupt for rent. *Parker v. Manning*, 7 T. R. 537.

[1] By s. 154, 12 & 13 Vic. c. 106, "that if the assignee shall agree in manner aforesaid to refer any matter in dispute to arbitration, such agreement of reference may be made a rule of any of her Majesty's superior courts of law at Westminster, whether such agreement contain a clause to that effect or not."

Assignees, by the terms of submission, should protect themselves from liability beyond the assets, or they would be liable to the extent of the award. 2 Rose, 50. As to revoking submission, *see* 15 & 16 Vic. c. 76, s. 142; 4 B. & A. 250. That they are not bound by the submission of the bankrupt, see *Marsh v. Ward*, 9 B. & C. 659. They should become parties to the reference, if

(B) *Limitation of Actions; General Issue.*[1]

XXXI. If Petition or Adjudication be Annulled, etc., Persons from whom the Assignees have Recovered, or who have *bonâ fide* paid the Assignees, etc., discharged from Claims by the Bankrupt.[2]

XXXII. If Assignee indebted to Bankrupt's Estate become Bankrupt, his Certificate shall not Discharge his future Effects in respect of such Debt.[3]

XXXIII. Suits not to abate by Death or Removal of Assignees.[4]

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it be pending at the time of the appointment of the assignees.

[1] By s. 159, id. "that every action brought against any person for anything done in pursuance of this act shall be commenced within three months next after the fact committed; and the defendant in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the defendant; and if there be a verdict for the defendant, or if the plaintiff shall be non-suited, or discontinue his action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

This will not include actions against the assignees, either official or general, in respect of the property of the bankrupt, for they are considered to act by virtue of the authority flowing from the right of property, not of any special authority under the act. See *Knight v. Turquand*, 2 Mee. & W. 101. Thus, an action against them for improperly entering the premises of a third person to seize the bankrupt's goods, would not be within this section (*Edge v. Parker*, 8 B. & C. 697), or for seizing the goods of a third party upon the premises of the bankrupt. *Carruthers v. Payne*, 5 Bing. 270. The meaning of the words, "in pursuance of the act," is, if the person *bonâ fide* believes that he is acting under the statute. The apparent difference in some of the decisions will be reconciled by examining the particular circumstances. The absence of all reasonable ground for such a belief would of course be an ingredient in determining that there was no *bonâ fide* belief. *Booth v. Clive*, 20 L. J. C. B. 150. *Horn v. Thornbury*, 3 Ex. 846.

[2] By s. 155 id. "that all persons from whom the assignees shall have recovered any real or personal estate, either by judgment or decree, are hereby discharged, in case the fiat be afterwards superseded, or the adjudication of bankruptcy, or petition for adjudication, be afterwards annulled or dismissed, from all demands which may thereafter be made in respect of the same by the person against whom such adjudication was made, and all persons claiming under him; and all persons who shall, without action or suit, *bonâ fide* deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them, are hereby discharged from all claim of any such person as aforesaid in respect of the same, or any person claiming under him, provided the persons so delivering up any real or personal estate, or paying any debt, shall not have had notice of an action, suit, or other proceeding to dispute or annul the fiat or adjudication, or petition for adjudication, and such action, suit, or other proceeding shall not have been commenced and prosecuted within the time and in manner allowed by this act."

In *Smallcombe v. Olivier* (13 Mee. & W. 77), the effect of superseding or annulling the fiat for other than the want of legal requisites was considered, and it was held that all acts done during the existence of the fiat were valid, and consequently debts, &c. paid to the assignees could not be recovered by the trader.

[3] By s. 156, 12 & 13 Vic. c. 106, "that if any assignee indebted to the estate of which he is such assignee in respect of money, being part of the estate of the bankrupt, retained or employed by him, become bankrupt, and obtain his certificate, it shall have the effect only of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children, excepted) shall remain liable for so much of his debt to the estate of which he was assignee as shall not be paid by dividends under his bankruptcy, and for interest at the rate of five per centum per annum on the whole debt."

As to what is receipt as assignee, see *Ex-parte Ralph*, 3 Mont. D. & D. 331. By s. 265, any assignee retaining, or permitting his assignee to retain money, is chargeable with 20*l.* per cent interest.

[4] By s. 157, 12 & 13 Vic. c. 106, "that whenever an assignee shall die or be removed, or a new assignee shall be chosen, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or

XXXIV. If Assignees commence Action before Time allowed to dispute the Bankruptcy has elapsed, Debtor to Estate may pay Money into Court.[1]

XXXV. Duties of Creditors' Assignee as prescribed by 24 & 25 Vic. c. 134.

(A) *To Manage and Realise Estate and render Account.*

Creditors' assignee to manage and realize estate of bankrupt, collect debts, &c.

By sect. 127, 24 & 25 Vic. c. 134, "the creditors' assignee shall manage, and, except as herein provided, realize and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money, and he shall pay all monies not necessarily retained for current expenses, all Exchequer bills India bonds, and all other public securities, and all bills, notes, and negotiable, instruments belonging to the estate, forthwith upon receipt thereof, into the Bank of England, to the account of the Accountant in Bankruptcy, unless in the case of any adjudication in a country district there shall be no branch of the Bank of England in the locality, and then into such bank as the court shall direct, to the credit of an account to be opened in such bank by such assignee in his official character.

But official assignee to collect debts under 10*l.*

By sect. 128, id. "the official assignee shall collect, realize, and recover every debt due to the estate, the amount of which shall not exceed the sum of 10*l.*, and shall pay all sums so collected, realized, and recovered forthwith into the Bank of England, or otherwise in manner in the next preceding clause provided; and as to all such sums of money he shall be and shall be deemed sole assignee of the estate, notwithstanding the appointment of a creditors' assignee.

Creditors' assignee to render account to official assignee every three months.

By sect. 129, id. "the creditors' assignee shall, at the end of three months from and after his appointment, and thenceforth at the expiration of every succeeding three months, render to the official assignee, in the presence of the registrar, a debtor-and-creditor account of all sums received and paid on account of the bankrupt or his estate, verified on oath as a full, true, and faithful account of his receipts and payments as such creditors' assignee; and the vouchers for such account, and all books of account in his possession or power, together with his banker's pass-book, shall be produced by him to the official assignee, who shall examine the same, and if he shall be dissatisfied with such account, the same, or any part thereof, or any matter arising thereon, shall be inquired into and considered by the registrar in the presence of the official and creditors' assignees; and if no creditors' assignee be appointed, the official assignee shall in like manner render the account herein required to the registrar, who shall examine the same: Provided, that in the case of county-court registrars their accounts, as official assignees, shall be in like manner rendered to and examined and passed by the judges of their respective courts.

Accounts to be printed and circulated.

By sect. 130, id. "forthwith after the passing of each such account of the creditors' assignee, a copy thereof, or a statement showing the nature and

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new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he had originally commenced the same." *See ante*, vol. i. p. 11. This section applies to official assignees (*Mann v. Ricketts*, 1 Phil. 617). As to proceeding in Chancery, *see* 15 & 16 Vic. c. 86, s. 53; and 7 Beav. 484; 1 Mylne & K. 217; 1 Phil. C. C. 617.

[1] By s. 158, 12 & 13 Vic. c. 106, "that if the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed for the bankrupt to dispute the bankruptcy shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same or any part thereof into the court in which such action or suit is brought, and all proceedings with respect to the money so paid into court shall thereupon be stayed until such time shall have elapsed; and if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as allowed by this act, and prosecuted the same with due diligence, the money shall be paid out of court to the official assignee, but otherwise shall abide the event of such action, suit, or other proceeding, and upon such event shall be paid out of court, either to the official assignee or the person adjudged bankrupt, as the court shall direct; and after such payment of money so made into court it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money."

result of the transactions and accounts of the assignee, shall be made out by the official assignee, and sent by him in a printed form through the general post to every creditor who has proved under the bankruptcy."[1]

(B) *Assignees empowered to Mortgage or Pledge Bankrupt's Property with Assent of Creditors and Sanction of Court.*

Power to mortgage or pledge bankrupt's property.

By sect. 133, 24 & 25 Vic. c. 134, "if it shall appear to any meeting of the creditors summoned by the assignees, by notice stating the object of the meeting, at which three-fourths in value of the creditors shall be present or represented, that the debts of any bankrupt can be discharged by means of money raised by way of mortgage or pledge of any of his property, and such meeting shall pass a resolution accordingly, it shall be lawful for the assignees, when thereunto authorised by order of the court, to execute such mortgage or pledge, with or without powers of sale and other powers, and in such manner in all respects as shall be specified in such order; and the court may order the execution of such mortgage or pledge by any other necessary parties, and give all necessary directions for the purpose of carrying into effect the resolution of the creditors."

Mortgagee may bid at sale.

By sect. 132, id. any mortgagee, with leave of the court, may bid at any sale of the mortgaged property.

(C) *Portions of Pay, Half-pay, Salary, or Pensions of Bankrupt, to be applicable to Creditors and paid to Assignees.*

Portion of pay, half-pay, salary of bankrupt, &c. to be applicable to creditors and go to assignees.

By sect. 134, 24 & 25 Vic. c. 134, "the court may order such portion of the pay, half-pay, salary, emolument, or pension of any bankrupt as, on communication from the court, the Secretary of State for War, or the Secretary of State for India, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such bankrupt may belong or may have belonged, or under which such pay, half-pay, salary, emolument, or pension may be enjoyed by such bankrupt, may officially sanction to be paid to the assignees, to be applied in payment of the debts of such bankrupt; and such order and sanction being lodged in the office of her Majesty's Paymaster General, or of the Secretary of State for India, or of any other officer or person appointed to pay or paying any such pay, half-pay, salary, emolument, or pension, such portion of the said pay, half-pay, salary, emolument, or pension as shall be specified in such order and sanction shall be paid to such assignees until the court shall make order to the contrary."

(D) *Assignee may obtain Sequestration of Profits of Benefices.*

Sequestration of profits of benefice of bankrupt clergyman may be obtained.

By sect. 135, 24 & 25 Vic. c. 134, "if any bankrupt be a beneficed clergyman the assignees may apply for and obtain a sequestration of the profits of the benefice of such bankrupt, which profits shall form part of the bankrupt's estate, and be applied accordingly; and the certificate of appointment of such assignees shall be a sufficient authority for the granting of such sequestration, without any writ or other proceeding to authorise the same, and such sequestration shall accordingly be issued as the same might have been issued upon any writ of *levari facias* founded upon any judgment against such bankrupt: Provided always, that the sequestrator shall allow out of the benefice to the bankrupt whilst he performs the duties of the parish or place such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situated shall

[1] Most, if not all, these duties were previously performed by the official assignees, who on their first appointment so far superseded the creditors' assignees. In fact, these sections are intended to restore the latter to nearly their former position, but with some control to which they were not subject.

direct; and it shall be lawful for the bishop to appoint to such bankrupt such or the like stipend as by law he might have appointed to a curate duly licensed to serve such benefice in case the bankrupt had been non-resident."

(E) *Court may determine in all Differences between Assignees, Creditors, or Parties claiming under Trust Deeds.*

Court may determine in all differences between assignees and creditors, or between parties claiming under trust deeds.

By sect. 136, 24 & 25 Vic. c. 134, "in case of any claim, dispute, or difference between the official assignee, the creditors' assignee, and the creditors, or any of such persons, or between any persons claiming under a trust deed, deed of composition or arrangement, relating to any bankrupt's or debtor's estate, or to any money or property claimed as part of the estate of any bankrupt or debtor, either party may apply to the court having jurisdiction in the bankruptcy, and in other cases to the court in London; and it shall be lawful for the court to determine the same, and to summon and examine upon oath the official creditors' assignee, trustee, or any other person whomsoever, as to any matters and things concerning the bankruptcy or trust estate, and to direct such inquiries, and to give such directions, and make such orders relative thereto, as shall to the court seem just and expedient, and to award costs, personally or in any other manner, against the official or creditors' assignee, trustee, or any other person: Provided that in all cases in which a resolution has been come to by a majority in number and value of the creditors assembled in a meeting, regard shall be had by the court to such resolution, and the same shall not be varied or set aside by the court, unless such resolution shall, in the opinion of the court, be unjust or inequitable, and not fit to be binding and conclusive under this act."

(F) *Assignees may sell Bankrupt's Book-debts, &c.*

Power for assignees to sell bankrupt's book-debts, goodwill, &c.

By sect. 137, 24 & 25 Vic. c. 134, "at any time after the expiration of twelve months from adjudication, or at any earlier period with the approbation of the court, the assignees may sell by auction or tender, or, with the sanction of the court, by private contract, all or any of the book-debts due or growing due to the bankrupt, and the books relating thereto, and the goodwill of his trade or business, and assign the same to the purchaser ; and such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually, and with the same privileges concerning proof of the requisites of bankruptcy and other matters, as the assignee himself."

(G) *Books and Papers to be disposed of or kept as the Court may direct.*

Disposal or custody of bankrupt's books and papers after his affairs are wound up.

By sect. 138, 24 & 25 Vic. c. 134, "when the affairs of the bankrupt are fully wound up, the court may, subject to the directions of any general order, make from time to time such orders as in each case seem fit respecting the disposal or custody of any books, papers, or documents relating to property or affairs in the possession or under the control of the official assignee, the creditors' assignee, or any other person."

(H) *As to Custody of Bankrupt's Books.*

Bankrupt's books to be deposited according to directions of court.

By sect. 120, id. "the court shall give such directions as it may deem expedient with respect to the custody and inspection of the books, papers, writings, and documents relating to the estate, and may authorise the official assignee to have the custody thereof or of any part thereof."

Not to be subject to lien.

By s. 121, id. "no person shall be entitled, as against the official or creditors' assignee, to withhold possession of the books of account of the bankrupt, or to claim any lien thereon."

(I) *As to Valuation of Bankrupt's Property.*

By sect. 126, 24 & 25 Vic. c. 134, "no valuation of a bankrupt's property shall be made unless the court shall so direct; and any valuation required by the creditors shall be made in such manner and upon such terms as general orders shall from time to time direct."

No valuation of bankrupt's property shall be made unless directed by the court.

XXXVI. Last Examination of Bankrupt; Appointment of Sitting for Preparing, Filing, and Statement of Accounts.

As to the last examination:

By sect. 140, 24 & 25 Vic. c. 134, "the court shall, forthwith after the meeting for the choice of an assignee by the creditors, appoint a public sitting, on a day not later than sixty days from the date of such meeting, and shall give notice of such sitting in the *London Gazette*, and in such newspapers as the court shall direct, for the bankrupt to pass his last examination, and also, unless the court shall in any case otherwise direct, to make application for his discharge; but the court shall have power to enlarge the time appointed for such sitting, or to adjourn the same."

Court to appoint sitting for last examination and application for discharge.[1]

By sect. 141, id. "the bankrupt shall prepare such statement of his accounts, and in such form as general orders or as the court in any case shall direct, and shall subscribe such statement, and file the same in court ten days at least before the day appointed for the last examination, or adjournment thereof; and such statement may before such last examination be amended from time to time as occasion shall require and the court shall direct; and the bankrupt shall make oath of the truth of such statement, whenever he shall be duly required by the court so to do; and the last examination of the bankrupt shall in no case be passed unless his statement shall have been duly filed as aforesaid."

The bankrupt to prepare and file a statement of accounts.[2]

By sect. 142, id. "the statement of accounts, when filed in court, shall be open to the inspection of all creditors, who may take copies of and extracts from the same, subject to such regulations as general orders shall direct; and an abstract thereof shall be printed, and a printed copy of such abstract shall be sent by post within a week from the filing thereof, by the official assignee, to each creditor who has proved."

Statement of accounts to be open to creditors.

By sect. 143, id. "in the preparation of such statement of his accounts the bankrupt shall be assisted by the official assignee, who shall prepare and file in court, together with such statement, a report upon the state of the affairs of the bankrupt, setting forth such facts and particulars as may be required by the court, or as it shall in the opinion of such assignee be important for the court to be informed of: Provided that if it shall in any case appear to the court that there are special circumstances rendering it necessary that the bankrupt should be assisted in the preparation of such statement of accounts by some person other than such official assignee, the court may nominate some such person to assist the bankrupt in that behalf, and may allow to such person, out of the bankrupt's estate, such remuneration as to the court, upon the taxation of such person's bill of costs, shall seem just; and in such case the statement so pre-

Official assignee to assist in preparing such statement, and to file therewith a report upon the state of bankrupt's affairs.

Power to grant assistance to bankrupt to make out statement under special circumstances.

[1] By s. 162, 12 & 13 Vic. c. 106, "that it shall be lawful for the court at the time appointed for the last examination of the bankrupt, or at any enlargement or adjournment thereof, to adjourn such examination *sine die;* and in such case the bankrupt shall be free from arrest or imprisonment for such time (if any) as such court shall from time to time, by indorsement on the summons of the bankrupt, think fit to appoint."

See 6 Geo. 4, c. 16, s. 118, and 5 & 6 Vic. c. 122, s. 23. *See* ss. 112, 256, 257, of 12 & 13 Vic. c. 106.

[2] By s. 163, id. "that whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment or sentence, the court may appoint a person to attend him from time to time, to produce to him his books, papers and writings, in order that he may prepare his balance-sheet, and show the particulars of his estate and effects, previous to his last examination and discovery thereof."

See 6 Geo. 4, c. 16, s. 119.

pared shall have appended thereto a certificate, signed by the person appointed to assist the bankrupt in the preparation thereof, expressing his approval or disapproval thereof, and the particulars and reasons of such disapproval."[1]

XXXVII. Bankrupt Apprehended by Warrant may submit to be Examined as if he had voluntarily Surrendered.[2]

XXXVIII. Proof of Debts.[3]

(A) *When and how Debts may be proved in general.*

When and how debts may be proved.

By sect. 144, 24 & 25 Vic. c. 134, "every creditor of the bankrupt may, after adjudication, prove his debt, by delivering or sending through the general post, before the appointment of the creditors' assignee, to the official assignee, and after such appointment to the creditors' assignee, a statement of such debt, and of the account, if any, between the creditor and the bankrupt, together with a declaration, signed by the creditor, appended thereto, that such statement is a full, true, and complete statement of account between the creditor and the bankrupt, and that the debt thereby appearing to be due from the estate of the bankrupt to the creditor is justly due; and all bodies politic and public companies incorporated, or authorised to sue or bring actions, may prove by an agent, provided such agent shall in his declaration declare that he is such agent, and that he is authorised to make such proof; and such declaration, signed by such creditor and agent respectively as aforesaid, shall be in such form as general orders shall direct."

Declaration and statement for proof of debt.

(B) *Provable*[4] *and Non-Provable Claims, alphabetically arranged.*

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[1] See *Ex-parte Russell*, 23 L. T. 121; 18 Jur. 411.

[2] By s. 161, 12 & 13 Vic. c. 106, "that if any bankrupt apprehended by any warrant of the court shall, within the time allowed for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered."

The same as 6 Geo. 4, c. 16, s. 115.

[3] *When and how Debts may be proved; by Corporations, &c. Creditor may be examined upon oath.*—And with respect to the proof of debts and payments in full it was enacted, by s. 164, 12 & 13 Vic. c. 106, "that at the sittings appointed by the court for the choice of assignees, and for the last examination of the bankrupt, and at every adjourned sitting held for either of such purposes, and at every other sitting held for proof of debts, and whereof and of the purport whereof ten days' notice shall have been given in the *London Gazette*, every creditor of the bankrupt may prove his debt, by his own oath; and all bodies politic and public companies incorporated, or authorised to sue or bring actions, either by charter or act of parliament, may prove by an agent, provided such agent shall in his deposition swear that he is such agent, and that he is authorised to make such proofs: Provided that it shall be lawful for the court to examine upon oath, either by word of mouth or by interrogatories in writing, every person claiming to prove a debt, or to require such further proof, and to examine such other persons in relation thereto, as such court shall think fit."

Bonâ fide *Creditors, in respect of Debts contracted after an Act of Bankruptcy, may prove.*—By s. 165, id. "that every person with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing of the fiat or the filing of the petition for adjudication of bankruptcy shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed."

The 24 & 25 Vic. c. 134, embodies the former enactments as to proof of debts, with some additional clauses. It is to be borne in mind that no debt or claim can be proved which was contracted after notice of an act of bankruptcy (*Bumford v. Burrell*, 2 B. & P. *Ex-parte Sharp*, 3 Mont. D. & D 490); and every debt or claim provable is barred by the certificate, and cannot be revived by any new contract. The Court of Bankruptcy being a court of equity as well as law, is not bound to admit all legal debts; and can, therefore, inquire into the consideration even of a judgment. *Ex-parte Mudie*, 3 id. 62.

[4] The debt must be contracted *bonâ fide*, and for a good and valuable consideration; and if payable at the time, the creditor might have had his remedy against the bankrupt either at law or equity, or otherwise, in his own name or in the name of another. It must, in general, have been a debt, either actually ascertained, or which might be readily ascertained, by computation, with-

Agent. *See* Pledge.
Agreements.[1]
Annuities as regards Grantor.[2]
Annuities as regards Sureties.[3]

out the intervention of a jury. *Sed vide* Damage, *post*, 266. Hence, where A. died intestate and insolvent, having abstained from making a provision by will for his daughters, in consequence of a promise from his son to pay an annuity of 50*l.* a-year to each of them while single and 500*l.* to each upon her marriage, but it did not appear what the nature or amount of the provision was which A. abstained from making, it was holden, upon the bankruptcy of the son, that this promise, though morally, was not legally, binding upon the son, and that it did not constitute a provable debt. *Ex-parte Mudie*, 6 Jur. 1093. *See* 10 id. 382; 16 L. J. Bank. 4.

[1] *Breaches of.*—Bankers residing at different places mutually agreed to return each other's notes weekly, together with those of certain other houses, and the deficiency, if any, was to be made up by the one in advance drawing a bill in favour of the other at a certain date; the one in advance is, from the receipt of the notes, indebted to the other in the excess, which debt is provable under the commission, notwithstanding a neglect to give the bill. *Forster v. Surtees*, 12 East, 605.

[2] *Annuity Creditor admitted to prove.*—By s. 175, 12 & 13 Vic. c. 106, "that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the *value of such annuity*, which value the court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the fiat or the filing of the petition for adjudication of bankruptcy."

A bond conditioned for the payment of a sum of money at the death of the obligor, with interest in the meantime, is not an annuity within the meaning of the act. An annuity is where the principal is altogether sunk, and a mere annual sum payable. See *Winter v. Mouseley*, 2 B. & A. 802. *Pattison v. Banks*, Cowp. 540. Where the grantor covenants to secure the annuity on future property, the claim under the covenant is not capable of calculation, and therefore is not provable. *Lyde v. Mynn*, 1 Mylne & K. 683.

The petitioner purchased an annuity of 924*l.* for 7000*l.* The 924*l.* was calculated for interest on the purchase-money, and also premiums of insurance for 7000*l.* on the life of the grantor. The deed contained a clause enabling the grantor to repurchase the annuity by instalments of not less than one seventh part, and on the whole being repurchased the grantor was to have the policies and all advantages thereof. The grantor became bankrupt, and the annuity of 924*l.* was valued at 6090*l.*, but the assignees insisted that the annuity to be valued was 630*l.*, that is the 924*l.* minus the amount of the annual premium of insurance:—It was held, that as by the construction of the deed the keeping up the policies was optional with the annuitant, he was entitled to have it valued and prove for the full amount. *Ex-parte Varnish*, 1 Mont. D. & D. 514.

Where the annuity is granted in consideration of relinquishing a business, it is not a case for valuation under this clause; but the creditor is entitled to prove for the market value (*Ex-parte Saxe*, Mont. & Bligh, 133; 2 Deac. & Chit. 172), though it has been held that an annuity, which the father has previously to the marriage of his daughter agreed to pay by letter addressed to the intended husband, may be proved on the father's bankruptcy. *Ex-parte Sitger*, Mont. 100. *Ex-parte Annandale*, 2 Mont. & Ayr. 19. An annuity upon the contingency of the annuitant surviving her husband is provable under the section. *Ex-parte Vanheythusen*, 1 Deac. 106; 2 Mont. & Ayr. 519. *Ex-parte Broadley*, 6 Jur. 200; 2 Mont. D. & D. 524. So also an annuity payable during the time the annuitant shall continue to superintend certain salt-works, which might be discontinued by the brine not flowing or the pits becoming forfeited (*Ex-parte Parratt*, 1 Deac. 696; 2 Mont. & Ayr, 626).

There is only jurisdiction to value for the purpose of proof; but leave would probably not be given to the assignees to sue upon a cross-demand if the annuity creditor would submit to the jurisdiction of the court for the purposes of set-off. *Ex-parte Law*, 1 De Gex, 378. See *Arnott v. Holden*, 22 L. J. Q. B. 14; 17 Jur. 318. *In re Foster*, 9 C. B. 422; 14 Jur. 814; 19 L. J. C. B. 274. *Parker v. Ince*, 29 L. J. Ex.

[3] *Sureties for Payment of Annuities granted by Bankrupt, in what manner to come in under the Bankruptcy.*—By s. 176, 12 & 13 Vic. c. 206, "that it shall not be lawful for any person entitled to any annuity granted by any bankrupt to sue any person who may be collateral surety for the payment of such annuity until such annuitant shall have proved against such bankrupt's estate for the value of such annuity, and for the arrears thereof; and if such surety, after such proof, pay the amount proved, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the annuity subsequent to the bankruptcy shall have become due) pay the sum so proved, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon at the rate of 4*l.* per centum per annum from the time of notice of such proof, and of the amount thereof being given to such surety; and after such payment or satisfaction such surety shall stand in the place of such annuitant, in respect of such proof, to the amount so paid or satisfied by such surety, and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity: Provided that such surety

shall be entitled to credit, in account with such annuitant, for any dividends received by such annuitant under the bankruptcy before such surety shall have fully paid or satisfied the amount so proved."

This section enables the collateral surety for the payment of an annuity to come in under the bankruptcy of the principal debtor. Neither the value nor the instalments of an annuity, for the payment of which a surety expressly covenants in case of the default of the grantor, were provable under a fiat against *the surety*, where the instalments did not become due until after the bankruptcy of the surety, for the surety did not contract a debt until default was made in payment by the grantor of the annuity. The liability of the surety depended upon the power and will of the principal to pay the first and subsequent instalments as they became due, and such a contingency could not be subjected to any known rule of calculation. The surety would not be liable if his principal performed his duty, and might perhaps never be called upon to pay anything. *Thompson v. Thompson*, 2 Scott, 266; 2 Bing. N. C. 168. *Ex-parte Marks*, 3 Deac. 133. *Ex-parte Thompson*, 2 Deac. & Chit. 126.

Where the bankrupt, as surety only, covenant for payment of an annuity in case the grantor made default, and default is not made until after the bankruptcy, the annuity is not within this section (*Thompson v. Thompson*, 2 Scott, 266; 2 Bing. N. C. 168.) A surety to a bond for payment of an annuity, if the principal became bankrupt before 6 Geo. 4, c. 16, can only prove sums paid by him for arrears due at the time of the bankruptcy. *Ex-parte Parton*, 2 Deac. 62; 3 Mont. & Ayr. 5.

A. and B. join with C. as their surety in the grant of an annuity to D., and the three jointly, and any two separately, covenant that the three, some or one of them, would pay the annuity at the times mentioned. A warrant of attorney was given as a further security, and judgment entered up. A. and B. became bankrupts:—It was held, that D. was entitled to prove against the joint estate for the value of the annuity, and that the covenant was not merged in the judgment. *Ex-parte Pennell*, 2 Mont. D. & D. 273.

Bond with surety conditioned for payment of an annuity, after breaches of the condition the surety became bankrupt and obtained his certificate. In an action for arrears of the annuity accrued due since the bankruptcy, it was held that the certificate was no bar, as it was not a case within 6 Geo. 4, c. 16, s. 54, or 12 & 13 Vic. c. 106, ss. 175, 176, which make no provision for proof for an annuity in case of the bankruptcy of the surety, and that although on the face of the bond the surety appeared as the co-grantor of the annuity; yet as it was recited that the principal "had agreed" to grant the annuity (that is, that the annuity had already been granted), and that the principal had requested the surety to join in the bond, it was manifest on the face of the bond that the defendant to the action was surety only. 2 Deac. 62; 3 Mont. & Ayr. 5.

The grantee of an annuity cannot prove for an annuity under the bankruptcy of the surety, although there is a judgment to secure the annuity, as the grantee is not an "annuity creditor" of the surety within the statute. *Johnson v. Compton*, 4 Jur. 3.

Where one of three co-sureties for the payment of an annuity paid money on account of the annuity after the bankruptcy of a co-surety, it was held that the latter was liable to an action for contribution, although he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the commission against his co-surety, but that *at law* he could not be compelled to pay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. *Brown v. Lee*, 6 B. & C. 689.

Before the stat. 6 Geo. 4, c. 16, s. 55, a surety redeeming the annuity after the bankruptcy and certificate of the grantor was entitled to the benefit of the grantee's proof, under the grantor's commission, and to proceed by action against the grantor for the arrears of the annuity subsequent to the commission. *Watkins v. Flanagan*, 3 Russ. 421; 1 Glyn and J. 199. So he might maintain an action against him for the value of the redemption of the annuity. *Watkins v. Flanagan* (in error), 8 Moore, 480; 1 Bing. 413; 13 Price, 24; 3 B. & A. 186; and the Court of Chancery would not restrain him by injunction from issuing execution for the arrears. *Watkins v. Flanagan*, 6 Madd. 280.

[1] By 12 & 13 Vic. c. 106, s. 170, "where any person shall have been an apprentice to a bankrupt at the time of the filing of a petition for adjudication of bankruptcy, or of the issuing of a fiat in bankruptcy, the filing of such petition, or the issuing of such fiat, shall be and enure as a complete discharge of the indenture whereby such apprentice was bound; and if any sum shall have been really and *bonâ fide* paid, by or on the behalf of such apprentice, to the bankrupt, as an apprentice fee, it shall be lawful for the court, upon proof thereof, to order any sum to be paid out of the estate of the said bankrupt, to or for the use of such apprentice, which such court shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice, and to the time during which such apprentice shall have resided with the bankrupt previous to the filing of such petition or the issuing of such fiat."

This clause is similar to the 6 Geo. 4, c. 16, s. 49, and the cases decided under that will be applicable to the present section.

Where the apprentice-fee was paid, under an agreement for the apprenticeship, but, from mere inattention, no indenture had in fact been executed, it was held to be a case within this section of the statute. *Ex-parte Haynes*, 2 Glyn & J. 122; 3 Deac. & Chit.

Awards.[1]
Bail.[2]
Baron and Feme.[3] *See* Proof by Husband and Wife.
Bastardy Bonds.[4]
Bills and Notes.[5]

320. And where, at the time of the bankruptcy, the father of the apprentice was indebted to the bankrupt 200*l.* for an apprentice-fee for his son, who had been apprenticed two years, the Court of Review on petition allowed 100*l.* to be retained. An articled clerk to an attorney who is made a bankrupt as a scrivener, is not within this section as an apprentice. *Ex-parte Prideaux*, 3 Mont. & Chit. 327.

[1] Money due under may be proved. Peake, 64. *Ex-parte Lowndes*, 1 Mont. B. L. 17.

[2] As the law stood formerly, if after the bankruptcy of the principal debtor the amount of the recognisance was paid by the bail, such debt could not be proved under a commission issued against the principal (*Smithson v. Johnson*, Barnes, 113. S. P. *Goddard v. Vanderheyden*, 2 Bl. 794; S. C. 3 Wils. 362. S. P. *Donnelly v. Dunn*, 2 B. & P. 453); unless the bail-bond (*Bouteflour v. Coal*, 1 Wils. 25. S. P. *Cockerell v. Ouston*, 1 Burr. 458), or the recognisance, was forfeited before the commission issued. *Hockley v. Merry*, 2 Stra. 104; S. C. Ca. Temp. Hard. 262.

As where a bail-bond becomes forfeited before the bankruptcy of a defendant, and a verdict being obtained after the issuing of the commission, execution is levied on the defendant, the court will order the money to be returned, the debt being provable. But this is now altered; *see* s. 173, 12 & 13 Vic. c. 106, *post*, Surety. *Dinsdale v. Eames*, 4 Moore, 350; S. C. 2 B. & B. 8. S. P. *Hewes v. Mott*, 6 Taunt. 329; S. C. 2 Marsh. 192.

[3] If a woman be indebted, and she marries, and her husband become bankrupt, her debts are provable under an adjudication against her husband. *Miles v. Williams*, 10 Mod. Rep. 243; S. C. 160; S. C. Gilb. 318; S. C. 1 P. Wms. 249.

[4] A contingent debt secured by a penalty to indemnify a parish against the maintenance of a bastard (*The Overseers of St. Martin in the Fields v. Warren*, 1 B. &. A. 491; S. C. 2 Stark. 188), or a promise to pay a weekly allowance for the support of an illegitimate child, are not debts provable, except for arrears due at the time of the bankruptcy; for the consideration arises after that event, and is not a *debitum in præsenti*. *Millen v. Whittenburg*, 1 Camp. 428.

[5] Formerly, a bill or note not due at the time of the bankruptcy could not be proved. But now, by s. 172, 12 & 13 Vic. c. 106, it can, after deducting the *rebate* of *interest* for the time the bill or note has to run at the time of bankruptcy. *See* 2 Glyn & J. 241; 5 B. & C. 360.

Lord Eldon, in *Ex-parte Dewdney*, 15 Ves. 495, said, that wherever a bill of exchange, or other negotiable security, would be valid at law, so as to support an action, it might be proved under a commission; and whatever would be a defence to a suit at law or in equity, would be an answer to such proof. *Long v. Bland*, Bunb. 120. S. P. *Grace v. Heyham*, Fitz. 281.

Bills, though not due at the time of the bankruptcy (*Stacey v. Barns*, 7 East 435; S. C. 3 Smith, Rep. 441); or a bill drawn before the bankruptcy, though not protested till after, are debts provable (*Macartney v. Barrow*, 7 East, 437 n.; S. C. 2 Stra. 949, cited 3 Wils. 16, and commented upon in 7 East, 441); even though the money be paid by the indorser after the commission issued. *Joseph v. Orme*, 2 N. R. 180.

If, after the bankruptcy of the acceptor of a bill of exchange, an indorser, who merely lent his indorsment to give credit to the bill, without the privity of the bankrupt, apply to the holder and take up the bill before it is due, such indorser may prove it under the commission against the acceptor. *Hoale v. Baxter*, 3 East, 177. So where two traders exchange acceptances, and afterwards become bankrupts, each may prove the other's acceptances under his commission, though the acceptances of neither were due at the time of the bankruptcy (*Rolfe v. Caslon*, 2 H. Black. 570); especially where each has engaged to pay his own acceptances. *Cowley* (surviving) *v. J. and R. Dunlop*, 7 T. R. 565. See *Buckler v. Bullevant*, 3 East, 72.

And even if an acceptance for the accommodation of the drawer of a bill be given before, and renewed after he has committed an act of bankruptcy, *such renewal* is a continuation of the same suretiship; and therefore, if a commission be issued, and the acceptor afterwards pay the bill, he will be entitled to prove the amount under such commission, though, before the renewal of the acceptance, he had notice of such an act of bankruptcy having been committed. *Stedman v. Martinnant*, 13 East, 427; S. C. not S. P. 12 East, 664. But the accommodation acceptor of a bill of exchange not having paid the same until after the bankruptcy of the drawer (*Snaith v. Gale*, 7 T. R. 364), or after the bankrupt has obtained his certificate, are not provable debts under the commission against the drawer. *Brooks v. Rogers*, 1 H. Black. 640.

And where a creditor, after taking a composition under a deed, which stipulated that he should deliver up all securities, obtained from a party the payment of certain bills of exchange, and applied the proceeds to the *total* liquidation of his debt, it was holden, on the bankruptcy of the creditor, that the insolvent might prove under the commission for the amount of the bills. *Stock v. Mawson*, 1 B. & P. 286.

A creditor may prove on a bill for part of his debt, and proceed at law on a bill for the remainder, which he has negotiated before and taken up after such proof, the bill

proved and the bill taken up constituting distinct debts, although they were originally taken in settlement of the same account. *Ex-parte Newton*, 2 Mont. D. & D. 422; 6 Jur. 68.

The bankrupt and R. have various bill transactions with each other, which were entered in a regular debtor-and-creditor account current. R. proved on four of the bills credited in the account for 800*l.*, and afterwards brought an action against the bankrupt to recover the amount of four other bills, amounting to 620*l.*, which were also included and credited in the account current, and which were returned dishonoured to R. after he had proved for the 800*l.*:—*Held*, that these must be considered as distinct and separate debts, and that the proof for the one did not prevent the creditor from suing the bankrupt for the other. (Id.)

In July, 1846, the defendant having been arrested under a *ca. sa.*, in order to obtain his discharge gave to the attorney of the execution-creditor 5*l.*, and a blank promissory-note stamp, with his name written on it. In May, 1851, the defendant obtained a certificate in bankruptcy, and in October, 1852, the attorney filled up the blank stamped paper by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month's date, and indorsed it to the plaintiff for value:—*Held*, first, that it was properly left to the jury to say whether the stamped paper was filled up within a reasonable time, considering the circumstances of the defendant, and his ability to pay the note. *Temple v. Pullen*, 8 Ex. 389; 22 L. J. Ex. 151:—*Held*, secondly, that there was no claim provable under the fiat, and consequently the certificate was no bar to an action on the note. (Id.)

A note was issued by a bank in this form: "I promise to pay the bearer, on demand, 5*l.*, for A., B., C., and D. Signed A." A., B., C., and D. being partners in the bank:—*Held*, that the holder had not a right of separate action against A., and that on the bankruptcy of the firm he had not a right of proof against the separate estate of A. *Ex-parte Buckley*, 1 Phil. 562; 9 Jur. 931; 15 L. J. Bank. 3; S. C. 14 Mee. & W. 469. *Hall v. Smith*, 1 B. & C. 407, overruled.

Two of six partners, who had given a confidential clerk a general authority in writing to sign bills and notes on behalf of the firm, direct the clerk to sign four promissory notes in the name of the firm, payable respectively to one or the other of the two partners, who claimed to be creditors of the aggregate firm, in respect of an excess of capital advanced by them for the purposes of the partnership. The two partners afterwards indorse the notes to a separate creditor for a private debt of one of the two:—*Held*, that although, as between these two partners and the other members of the firm, the notes were unjustifiably created and possessed by the two, yet, in the absence of all fraud or connivance in the transaction by the party to whom the notes were indorsed, the firm of the six were liable for the amount; and that, on the bankruptcy of the firm, the holder of the notes had a right to prove the amount of them against the joint estate. *Ex-parte Bushell*, 3 Mont. D. & D. 615; 8 Jur. 937.

B., the agent for T., obtained from a bank the discount of two bills of exchange drawn by T. on and apparently accepted by the H. F. Company, but without the indorsement of B. being required, and the money was paid to him. It subsequently turned out that the acceptance was a forgery by T., who was convicted of the same. B. became bankrupt, and the bank tendered a proof against his estate for the amount of the bills, which was allowed by the commissioner. It was assumed that B. was innocent of any knowledge of the forgery, and no inquiry was made before the commissioner whether B. paid over the money received for the discount of the bills to T. On an appeal from the judgment of the commissioner, it was referred back to the commissioner, with liberty to either party to add to the evidence. *Ex-parte Bird*, 15 Jur. 894; 20 L. J. Bank. 16.

[1] Anterior to the 6 Geo. 4, c. 16, s. 56, bonds which depended upon a contingency, which did not happen before the bankruptcy, were not provable. *Tully v. Sparkes*, 2 Ld. Raym. 1548; S. C. 2 Stra. 869. S. P. *Crookshank v. Thompson*, 2 Stra. 1160. But bonds for payment of money on a certain future day, though after the bankruptcy, or payable by instalments, were admitted to proof. *Ex-parte Barker*, 9 Ves. 110. And bonds for the payment of a certain sum on demand were provable, if demand had been made before the bankruptcy, or if the bond had become forfeited before the bankruptcy. *Ex-parte Spurling*, 1 Cooke, B. L. 169, 8th ed. *Ex-parte Elder*, 2 Madd. 282. Although a bond is not assignable at law, yet the assignee may prove it under a commission against the obligor, but the assignor must join in the deposition. *Ex-parte Child*, 1 Atk. 111. *Voluntary bonds* are not provable, except on condition that they be not paid until after the other debts are satisfied (*Garland v. Skinner*, 2 S. &. L. 228); though a bond given for the payment of arrears of a voluntary bond is provable. *Gilham v. Locke*, 9 Ves. 612. *Ex-parte Berry*, 1 Christ. B. L. 484. A bond to replace stock, if it has become forfeited by a breach of any of the conditions, such as the non-payment of the dividends before the bankruptcy, the obligee is entitled to prove; but a bond to replace stock, which is not forfeited till after the bankruptcy, cannot be proved. *Ex-parte Leitish*, 1 Cooke, B. L. 171, 8th ed. *Ex-parte Canning*, 9 Ves. 115. If the condition is to replace it generally, then it seems the valuation is to be taken from the price of the

Bottomry Bonds.[1] *Children's Earnings.*[2]

stock at the date of the commission; and if it is to replace it on a day certain, then it is to be ascertained from the price of stock at the time of payment. *Ex-parte Day*, 7 Ves. 301. But all these perplexing and intricate distinctions are now removed by s. 177.

Where a bond was conditioned for the payment of a sum to executors of obligor, and interest in the meantime to him on certain days, "or within twenty days after demand," the obligor became bankrupt, and no interest being paid, but no demand ever made:—*Held*, that the bond was not a debt provable under the commission, there being no forfeiture of it before the bankruptcy; and held also, that it was not provable as an annuity-bond within the meaning of the 49 Geo. 3, c. 121, s. 17. *Winter v. Mouseley*, 2 B. & A. 802.

So where a bond was given by a member of Parliament under the 4 Geo. 3, c. 33, s. 1, and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given:—*Held*, that though the debt and costs of the action were barred by the certificate, he was not also discharged from the bond. *Jameson v. Campbell*, 5 B. & A. 250; S. C. 1 Bing. 320; affirming judgment of the K. B.

So where an assignee of a lease gave a bond to the lessee for the performance of covenants, and for his indemnification from any breach thereof, the assignee not having paid the rent, and the lessor having recovered from the assignor:—*Held*, in an action on the indemnity-bond after the bankruptcy of the assignee, that as the assignor *had not paid the lessor* before the bankruptcy of the assignee, he could sue on the bond, the bankruptcy being no bar, though the bond became forfeited before the bankruptcy. *Young v. Taylor*, 8 Taunt. 316; S. C. 2 Moore, 326; S. C. affirmed 3 B. & A. 521.

A bond given in substitution of a voluntary bond is valid if the transaction is not tainted with *mala fides* on the part of any of the parties, and notwithstanding the obligor was in a state of insolvency at the time he executed the substituted bond. 3 De Gex, 549; 13 Jur. 114.

The bankrupts were bankers; one of them gave to his sister a bond for 3000*l.* in performance of a promise voluntarily made to their father on his deathbed; the sister died, having specifically bequeathed the sum secured by the bond. The bankrupt gave the legatees fresh bonds for sums amounting together to the sum secured by the original bond, in consideration of the delivery up of that bond. Six years afterwards the partners in the bank became bankrupt. At the time of both transactions the firm must have been insolvent, and this must have been known to or suspected by the obligor of the bonds, but the transactions were entered into fairly and without reference to the insolvency, and there was no evidence of the knowledge or suspicion of this circumstance on the part of the obligees. The obligees were held entitled to prove upon the bonds. (Id.)

A., the bankrupt, gave to B. a bond conditioned to pay 1000*l.* when C., an infant, attained twenty-one, with interest in the meantime half-yearly. A. became bankrupt during the minority of C., and at the date of the fiat the interest was in arrears:—It was held, that the bond was forfeited, and that B. was entitled to prove for the 1000*l.*, and interest to the date of the fiat. 1 Fonb. c. 159.

The court will rectify a clear mistake in the condition of a bond to enable the proof to be made. 12 Mont. & Ayr. 541. And where there are several obligors, the obligee may prove the whole amount of the sum that remains due to him, upon the estate of each, and receive dividends thereon, until he receives 20s. in the pound. 1 Atk. 109.

As to the interest allowed to be proved on bonds, it must not (added to the principal remaining due) exceed the amount of the penalty. Cooke, B. L. 207.

[1] By s. 174, 12 & 13 Vic. c. 106, "that the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, made upon good and valuable consideration, shall be admitted to claim, and, after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing of the fiat or the filing of the petition for adjudication of bankruptcy against such obligor or insurer; and the person effecting any policy of insurance upon ships or goods with any person (as a subscriber or underwriter) having become or becoming bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person so interested is not within the united realm."

The same as 6 Geo. 4, c. 16, s. 53.

The words, "any policy of insurance," would seem to include all the various kinds of insurances now effected (see *Cox v. Liotard*, 1 Dougl. 166), where life insurance was considered to be within the corresponding statute. The "United Kingdom" does not include the Isle of Man. *Davison v. Farmer*, 6 Ex. 242. And as realm is nothing more than *royaume*, *i. e.* kingdom, the same question may perhaps arise upon this section.

[2] When a child earns money by its own labour, which is received by the father, who becomes a bankrupt, it will be permitted to prove. *Ex-parte Macklin*, 6 Ves. 675. But where a commission issued against the father of a young man, who had lived seven years with his father as clerk, from whom he received only board and lodging, and

Clerks. *See* Servants.
Cognovits. *See* Judgment.
Collateral Undertakings. *See* Contingent Debt; Contingent Liabilities; Surety.
Composition, Proof of.[1]
Contingent Debt.[2]

there was not any contract for wages, it was holden that he could not prove any debt for wages, although it was the father's intention to have made him some allowance. 1 Mont. B. L. 165; 1 Ves. & B. 48.

[1] Where a creditor had agreed with his debtor to take a composition to be paid by instalments, and after payment of the first instalment the debtor became bankrupt, *Lord Hardwicke* thought that the creditor ought to be admitted to prove the whole of the original debt, and not the amount of the composition only. Eq. Ca. Abr. 28. *Sewell v. Musson*, 1 Vern. 240. *Heathcote v. Crookshanks*, 2 T. R. 24. And where a composition-deed contained a proviso that in default of payment, or if a commission should issue before the whole of the composition be paid, the covenants on the part of the creditors should be void, and a commission having issued after a second instalment was due, but before it was proved, it was holden that the creditors might retain their first instalment, and prove for the whole of the residue. *Ex-parte Vere*, 1 Rose, 281. *Ex-parte Peele*, id. 435. But where under a composition-deed no fund was appropriated for the dividends, it was holden that a creditor party thereto, not having received them, could not upon bankruptcy have them out of the estate, and prove the residue, but must come *in pari passu* with the other creditors. *Ex-parte D'Oliviera*, 8 Ves. 84. Though where an assignment was made of certain book-debts by a trader previously to his bankruptcy, to those who should execute the deed, with a covenant that if they were not paid in full within two years from that period he would pay the deficiency within one month after the expiration of the two years, he becoming a bankrupt within the two years, *Lord Eldon* held that the creditors who executed the deed were entitled to the produce of that fund, and might prove the deficiency also under the commission. *Ex-parte Richardson*, 14 Ves. 114. Where a creditor, wishing to induce another creditor to come to an arrangement, conceals his own debt, the party making such misrepresentation, in case the composition took effect, would be precluded from proving his own debt. *Cecil v. Plaistow*, 1 Anst. 202; 3 Ves. 456; 1 Esp. N. P. C. 132; 11 Ves. 40. But in a case where the proposed arrangement did not take effect, *Lord Eldon* held that the person so dealing could not be bound by such representation. *Ex-parte Oakley*, 1 Rose, 198.

[2] *Debt contingent at the time of the Bankruptcy to be provable for the value thereof ascertained by the Court; or if value not ascertained before the contingency has happened, then, after the contingency has happened, amount of Debt may be proved.*—By s. 177, 12 & 13 Vic. c. 106, "that if any bankrupt shall, before the issuing of the fiat or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

Before the passing of the act 6 Geo. 4, c. 16, s. 56 (same as above), debts depending upon a contingency, which had not taken place at the time of the bankruptcy, could not be proved (2 P. Wms. 395; 2 Stra. 867; 1 Atk. 114; 3 Wils. 270; 3 T. R. 435; Dougl. 165; 2 P. Wms. 497); consequently we have seen that a debt, payable at a future uncertain period, was not provable. *Ex-parte Barker*, 9 Ves. 110. *Ex-parte East India Company*, 2 P. Wms. 396. So a covenant in a marriage settlement, to transfer stock upon one month's notice into trustees' names, with leave to trustees to forbear notice during covenantor's life, could not be proved (*Ex-parte Alcock*, 1 Ves. & B. 176; 1 Rose, 326); nor a covenant within seven years, upon request to convey lands of a certain value, was not provable, though the covenantor become bankrupt after the seven years, if no request was made, unless the covenant was secured by a penalty (*Ex-parte Mare*, 8 Ves. 635); nor a contract to pay another's debt upon notice, if no notice had been given. *Ex-parte Minet*, 14 Ves. 189. *Staines v. Planch*, 8 T. R. 386.

There is a distinction under this section between contingent liabilities which may never become debts, and debts payable upon a contingency, and it is only the latter which are provable. *Ex-parte Marshall*, 2 Mont. & Bligh, 242; 1 Mont. & Ayr. 118. See *Hinton v. Acraman*, 2 C. B. 409. Accordingly a covenant in a marriage settlement, that the heirs or executors of the settlors should pay a certain sum to trustees within a certain time after his death, is a debt payable upon a contingency. *Ex-parte Tindal*, 8 Bing. 402. So where a father bequeathed his business and stock in trade to his sons, with a decla-

ration that a grandson, then an infant, should be admitted into the firm on attaining twenty-one, or in default thereof that the sons, or the survivors of them, should pay the grandson 1000*l.* on his attaining twenty-one, it was held, on the bankruptcy of the surviving son before the grandson attained twenty-one, that there was a right of proof for the 1000*l.* as a contingent debt. *Ex-parte Megarey*, 1 De Gex, 167.

But contingent liabilities are not within this section; as, for instance, a covenant to pay future premiums of insurance, or to repay them to a third party, if he should pay them. *Toppin v. Field*, 4 Q. B. 386. So where the covenant was to repay to the trustees of a marriage settlement the amount which they should pay on the settlor's becoming bankrupt, it was held that the trustees could not prove for the amount required by the office to be paid to keep up the policies during the remainder of the bankrupt's life. *Re Whitmore*, 2 De Gex & S. 565.

The defendant assigned the policies to the plaintiff as security for a debt, and covenanted with the plaintiff to pay the premiums, and also, if he failed so to do, that it should be lawful for the plaintiff to pay thereon such sum as might be necessary for keeping on foot the policies or affecting any new policies, and that the defendant would repay the plaintiff all such sums paid by him. The defendant afterwards became bankrupt:—*Held*, that the certificate of discharge in bankruptcy was no bar to an action by the plaintiff, on the covenant to pay the premiums which had become due after the bankruptcy. *Warburg v. Tucker*, 4 Jur. N. S. 1142; 28 L. J. Q. B. 56.—Ex. Cham.

Semble, also, by a majority of the court, that the certificate was no bar to an action on the second covenant to repay the plaintiff the amounts he had paid to keep the policies alive on the defendant's default in paying the premiums. *Sed vide* s. 154, 24 & 25 Vic. c. 134, *post*, p. 267 n.[4].

By deed of separation between husband and wife, the husband covenanted that he would every year during the joint lives of himself and his wife pay to a trustee for her, to her separate use, such sum as, together with the dividends and interest or other income to arise from 948*l.* 6*s.* 4*d.* Bank Three per Cent. Annuities, or from other funds settled or which might be settled to her separate use, and which might be received by her, would make one clear annuity or yearly sum of 200*l.*, such annuity to commence from the 11th of January, 1854, and to be paid by four even and equal quarterly payments: provided, that if the defendant and his wife should at any time thereafter cohabit as man and wife, that thenceforth the said annuity should cease. On the 29th of September, 1854, and while he and his wife continued to live separate, he became bankrupt:—*Held*, that the annual sum, so covenanted to be paid for the separate use of his wife, was not an annuity within s. 176 of the 12 & 13 Vic. c. 106, nor a debt payable upon a contingency within s. 177, or a liability to pay money upon a contingency within s. 178, and, consequently, his certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy. *Parker v. Ince*, 4 H. & N. 53; 28 L. J. Ex. 189; 7 W. R. 201; 32 L. T. 279. Confirmed in Ex. Cham.

Where it appears on the face of a bond to secure an annuity that one of the joint and several obligors is, in fact, a surety only for the other, he is to be looked upon as a surety and not as a principal in all questions under the bankrupt laws, consequently his bankruptcy and certificates will not discharge him from liability to pay arrears of the annuity accruing due since his bankruptcy, and unpaid by the principal. *White v. Corbett*, 5 Jur. N. S. 407; 28 L. J. Q. B. 228.—Ex. Cham.

Action upon a bond, the condition of which, after reciting that C. had contracted with the plaintiff to grant to him an annuity of 52*l.* for his life, for the consideration therein mentioned, and that the defendant had agreed to join with C. in the bond as his surety for the payment of the annuity, was, that if C. or the defendant should pay the annuity, the bond should be void; and there was a covenant by the defendant that C. and the defendant, or one of them, would pay the annuity. *Breaches*, non-payment of six quarterly payments. *Plea*, that the defendant became bankrupt, and that the claim accrued to the plaintiff before such bankruptcy:—*Held*, that the defendant's liability under the bond and condition was that of a surety only; that C. was the principal and grantor of the annuity; that the plaintiff had not a debt provable under the defendant's bankruptcy, under s. 175 of the 12 & 13 Vic. c. 106, and therefore his certificate was no bar to the action; and that the bond was not a contingent liability under s. 178. (Id.)

A debt on a guarantee, which did not become absolute before the bankruptcy, is provable as a contingent debt. *Ex-parte Myers*, 2 Deac. & Chit. 251; 1 Mont. & Bligh, 229. *Ex-parte Simpson*, 1 Mont. & Ayr. 541; 3 Deac. & Chit. 792. In July, 1850, A. B. gave C. a guarantee (continuing) for 200*l.* for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance, exceeding 200*l.*, was due in respect thereof. In June, 1853, B. became bankrupt, and duly obtained his certificate:—*Held*, that B.'s liability upon this guarantee was not a contingent liability within s. 178 of the 12 & 13 Vic. c. 106, and, consequently, that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B. *Boyd v. Robins*, 5 C. B. (N. S.) 597; 5 Jur. N. S. 915; 28 L. J. C. P. 73; 7 W. R. 78.—Ex. Cham.

A claim under a guarantee for a sum certain, when due, was provable as a debt, and before it was due it was provable as a debt due on a contingency under 6 Geo. 4, c. 16,

s. 56. *Re Willis*, 19 L. J. Ex. 30; 4 Ex. 530. A. bought wood from B., payable, by the buyer's acceptance, at eight months; and one half of the sum was secured by the guarantee of C. Before the bill became due a fiat in bankruptcy issued against C., and a few days afterwards one against A.; and no dividend was declared under either fiat. The bill was dishonoured when due:—It was held, that the claim upon the guarantee was provable as a debt against the estate of C. (Id.)

In a continuing limited guarantee there was a proviso that, if the creditors received a dividend from any estate of the principal debtor, it should not be taken in discharge of the guarantee, but that the creditors should be entitled to recover on the guarantee to the full extent of the limit notwithstanding. On the bankruptcy of the principal debtors the creditors proved, and before receiving any dividend obtained payment from the guarantee to the extent of the limit:—It was held, that the guarantors were not entitled to stand in the place of the creditors as to so much of the proof as was equal to their payment. *Ex-parte Miles, re Porter*, 1 De Gex, 623.

A contingency depending upon the separation of husband and wife (*Parker v. Ince, ante*, p. 263), or of a widow's not marrying again, would not be within the section. *Ex-parte Davis*, Mont. 121, 297. The rule was (but *see* now s. 153, 24 & 25 Vic. c. 134, and *post*, Unliquidated Damages), that no claim upon the breach of a contract is a contingent debt if the intervention of a jury is necessary to ascertain the amount. Thus, damages for a breach of covenant in not building a certain number of houses within a given time (*Barrister v. Scott*, 6 T. R. 489); in not having full power and authority to sell a ship (*Hammond v. Toulmin*, 7 T. R. 612); in not indemnifying the assignor of a lease from covenants contained in it (*Auriol v. Mills*, 4 T. R. 94); a claim on a charter-party for not supplying a cargo (*Woolley v. Smith*, 3 C. B. 610); or on a contract to accept goods on a given day, whether the refusal be before or after the bankruptcy. *Bowman v. Nash*, 9 B. & C. 145. *Green v. Bicknell*, 8 Ad. & E. 701. The liability to calls on a railway company are not provable debts. *South Staffordshire Railway v. Burnside*, 5 Ex. 129. See *Re Gales*, L. J. Bank. 9. *Hope v. Booth*, 1 B. & Adol.

Proofs upon contracts to replace stock upon a given day have, however, been held admissible (*Ex-parte Day*, 7 Ves. 301), and upon a covenant in a marriage settlement to assign stock to trustees upon request (*Ex-parte Campbell*, 16 Ves. 244), but these are to be regarded rather as exceptions. See *Green v. Bicknell*, 8 Ad. & E. 701. As to contracts of indemnity, see *Fullop v. Ebers*, 1 B. & Adol. 698; and s. 153, 24 & 25 Vic. c. 134, *post*.

[1] *Liabilities contingent on the Bankruptcy may be admitted to claim, and after the contingency has happened, and the demand been ascertained, Demand may be proved.*—By s. 178, 12 & 13 Vic. c. 134, "that if any trader who shall be a bankrupt after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends: Provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed: Provided also, that where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such time, and if the court shall think fit, be expunged either in whole or in part from the proceedings."

The defendant being indebted to the plaintiff, assigned to him as security an insurance on the defendant's life, and an insurance on the life of the defendant's wife, and covenanted, first, to pay the premiums; and, secondly, that if he did not pay them, the plaintiff might pay them, and the defendant would repay the plaintiff. The plaintiff sued the defendant on this covenant, assigning as breaches, first, that the defendant had not paid the premiums; and, secondly, that he had not paid to the plaintiff premiums paid by the plaintiff in the defendant's default. The defendant pleaded his bankruptcy and certificate, averring that they had occurred after the execution of the deed of assignment, but not that they had occurred after the breaches had taken place. On demurrer held (affirming the judgment of the Queen's Bench), that the plea gave no answer to the breach first assigned, the liability of the defendant to pay damages upon the covenant to pay premiums not being "a liability to pay money upon a contingency" within s. 178 of 12 & 13 Vic. c. 106. *Warbury v. Tucker* (in error), 4 Jur. N. S. 1142.—Ex. Cham.

As to the breach secondly assigned, *quære*, whether the second covenant was "a liability to pay money upon a contingency" within s. 178? (Id.)

In *Ex-parte Firbank* (15 L. T. 504), judg-

ment was signed under an award on the 15th of July, 1850, and costs taxed; on the same day the petition of bankruptcy was adjudicated upon and filed:—It was held that the contingency of the award not being set aside, &c. was a contingency within this section.

The obligation to pay calls on railway shares did not create a debt payable on a contingency, but was only a contingent liability. *South Staffordshire Railway Company v. Burnside*, 5 Ex. 129. There was no provable debt where in a reference in a cause the arbitrator awarded a certain sum to be paid by a party who, before the costs are taxed, became a bankrupt. *Haswell v. Thorogood*, 7. B. & C. 705. See *Boyd v. Robins*, 4 Jur. N. S. 1084; 27 L. J. C. P. 209.

[1] By s. 152, 24 & 25 Vic. c. 134, "if any debtor shall, at the time of adjudication, be liable upon any bill of exchange or promissory note in respect of distinct contracts as member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

[2] *Plaintiff or Defendant obtaining Judgment, &c. entitled to prove for Costs, &c.*—By s. 181, 12 & 13 Vic. c. 106, "that if any plaintiff in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt for any debt or demand in respect of which such plaintiff or petitioner shall prove under the bankruptcy, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy; and if any defendant shall have obtained any judgment, decree, or order in any such action or suit, or in the matter of any such petition, against any person who shall thereafter become bankrupt, such defendant shall be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy."

Costs at law after judgment bear relation to the debt; therefore, if the debt may be proved, so may the costs (*Scott v. Ambrose*, 3 M. & S. 326); whether of actions of *tort* or *contract*. *Longford v. Ellis*, 1 H. Black. 29 n.; S. C. 14 East, 202 n. S. P. *Beeston v. White*, 7 Price, 209. Hence, if a party become bankrupt after final judgment, the costs are in all cases provable. *Gulliver v. Drinkwater*, 2 T. R. 261. So, if between the period of a nonsuit at *nisi prius* and a judgment on the same *in bank*, plaintiff become bankrupt, the costs of the nonsuit are provable under the commission (*Watts v. Hart*, 1 B. & P. 134. *Contrà*, *Walker v. Barnes*, 1 Marsh. 346; S. C. 5 Taunt. 778), though the plaintiff become bankrupt before the taxation. *Hurst v. Mead*, 5 T. R. 365. So are the costs of a *scire facias* to revive a judgment provable under the defendant's commission, if the judgment itself be provable. *Phillips v. Brown*, 6 T. R. 282. So, where a bankrupt sued the commissioners for false imprisonment, and they obtained judgment for costs, and that commission was superseded, and another issued on the same act of bankruptcy under which he obtained his certificate, such costs were holden a debt provable under the latter commission. *Holding v. Impey*, 1 Bing. 189; S. C. 7 Moore, 614. And the same rule applies to the costs of a writ of error. *Graham v. Benton*, 2 Stra. 1196. S. P. *Phillips v. Brown*, 6 T. R. 282. And formerly, even where the verdict was obtained after the bankruptcy, the costs were considered provable. *Lewis v. Piercy*, 1 H. Black. 29. But where a verdict was found for defendant, and the plaintiff afterwards became bankrupt, but before judgment, the costs were holden not provable. *Walker v. Barnes*, 1 Marsh. 346; 5 Taunt. 778.

And the court were of the same opinion, where an action was brought against a bankrupt as executor, after the commission, and he incurred costs by a false plea. *Howard v. Jemmett*, 3 Burr. 1368; S. C. 1 Black. 400.

The following rules are laid down in Deacon & De Gex's *Bankruptcy*, p. 299:—

"1st. Where the verdict is not obtained until after the act of bankruptcy, the costs can in no case be proved, whether the action is on a contract or in tort; unless, indeed, the verdict can be said to be a dealing or transaction with the bankrupt, within the meaning of the 2 & 3 Vic. c. 29 (*see* now s. 133).

"2d. Where the verdict is before the bankruptcy, and judgment is obtained before the issuing of the fiat, though not till after the act of bankruptcy, then the costs in actions, both of contract and of tort, may be proved as a debt contracted before the issuing of the fiat, provided the creditor, when judgment was obtained, had no notice of the act of bankruptcy.

"3d. Where the action is on a contract, and there is a verdict before the issuing of the fiat, then, although judgment be not obtained until after the issuing of the fiat, the costs are provable, as being consolidated with the original debt by the verdict, though not ascertained until the judgment.

"4th. But where the action is in tort, and the judgment is not obtained until after the issuing of the fiat, then, as there is no debt whatever with which the costs can be incorporated until the judgment, the costs in this case cannot be proved."

Costs, of which Payment may be enforced by Process of Contempt.[1]
Covenants.[2]
Creditor having Security. *See* Security, Creditors having.
Damages, Ascertained.[3]
Damages, Unliquidated.[4]
Equitable Claims.[5]
Executors.[6]
Felony or Fraud, Debts arising out of.[7]
Femes Covert. *See* Husband and Wife.
Friendly Societies.[8]

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[1] By s. 149, 24 & 25 Vic. c. 134, "a person entitled to enforce against the bankrupt payment of any money, costs, or expenses by process of contempt issuing out of any court, shall be entitled to come in as a creditor under the bankruptcy, and prove for the amount payable under the process, subject to such ascertaining of the amount as may be properly had by taxation or otherwise."

[2] A covenant to pay money at a time certain after the bankruptcy may be proved. *Charlton v. King*, 4 T. R. 156. But a covenant to do any act, except the payment of money, as to build houses (*Banister v. Scott*, 6 T. R. 489. S. P. *Hancock v. Entwistle*, 3 id. 435); or to indemnify (*Ludford v. Barber*, 1 id. 90. S. P. *Mayor v. Steward*, 4 Burr. 2443); or a covenant that the vendor had authority to sell a ship free from all incumbrances (*Hamond v. Toulman*, 7 id. 612). But *see* Contingent Debt, Liabilities, and Unliquidated Damages.

[3] A demand in the nature of damages capable of being liquidated, and ascertained at the time of the bankruptcy, if the creditor can swear to the amount, may be proved as a debt. (Abolished, T. T. 1 Wm. 4.) *Johnson v. Spiller*, 1 Dougl. 167. So a demand in trover, if for a liquidated amount (id. 168), or damages liquidated by a security, as a note given upon compromising an action for seduction, may be proved under a commission. *Ex-parte Mumford*, 15 Ves. 289. So, if a demand be partly liquidated and partly not, as the difference of price upon a re-sale, creditors having a security may apply it first to the former, then to the latter, and may prove for the residue. *Ex-parte Hunter*, 6 Ves. 94.

[4] *Proof in respect of Unliquidated Damages.*—By s. 153, 24 & 25 Vic. c. 134, "if any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be provable as if a debt due at the time of the bankruptcy: Provided, that in case all necessary parties agree, the court shall have power to assess such damages without the intervention of a jury or a reference to a court of law."

Formerly, where the damages could only be ascertained by the intervention of a jury, they could not be proved. *Goodtitle v. North*, 2 Dougl. 562. S. P. *Gulliver v. Drinkwater*, 2 T. R. 261. S. P. *Moggridge v. Davis*, Wightw. 16.

[5] Equitable debts may be proved. 1 Sch. & Lef. 48; 3 Ves. & B. 40; 2 Rose, 196.

[6] An executor may prove a debt due to the testator. 2 Bro. C. Rep. 610.

A vested legacy may be proved against the estate of an executor who has received or admitted assets. *Walcott v. Hall*, 3 Bro. C. Rep. 305; S. C. 1 Cooke, B. L. 483, 8th ed. And if an executor misapply the testator's assets, the amount of such *devastavit* may be proved. 1 Cooke, B. L. 460. So proof against husband of executrix allowed, he having admitted assets in answer to a bill filed against them. 1 Sch. & Lef. 173.

[7] Not provable. 2 Deac. 179; 3 Deac. & Chit. 525.

[8] By s. 167, 12 & 13 Vic. c. 106, "that if any person already appointed or employed, or who may be hereafter appointed to or employed in any office in any society established under any of the acts relating to *friendly societies*, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall have been or shall become bankrupt, the court shall, upon application made by the order of any such society, or any committee thereof, or the major part of them, assembled at any meeting thereof, order payment and delivery over to be made to such society, or to such person as such society or committee may appoint, of all monies and other things belonging to such society, and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due which the bankrupt received by virtue of his said office or employment, before any other of his debts are paid or satisfied." It does not apply to building societies nor to country bankers receiving monies for transmission to their London agent for investment (*Ex-parte Whipham*, 3 Mont. D. & D. 564), nor bankers receiving from the treasurer pursuant to the rules, although they are named the bankers of the society. *Ex-parte Harris*, 1 De Gex, 172. See *Ex-parte Orford*, 1 De Gex, Macnaght. & Gord. 483; 21 L. J. Bank. 31. The money must come into the trader's hands by virtue of the office, the word "employment" not extending the sense of office; but if it is within this description, the omission of the society to set aside the transaction, on the ground of its being a breach of trust or otherwise, will not deprive them of their priority. *Ex-parte Burge*, 1

Guardian and Ward.[1]
Husband and Wife.[2]
Instalments, Debts payable by.[3]
Insurances.[4] *See ante*, Bottomry; and *post*, Respondentia Bonds.
Interest.[5]
Joint and several Demands. *See post*, Partners.
Joint or separate Demands.[6]

Mont. D. & D. 540. *See* also *Ex-parte Riddell*, 3 id. 80. *Ex-parte Stamford Friendly Society*, 15 Ves. 280. *See* 19 L. J. Bank. 18.

[1] A guardian may prove a debt due to the infant. *Ex-parte Bolton*, 1 Atk. 251. *Walcot v. Hall*, 2 Bro. 305.

[2] If a woman be indebted and she marries, and her husband become bankrupt, her debts are provable under his estate. *Miles v. Williams*, 10 Mod. 243.

[3] *Proof when Debt payable by Instalments.* —By s. 131, 24 & 25 Vic. c. 134, "if any bankrupt shall have contracted, before the filing of a petition for adjudication, any debt payable by way of instalments, the creditor may prove for the amount of such instalments remaining unpaid at the time of such petition."

[4] A life policy made before, and forfeited after the bankruptcy of the insurer, is provable under the commission issued against him. *Cox v. Liotard*, 1 Dougl. 166.

Proof for Premiums upon Policies of Insurance.—By sect. 154, 24 & 25 Vict. c. 134, "if any bankrupt shall, at the time of adjudication, be liable by reason of any contract or promise to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the court to set a value upon his interest under such contract or promise; and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

[5] By s. 180, 12 & 13 Vic. c. 106, "that upon all debts or sums certain, payable at a certain time or otherwise, whereupon interest is not reserved or agreed for, and which shall be overdue at the issuing of the fiat or filing of the petition for adjudication of bankruptcy, and provable thereunder, the creditor shall be entitled to prove for interest, to be calculated, at a rate not exceeding four pounds per centum per annum, up to the date of the fiat or the filing of such petition, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment."

[6] *Joint estate* is that in which the partners are jointly interested for the purposes of the partnership at the time of the bankruptcy. *Separate estate* is that in which the partners are each separately interested at the time of the bankruptcy. It is not unusual to confine the term "separate estate" to that part of the partner's property which is unconnected with the partnership. But it may be applied to property used for the purposes of a partnership, if belonging to one or more partners, to the exclusion of the rest. *Ex-parte Hamper*, 17 Ves. 404; Coll. on Part. 595, 596, 2d ed.

Separate debts are those for which the creditor has a remedy at law against such partner *only* of the firm as contracted them. Joint debts are those which can be recovered by action, in which all the partners constituting the firm must be defendants. (Id.)

A. B., in consideration of one per cent, guaranteed to C. D. & Sons the payment of one half of the price of certain bales of wool purchased by W. & E., who had given their acceptance at eight months for the full amount to C. D. & Sons. W. & E. and A. B. severally became bankrupt. A. B. had not obtained his certificate, and no dividend had been declared when the bill was dishonoured. A proof by C. D. against the estate of A. B. for the amount guaranteed was tendered before the commissioner and refused, but on appeal was allowed. *Ex-parte Brook*, 12 Jur. 411; 17 L. J. Bank. 8.

A. & B. were partners. B., to obtain capital for the business, borrowed money, and for security entered into a bond, in which C. & D. became his securities for the re-payment of the money and interest, and also effected and deposited with the lenders a policy of insurance on his life. One of the conditions of the bond was, that the money should be repayable on either B., C., or D. becoming bankrupt. The two partners entered into a deed of covenant to indemnify C. and D., the sureties, from all loss by reason of their entering into the bond. A. & B. became bankrupt, and C. & D. were called on for payment of the whole money, which C. paid, together with interest and expenses:—*Held*, that C. was not entitled to prove for the money as a creditor on the joint estate. *Ex-parte Meyer*, 12 Jur. 447.

A., B., & C., who are in partnership, are joint owners of a ship with D., the managing owner, who contracts a debt with the petitioners for goods supplied for the use of the ship. A., B., & C. become bankrupt:—*Held*, that the petitioners could not prove against their joint estate, but only against the separate estate of each of the bankrupts. *Ex-parte Benson*, 2 Mont. D. & D. 750.

A. & B. dissolve their partnership, when B. assigns all the joint property to A., among which are debts due to the firm to the amount of 60*l.*, but no notice of assignment is given to the debtors. A. & B. severally become

Joint-stock Company.[1]
Judgments.[2]
Legatees. *See* Executors.
Limitation, Debt barred by.[3]
Marriage Settlements.[4]
Mutual Credit and Set-off.[5]

bankrupt:—*Held*, that a joint creditor, who had proved under the separate fiat against A., was entitled to receive dividends on his proof. *Ex-parte Taylor*, 2 Mont. D. & D. 753.

A trader makes a promissory note as a surety for a debt due to one of the creditors of a firm. The firm and the trader become bankrupt, and the creditor proves against the estate of the trader on the note, and against the separate estate of a partner in the firm on the debt. A dividend is declared and paid on the former proof, but not on the latter:—*Held*, that the assignees of the trader were not entitled to an order to prove against the joint estate of the firm for the amount of the dividend which they had paid on the promissory note. *Ex-parte Brown*, 2 Mont. D. & D. 718; 6 Jur. 1021.

[1] By s. 164, 12 & 13 Vic. c. 106, "all bodies politic, and public companies incorporated, or authorised to sue or bring actions either by charter or act of parliament, may prove by an agent, provided such agent shall in his deposition swear that he is such agent, and that he is authorised to make such proof." *See* 12 L. J. Bank. 13; 1 Mont. D. & D. 16, 648; 2 id. 201, 368.

[2] Where, in an action of *tort* for damages, a verdict was taken subject to an award, and the defendant became bankrupt, it was holden a debt provable as a debt of record. *Beeston v. White*, 7 Price, 209.

Formerly a *cognovit* was not provable (*Wyborne v. Ross*, 2 Taunt, 68); but now a *cognovit* given after an act of bankruptcy, but before commission, is discharged by the certificate (*Fansandon v. Corsbie*, 1 Chit. R. 16). But a debt due on a judgment, signed in an action for damages after an act of bankruptcy by the defendant, and commission issued, though the verdict was before the bankruptcy, is not provable. *Buss v. Gilbert*, 2 M. & S. 70.

[3] Is not provable. *Ex-parte Wilson*, 1 Mont. D. & D. 586; id. 289. *Re Emmings*, 1 Fonb. 34

[4] Marriage being in law a valuable consideration, contracts to settle money in consideration of it, made before marriage, or after marriage in pursuance of articles made before, create debts, provable in the same manner and to the same extent as contracts founded upon any other valuable consideration. Therefore a covenant or bond by the husband to pay or vest in trustees, during his lifetime, a sum of money for the benefit of the wife or issue after his death (*Ex-parte Granger*, 10 Ves. 349. *Ex-parte Dicken*, Buck, 115. *Ex-parte Winchester*, 1 Atk. 177. *Ex-parte Campbell*, 16 Ves. 244. *Ex-parte Gardner*, 11 Ves. 40. *Montefiori v. Montefiori*, 1 W. Black. 363; and see *Ex-parte Brown*, Cook, 240. *Shaw v. Jakeman*, 4 East, 201); or to pay or invest it upon the death of himself or wife, whichever should first happen (*Ex-parte Smith*, Cook, 238. See *Brandon v. Brandon*, 2 Wils. C. C. 14); or upon the death of himself, with interest in the meantime, and default be made in payment of the interest before his bankruptcy (*Ex-parte Elder*, 2 Madd. 282), may be proved upon the estate of the husband, if he afterwards become bankrupt.

[5] *Mutual Debts and Credits may be set off, notwithstanding prior act of Bankruptcy.*—By s. 171, 12 & 13 Vic. c. 106, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

This section is the same as 6 Geo. 4, c. 16, s. 50.

The object of the statute is, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side, and the account is to be stated as between merchant and merchant, and whatever would, in ordinary practice, be a pecuniary item in such account, should be the subject of set-off. *Per Tindal, C. J.: Gibson v. Bell*, 1 Bing. N. C. 768.

There must be mutual credit existing between the parties at the time of the bankruptcy. *Boyd v. Mangles*, 16 Mee. & W. 337. The provision with respect to mutual credits is confined to debts between the bankrupt and to other parties, or to transactions necessarily ending in debts. *Rose v. Hart*, 2 Moore, 547; 8 Taunt. 499. *Easum v. Cato*, 5 B. & A. 861. Therefore a guarantee, being merely a contract to indemnify against contingent damages, cannot form the subject of a mutual credit. *Sampson v. Burton*, 2 B. & A. 89; 4 Moore, 515. *Rose v. Sims*, 1 B. & Adol. 521.

The distinction between the right of set-off under the bankruptcy statutes, and the statutes of set-off is, that under the former the object is that substantial justice shall be done; and under the latter, the object is to prevent cross-actions between solvent parties. If the debts are legal debts, due to each in his own right, whether as trustee or not, it would be sufficient for the ordinary plea of

set-off, but under the bankruptcy statutes a debt legally due to the debtor from the bankrupt, if due to him as trustee for another, although recoverable in a cross-action, cannot be set off. It depends upon the right to the beneficial interest. Hare, 176.

Debts to be set off must be due in the *same right*, and a debt due to an executor cannot be set off against a debt due from him in his own right. *Bishop v. Church*, 3 Atk. 601. *See* 10 Bing. 310. Nor a debt due to a wife *dum sola* against a debt due from the husband. See *Yates v. Sherrington*, 11 Mee. & W. 42; 12 id. 855. Therefore a debtor by bond to a separate estate of a deceased partner, cannot set off his bond-debt against acceptances for which he has become liable to the partnership estate (*Stainforth v. Fellowes*, 1 Marsh. 184); but a debt to a surviving partner may be set off against a debt due from him in his own right. *Slipper v. Stidstone*, 5 T. R. 493. In actions for unliquidated damages, as for not applying money received to meet the bankrupt's acceptance, there can be no plea of set-off or mutual credit. *Bell v. Carey*, 8 C. B. 887. See *Alsager v. Currie*, 11 Mee. & W. 14; 12 L. J. Ex. 164.

An agreement for a lease of a mill provided that the machinery on the mill at the commencement and expiration of the tenancy should be valued, and the increase or diminution in value paid by the lessor or lessee, as the case might be. The lessee became bankrupt, having improved the machinery. The assignees elected not to continue the tenancy, and the value of the improvements was ascertained:—*Held*, that against this amount the landlord might set off the rent, and also a demand for goods sold and delivered. *Hope, in re Ex-parte Hanson*, 3 De Gex & J. 92; 4 Jur. N. S. 464; 27 L. J. Bank. 40.

Also, where a debtor to a bankrupt's estate has a fair subject of set-off the assignees shall not deprive him of it. Therefore, where a country banker became bankrupt, and at the time of his bankruptcy he and another country banker in the same town held notes and other securities of each other to nearly the same amount, and immediately after the private meeting, where the banker was declared bankrupt and a provisional assignee appointed, the provisional assignee presented the notes of the other bankrupt for payment, partly at the bank in the country and partly at the house of his agent in London, and was paid:—It was holden that the banker whose notes were so paid might recover the amount in an action for money had and received against the provisional assignee. *Edmeads v. Newman*, 2 D. & R. 568; 1 B. & C. 418; and see *Ex-parte Rawson*, Jac. 274. Where one of the partners in a banking-house drew a bill, which was accepted by one of the customers, and indorsed over to the banking-house, who discounted it, and indorsed it over to third parties, and before the bill became due the bankers became bankrupt, having money in their hands belonging to the acceptor of the bill, this was held to be a case of mutual credit, under the 5 Geo. 2, c. 30, s. 28, and therefore that the acceptor of the bill could set off against the assignees the amount of the money due to him from the bankers at the time of the bankruptcy. *Bolland v. Nash*, 2 M. & R. 189; 8 B. & C. 105. And where the bankrupt agreed to set off a debt owing to him, against a debt he owed to the debtor's brother, and had set off the debt in his books, it was held to bar the assignee's claim to the debt. *Cuxun v. Chadley*, 1 Car. & P. 174. But this clause only applies to debts, or transactions which must end in specific demands. See *Rose v. Hart*, 2 Moore, 547; 8 Taunt. 499.

Nor can a party avail himself of his own wrongful act as establishing a mutual credit within the statute, as where a solicitor, with whom bills of exchange are deposited by his debtor for a specific purpose, detains them against good faith. *Key v. Flint*, 8 Taunt. 21. *Buchanan v. Findlay*, 9 B. & C. 738.

An accommodation acceptance is a credit given by the acceptor to the party accommodated (*Smith v. Hodson*, 4 T. R. 211); and an accommodation indorser, who pays the amount after the bankruptcy, may set it off. *Hulme v. Muggelstone*, 3 Mee. & W. 30. An agreement to pay the bankrupt for goods sold prompt payment in two months, or by acceptance, is a claim against which a debt due from the bankrupt may be set off. *Groom v. West*, 8 Ad. & E. 758.

Mutual credits are credits which must either terminate in debts or have a natural tendency to terminate in debts, not claims differing in nature from a debt. *Rose v. Hart*, 8 Taunt. 499; 2 Smith's *Lead. Cas.* 179.

Hence where, upon the dissolution of partnership, the debt of the retiring partner was ascertained upon the supposition that all the joint debts were paid, and the retiring partner assigned his share of the partnership assets, upon an agreement that he should pay the continuing partners his balance, and that the continuing partners should pay the outstanding debts of the firm, and afterwards the continuing partners became bankrupt; the liability of the retiring partner to pay an outstanding debt of the original partnership was held not to be a debt of mutual credit, so as to enable him to set it off against the claim of the assignees for his ascertained balance under the agreement. *Abbott v. Hicks*, 5 Bing. N. C. 579. *See* also *Rose v. Sims*, 1 B. & A. 521. As to what guarantees may be the subject of proof, *see* ss. 173–177.

If the credit be given before the notice of the act of bankruptcy or petition, the accrual of the debt afterwards will be immaterial.

[1] *On Bankruptcy of Agent intrusted with goods, but which have been pledged by him, Owner may prove for Amount paid to redeem, or for Value if the goods be unredeemed.*—By s. 179, 12 & 13 Vic, c. 106, "that in case of the bankruptcy of any agent intrusted with the possession of goods within the meaning of an act passed in the parliament holden in the fifth and sixth years of the reign of her present Majesty, intituled 'An Act to amend the Law relating to Advances *bonâ fide* made to agents intrusted with Goods,' the owner of any goods so intrusted to such agent, and which shall have been redeemed by such owner in manner provided by the said act after having been pledged by such agent, shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy, or in case such goods shall not be so redeemed the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge, and shall, if he shall think fit, be entitled in either of such cases to prove for or set off the sum so paid, or the value of such goods, as the case may be." *See* 5 & 6 Vic. c. 39, s. 1.

[2] Money received by an overseer of a parish cannot be proved under the commission. *See* 1 T. R. 360; 6 Ves. 811. *Ex-parte Burwash*, 1 Pr. R. 60; 19 L. J. M. C. 115.

Rates and taxes due by the bankrupt, or received by the bankrupt as collector, are provable. 2 B. & B. 388; 5 M. & S. 508; 6 Ves. 811.

Payment of One Year's Parochial Rates.—By s. 156, 24 & 25 Vic. c. 134, the court, out of the estate and effects of the bankrupt, shall order payment of all such parochial rates as may be due from him at the time of his being adjudicated a bankrupt, provided such rates have become due during the twelve months immediately preceding the bankruptcy.

[3] By s. 129, 12 & 13 Vic. c. 106, "that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of the filing of such petition, but the landlord or person to whom the rent shall be due shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available."

Rent could not formerly be proved until actually due (Roots, B. L. 121); therefore, if the tenant for life dies at nine at night on the 29th of September, he is not entitled to the quarter's rent which became due on that day. 2 Madd. 268. As long as the goods remain on the premises of the bankrupt, the landlord may distrain for his rent, notwithstanding the assignment. 1 Atk. 103; 1 Mont. B. L. 242. But if the landlord permits the goods to be sold, or to be removed from the premises without distraining, he loses his remedy, and can only come in as a creditor. 1 Atk. 103, 104; 1 Bro. C. C. 427. And if a trader after an act of bankrupcy pays rent to his landlord who is about to distrain, it is a good payment, and cannot be recovered by the assignees. *Stephenson v. Wood*, 5 Esp. N. P. C. 200.

A landlord, in order to enforce his claim for rent in arrear against the bankrupt's goods, seized by the sheriff under a *fi. fa.*, must distrain; it is not sufficient that he gives notice to the sheriff before the sale under the 8 Anne, c. 14, s. 1, as that statute does not apply to commissions of bankrupt. *Gethin v. Wilkes*, 2 Dowl. 189. Even where the landlord distrained before bankruptcy, and the goods were replevied, and pending the replevin both the tenant and his pledges became bankrupt, and the tenant's assignees possessed themselves of the goods replevied, it was holden that the landlord had lost his lien upon them, and must prove for his rent under the commission (*Bradyll v. Ball*, 1 Bro. 427): but he cannot do both; he cannot distrain and prove for the same rent. *Ex-parte Grove*, 1 Atk. 103.

M., a trader, committed an act of bankruptcy on the 13th of December, by assigning all his goods to trustees for the benefit of his creditors, and P., an auctioneer, was put into possession by the trustees, and proceeded to make an inventory of the goods. More than three years' arrears of rent were due at that time from M. to the landlord. Upon a demand made on the 29th December by T., an agent of the landlord, of the arrears of rent so due, he was informed of the assignment having been executed, but nevertheless proceeded under a regular warrant of distress to distrain the goods upon the premises for the arrears of rent due up to Michaelmas preceding. On the 3d January P.'s clerk paid to T. the amount of rent distrained for, and expenses of the distress (the goods seized having been appraised exactly at that amount), upon an agreement that the landlord was to waive his right to distrain for the quarter's rent due at Christmas. The distress was then withdrawn, and the sum received, after deducting the expenses, paid over by T. to the landlord. On the 9th January the fiat issued against M.:—*Held*, under these circumstances, that there had been no sale of these goods by the landlord, and the money paid was either the money of the auctioneer or the trustees, and therefore that an action for money had and received was due against the landlord at the suit of the assignees. *Lackington v. Elliott*, 8 Jur. 695; 13 L. J. C. P. 153.

A landlord levied a distress for rent, and

Respondentia Bonds.[1] *See supra*, Bottomry Bonds.

School-money.[2]

Security, Creditor having.[3]

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before he sold the tenant was adjudicated a bankrupt, and then the sale took place under the distress:—*Held*, that the landlord, under 3 & 4 Wm. 4, c. 27, s. 42 (the Statute of Limitations), was entitled to six years' rent out of the produce of the sale (*Ex-parte Bayly*, 22 L. J. Bank. 26); but, as to rent due before the bankruptcy, the certificate discharges the person and goods of the bankrupt, but it does not release collateral remedies. So, where a landlord distrained goods on his tenant's premises, but not his goods, and the tenant afterwards became bankrupt and obtained his certificate, this did not operate as a release of the rent, and therefore the landlord had a right in replevin, at the suit of the owner of the goods, to avow for a return of the goods replevied. *Newton v. Scott*, 9 Mee. & W. 434; S. C. in error, 10 id. 471; and see *Phillips v. Sherville*, 9 Jur. 179.

And where an execution levied was overreached by an act of bankruptcy, the creditor was allowed to retain a payment he made to the landlord under a distress for rent. *Ex-parte Elliott*, 3 Deac. 343; 3 Mont. & Ayr. 664. But where the sheriff seized under an execution, at the suit of the landlord, for a judgment debt, after an act of bankruptcy, and sold the goods on the day the commission issued and the day after, and afterwards paid the landlord a year's rent, it was holden that this payment to the landlord could not be justified by the sheriff, and that the assignees had a right to recover it from him. *Lee v. Lopez*, 15 East, 230.

Proof for Part of Rent and other Payments.—By s. 150, 24 & 25 Vic. c. 134, "in all cases in which the bankrupt is liable to pay any rent or other payment falling due at fixed or stated periods, and the adjudication of bankruptcy shall happen at any time other than one of such fixed or stated periods, it shall be lawful for the person entitled to such rent or other payment to prove for a proportionate part thereof up to the day of the adjudication of bankruptcy, in such manner as if the said rent or payment grew due from day to day, and not at such fixed or stated periods as aforesaid."

This section does not appear to affect the 129th section of the 12 & 13 Vic. c. 106, which restricts the right of a landlord levying a distress on the bankrupt's goods after an act of bankruptcy to one year's previous rent, but allows him to prove for the overplus due as an ordinary creditor.

[1] A. becomes bound, as surety with B., in a respondentia bond, upon a ship bound to the East Indies, conditioned to be void upon payment within thirty days after arrival in the River Thames, or at the end of thirty-six calendar months, or upon an utter loss. B. assigned all his goods on board to A. upon trust—in the first place to pay a debt owing from himself to A., and in the next place to pay off all the debts for which he had become surety on the respondentia bond. Before the time specified in the bond A. becomes bankrupt; the assignees receive a sum of money on account of the proceeds of the goods:—It was ordered, that, after deducting the amount of A.'s private debt, the residue of the proceeds, and all future receipts, should be divided among the respondentia creditors only. 1 Rose, 130.

[2] School-money for the education of a child, payable half-yearly, is not a *debitum in præsenti*, so as to be provable under a commission against the father, though the child is taken home for the holidays before the bankruptcy, and before the expiration of the half year. *Parslow v. Dearlove*, 4 East, 437; S. C. 1 Smith, 281; S. C. 5 Esp. N. P. C. 78.

The plaintiff, a schoolmaster, sued the defendant for a quarter's schooling of defendant's son, the payment of which was contracted to be made quarterly. The defendant became bankrupt during such quarter:—*Held*, that the defendant's liability to pay on the quarter-day was not a liability on a contingency within the 178th section of the Bankruptcy Consolidation Act, nor a debt payable after the bankruptcy within the 172d section of that act, and that the plaintiff's claim was, therefore, not barred by the defendant's certificate. *Thomas v. Hopkins*, 29 L. J. C. P. 187.

[3] *Creditors having Security not to receive more than other Creditors.*—By s. 184, 12 & 13 Vic. c. 106, "that no creditor having security for his debt, or having made any attachment in London or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of, or lien upon any part of the property of such bankrupt before the date of the fiat or the filing of a petition for adjudication of bankruptcy: Provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, *cognovit*, or consent to a judge's order declared to be null and void by any provision of this act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, *cognovit*, or consent."

This is a substitution for s. 108 of 6 Geo. 4, c. 16: the words "and sale," were not in that statute. The section means that no person who has issued an execution shall, whether in an adverse action or not, take any benefit from it, unless he *sells* before the petition for adjudication. *Hutton v. Cooper*, 6 Ex. 159; 20 L. J. Ex. 123. *Parke, B.*, observed, that the consequences of this

section of the act may be very serious, for no plaintiff who has issued execution against a person who is liable to become bankrupt can possibly allow of any delay, but must call on the sheriff to complete the execution by an immediate sale. And this, it is presumed, would apply to an extent at the suit of the crown. If the goods were sold in bulk, and not separated and appropriated at the time of the petition, the creditor will be held to have security within this section. *Ward v. Dalton*, 7 C. B. 643.

This clause refers to legal as well as equitable mortgages.

The creditor must be careful not to prove for the whole debt without regard to his security, whether by mortgage or lien, as he will be held thereby to have abandoned his security, and permission to withdraw the proof and set up the security will not in general be given. See *Grugeon v. Gerrard*, 4 You. & C. 131. *Ex-parte Solomon*, 1 Glyn & J. 25. *Ex-parte Spottiswoode*, 1 Fonb. 20. The security must either be realised or given up before proof for dividend, but it may be valued to enable the creditor to prove for the difference, for the purpose of voting in the choice of assignees, &c. *Ex-parte Nunn*, 1 Rose, 322. But this rule only applies to securities on the estate of the bankrupt alone, and therefore he may retain the security of a third person, or a joint security from the bankrupt, and any other person (*Ex-parte Bennett*, 2 Atk. 528), even the wife of the bankrupt. *Ex-parte Hedderley*, 2 Mont. D. & D. 487.

If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up or realising his security. *Ex-parte Bennett*, 2 Atk. 527. *Ex-parte Parr*, 1 Rose, 76. *Ex-parte Goodman*, 3 Madd. 375. In administration under bankruptcy, the joint and separate estates are considered as distinct estates; and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. *Ex-parte Peacock*, 2 Glyn & J. 27. *Ex-parte Bowden*, 1 Deac. & Chit. 135. A creditor whose debt was secured by the joint and several covenants of two partners in trade, and also by a mortgage on part of the joint property, was admitted to prove his debt against the separate estate of each, without surrendering or realising his mortgage security. *In re Plummer*, 1 Phil. C. C. 56; 2 Mont. D. & D. 204.

The court refused to give an assignee of a bankrupt, who was also the second mortgagee of property to be sold by auction under the fiat, liberty to bid at the sale, but allowed him to name a price at which to purchase the property in case it should not be sold at the sale. *Ex-parte Holyman*, 3 Jur. C. R. 150.

The court will, at the instance of a legal mortgagee, order the sale of a part only of his security, where the remainder, from its being the subject of litigation in a chancery suit, is at the time unsaleable. *Ex-parte Wace*, 2 Mont. D. & D. 730; 6 Jur. 1069.

On a petition that the property on which an annuity is charged should be sold for the payment of the value of the annuity, the court will refer it to the commissioners to ascertain in the first instance whether the petitioner has a valid security on the premises on which the annuity is alleged to be charged. *Ex-parte Stuart*, 2 Mont. D. & D. 540.

Where a partner gives a separate security for a joint debt and becomes bankrupt, the other partners remaining solvent, the creditor may have, under the separate fiat, the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate. *Ex-parte Leicestershire Banking Company*, 1 De Gex, 292.

See a case of an assignee buying in, by mistake, a mortgaged estate of the bankrupt at a sale, under Lord Loughborough's order. On such a sale the assignees must have the conduct of it; and it is an improper practice for the sale to be conducted by the mortgagee. *Ex-parte Cuddon*, 3 Mont. D. & D. 392.

Where there have been several mortgages of different estates by a bankrupt for distinct debts to one and the same mortgagee, and the latter petitions to have a consolidated account taken of what is due on all the securities, and the amount realised by sale of all or any of the mortgaged estates, and the circumstances of the case show that such a course would be beneficial to the bankrupt's estate, the court will adopt it. *Ex-parte Berridge*, 3 Mont. D. & D. 464; 7 Jur. 1141.

Where a legal mortgagee petitions for leave to bid and not for sale, it is not the practice to give him costs. *Ex-parte Smith*, 13 Jur. 1044. *Ex-parte S. P. Martelli*, 6 Jur. Bank. 352.

An order was made, with the consent of the mortgagee of an estate of the bankrupt with a power of sale, that it should be sold in the bankruptcy. A petition was presented by the mortgagee for liberty to bid at the sale, and for payment of the costs of the application out of the purchase-money, to which the assignees consented: but held, that the petitioner was not entitled to such costs, unless the assignees would state that the petition was presented at their request. *Ex-parte Danks*, 12 L. J. Bank. C. R. 45.

Where the bankrupt and his wife executed a power of appointment of the wife's estate to a creditor as a security for a debt due from the bankrupt, it was held that the creditor might prove for the whole debt without giving up the security, it being incumbent on him to recover what he could from the bankrupt's estate before he resorted to the property of the wife. *Ex-parte Hedderley*, 2 Mont. D. & D. 487.

A creditor, on a judgment founded upon a warrant of attorney, issued execution thereon, and seized and sold the goods of the debtor under a *fi. fa.*, without notice of any act of bankruptcy committed by the debtor. On the day after the sale a fiat in bankruptcy issued against the debtor:—It was held, that the assignees were not en-

Servants. *See* Wages.
Stock-Exchange Transactions. *See supra*, Bonds. *Sureties.*[2]

titled to recover from the creditor the proceeds of the sale, inasmuch as at the time of the fiat he was not a creditor of the bankrupt, within the 6 Geo. 4, c. 16, s. 108. *Ramsey v. Eaton*, 10 Mee. & W. 22. See *Ex-parte Mudie*, 3 Mont. D. & D. 66.

[1] An arrangement between P. and M. that either party should pay or receive every fortnight the difference in value of certain railway shares, as ascertained upon each recurring settling-day, resulted in a balance in favour of P.:—*Held*, gambling transactions are not provable, upon the ground of public policy. *Ex-parte Phillips*, 2 L. T. (N. S.) 637; 3 id. 516; 6 Jur. N. S. 1273. *See* 23 Vic. c. 28.

[2] Before the 49 Geo. 3, if a surety became such before, and not called on to pay till after the bankruptcy of his principal, the money so paid was not a debt provable. But if the surety had taken from the principal a counter-security, payable at a day certain, it might have been proved.

But by s. 178, 12 & 13 Vic. c. 106, "any person who at the time of issuing the fiat, or of filing the petition for adjudication of bankruptcy, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy), if the creditor shall have proved his debt under the bankruptcy, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the bankruptcy which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the bankruptcy, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by the bankrupt, provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

The same as 6 Geo. 4, c. 16, s. 52.

Where the party is liable in the nature of a surety for what is, as between himself and the bankrupt, the bankrupt's debt, and for which he at the time of the bankruptcy ought to provide by express or implied contract, *e. g.* the acceptor for the accommodation of the bankrupt drawer (*Stedman v. Martinnant*, 13 East, 427), the words, "liable for debt" apply, and the debt is provable. But they do not apply to sureties liable for the debt of another, at the time of the bankruptcy of one of them. Such liability is a mere contingency, for until the co-surety has paid more than his share he cannot sue his co-surety for contribution. See *Clements v. Langley*, 5 B. & Adol. 372. *Wallis v. Swinburne*, 1 Ex. 203; 17 L. J. Ex. 169.

The court held, that the debt of a surety, provable by stat. 49 Geo. 3, c. 121, s. 8, under the commission, should be an actual existing debt when the commission issued. *M'Dougal v. Paton*, 2 Moore, 644; S. C. 8 Taunt. 684.

The 49 Geo. 3, enacting that the bankrupt shall be discharged of all demands at the suit of the surety in regard to his debt, in respect of such suretiship, makes the certificate a bar, not only to the recovery of the money which established the principal debt, but to any damages arising from the bankrupt's not fulfilling his engagement. *Van Sandau v. Corsbie*, 3 B. & A. 13, affirming S. C. 2 Moore, 602; S. C. 8 Taunt. 550. It has, therefore, been determined, that if upon the dissolution of a partnership a partner continuing the business covenant to indemnify the retiring partner from the debts then owing by the partnership, and the former become bankrupt and obtain his certificate, and an action is commenced against the latter upon an acceptance of the partnership, and he pays the debt and costs, no action will lie against the bankrupt on his covenant. *Wood and another v. Dodgson*, 2 M. & S. 195. So, debt paid by a surety in respect of his bond after the bankruptcy of the principal, was holden to be within the 49 Geo. 3, c. 121, s. 8, and the court considered that the bankrupt was consequently protected by the certificate, and had thereby the benefit of the general plea of bankruptcy, as if the debt had accrued before the bankruptcy. *Westcott v. Hodges*, 5 B. & A. 12.

A. as principal, and B. as surety, gave a joint and several promissory note to C. A. afterwards executed a deed of assignment for the benefit of his creditors, which contained a release by the creditors, without any reservation of their remedies against the surety. C. executed this deed with the privity and approbation of B., and on the understanding that his remedies against B. were not to be prejudiced. C., and two others with him, who were trustees of the deed, were the only creditors who executed it; and A. was soon afterwards adjudged a bankrupt, the execution of the deed being the act of bankruptcy. A few days after the execution of the deed B. committed an act of bankruptcy, and was adjudged a bankrupt:—It was held, reversing the decision of the commissioner, that C. was entitled to prove on the note against the estate of B. *Re Blakely, Ex-parte Harvey*, 1 Bank. & Ins. R. 220. *Ex-parte Springfield*, 1 id. 65. See *Lee v. Lockhart*, 3 Mylne & C. 302.

A bond was entered into by a principal and three sureties. The principal and one of the sureties compounded with their creditors, and the other two sureties became bankrupt. The obligee proved the full

amount of his debt against the separate estates of the two bankrupts, and claimed under the composition, and by those means received 20s. in the pound; but the estate of the compounding surety paid more than his contributive share:—It was held, that such estate was entitled to the benefit of the proof made by the obligee against the bankrupt surety. *Ex-parte Stokes, re Clarke and others*, 1 De Gex, 618.

The surety for a debt due to a bankrupt must pay or satisfy the whole debt before he can be allowed to prove; but the administrator of a deceased surety was allowed to enter a claim to stand until it should be ascertained whether the estate of the deceased surety could pay the debt. *Re Beaumont*, 1 Fonb. B. C. 268.

The plaintiff accepted two bills drawn upon him by the defendant for value. Before they arrived at maturity, the plaintiff being unable to meet them, it was agreed that he should accept other two bills in lieu of them, in consideration of which the defendant undertook to provide for the first two which he had negotiated; the defendant, however, failed to perform his engagement, and the plaintiff was compelled to pay all the bills. The two first bills became due before, but were not taken up by the plaintiff until after the issuing of the fiat against the defendant. In an action against the defendant for a breach of the indemnity it was held, that the bills constituted a debt of the bankrupt for which the plaintiff was liable at the time the fiat issued, within the meaning of the 52d section of 6 Geo. 4, c. 16, and consequently that the certificate was a bar. *Filbey v. Lawford*, 4 Scott, N. R. 203; affirmed on error in Exchequer Chamber, id. 611.

In 1855, R., and H. as his surety, gave to G. a bond for 2000*l*. R. gave to H. by way of indemnity a warrant of attorney. In 1858, G., without the knowledge of R., gave up the bond to H., and received in satisfaction for it a promissory note of H. for the sum remaining due; R. at the same time assigned all his property to H. in satisfaction of the liabilities under which H. had come for him. Afterwards R. became bankrupt, and the warrant of attorney and the assignment became void as against the assignees:—*Held*, that the dealings between H. and G. had not taken away the rights of H. against R., and that H. having paid the debt was entitled to prove against R.'s estate. *Ex-parte Allen, in re Roberts*, 3 De Gex & J. 447.

A creditor holding a security is entitled to apply it in discharge of whatever liability of the bankrupt debtor he may think fit. When two firms deal together, one making payments for and accepting bills for the accommodation of the other, and receiving cash and bills from the accommodated firm by way of payment of and security for the outlay and liabilities made and incurred, the question how the proceeds of the bills so remitted are to be applied must depend on the contract of the parties express or implied. In a case where, in the absence of express contract, the course of dealing might have led to a presumption that the agreement between the parties was, that the proceeds of each bill as it was paid should be applied as far as it would go in discharge of the cash balance, this presumption was not held to extend to the event of bankruptcy, or to establish any agreement which prevented the party who was in the position of a surety from insisting against the bankrupt's principal on the same rights on which he might have insisted in the absence of contract. *Ex-parte Johnson, re Bulmer*, 3 De Gex, Mac. & G. 218; 1 id. B. C. 179; 22 L. J. Bank. 65. See *Ex-parte Hunter*, 6 Ves. 94. *Ex-parte Havard and Ex-parte Ashley*, 1 Cooke's *Bankr. L.* 120, 122.

Where a surety paid to the original creditor a specific sum in discharge of his personal liability as surety after the former had proved under the commission:—*Held*, that it was not a case within the 49 Geo. 3, c. 121, s. 8, that only applying to cases where the surety had paid the whole debt or a part in discharge of the whole, and thereby stood in the creditor's place with respect to the bankrupt. *Soutten v. Soutten*, 5 B. & A. 852; S. C. 1 D. & R. 521.

A debt due from a surety, payable after the issuing of a commission against him, is provable. *Brooks v. Lloyd*, 1 T. R. 17. But before the 6 Geo. 4, if a surety's engagement was *conditional*, only to pay in *default* of the principal, the debt could not be proved against the surety, unless default had been made by the principal before the bankruptcy of the surety. *Ex-parte Adney*, Cowp. 460. Hence, where a bond was conditioned for the re-payment of money, and it had not become forfeited till after the bankruptcy of the surety, it was holden that it could be proved. *Alsop v. Price*, 1 Dougl. 160. S. P. *Hoffham v. Foudrinier*, 5 M. & S. 21.

By s. 166, 24 & 25 Vic. c. 134, "that the court, out of the estate and effects of the bankrupt, shall order payment of all duties of assessed taxes assessed on the bankrupt at the time of his bankruptcy up to the fifth day of April next after the same shall have happened (such payment not exceeding in the whole one year's assessment), and the bankrupt shall not be liable to be assessed to such duties after the said fifth day of April in respect of any article kept and used for the purposes of trade at or before the time of the bankruptcy, which article shall have been seized and surrendered and *bonâ fide* sold under the bankruptcy, and not kept or used by the bankrupt after the said fifth day of April."

The collector should prove in respect of taxes due from the bankrupt. Cooke, B. L. 121; 1 Mont. Dig. 143. *Lloyd v. Heathcote*, 2 B. & B. 388; 5 Moore, 129. Where a collector became bankrupt after having received taxes which were not paid over, one inhabitant was allowed to prove on behalf of himself and the other inhabitants. *Ex-parte Child*, 1 Atk. 111. See *Rex v. Tucker*, 5 M. & S. 508. In the case of joint collectors the solvent one must prove. *Ex-parte Muggeridge*, Co. B. L. 144. *Ex-parte Exleigh*, 6 Ves. 811.

Trustee.[1]
Unliquidated Damages. *See* Damages.
Voluntary Bonds. *See supra*, Bonds.
Wages.[2] *See* also *Apprentices, ante*, 258.

(C) *Expunging or reducing Proof by Court.*

How proof may be expunged.

By s. 155, 24 & 25 Vic. c. 134, "the court may at any time expunge or reduce a proof of debt on such application and such evidence as it shall think fit, and for that purpose may summon and examine, upon oath or otherwise, the person who has proved, and every person capable of giving evidence concerning the alleged debt, and may make such order as to the costs of any application as shall seem just." This in lieu of s. 183, 12 & 13 Vic. c. 106. *See* 1 Mont. D. & D. 586, 602; 2 id. 164; 3 id. 53; 3 Deac. 597; 8 Jur. 919.

(D) *Proving Debt an Election not to proceed against Bankrupt by Action.*[3]

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[1] Where a bankrupt, who is executor or trustee, has applied the trust-property to his own use, he ought not to be permitted to prove the amount against his own estate; but a legatee may prove on behalf of himself and the other legatees, with a direction that the dividends be paid into the bank. 2 Rose, 413. *See* 3 Mont. D. & D. 361; 1 id. 497, 643; 2 id. 113; 12 L. J. Bank. 5.

[2] *Court may order Three Months' Wages or Salary to Clerks or Servants.*—By s. 168, 24 & 25 Vic. c. 134, "that when any bankrupt shall have been indebted at the time of issuing the fiat or filing the petition for adjudication of bankruptcy to any servant or clerk of such bankrupt in respect of the wages or salary of such servant or clerk, it shall be lawful for the court, upon proof thereof, to order so much as shall be so due, not exceeding three months' wages or salary, and not exceeding thirty pounds, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove for any sum exceeding such amount."

A longer period of service than that of a mere weekly hiring was intended by the 48th section of 6 Geo. 4, c. 16; but a servant hired for a year, at a certain sum payable weekly, is within the act. *Ex-parte Collier*, 4 Deac. & Chit. 520, correcting *Ex-parte Skinner*, Mont. & Bligh, 417; 3 Deac. & Chit. 332. *Ex-parte Humphreys*, 3 Deac. & Chit. 114. A person engaged as a traveller at an annual salary comes within the clause. *Ex-parte Neal*, Mont. & Mac. 194. So does a mate of a vessel, at certain wages, hired by the master, who was also one of the owners. *Ex-parte Homberg*, 2 Mont. D. & D. 642. *See* 17 Jur. 198; 22 L. J. Bank. 27; 19 id. 8.

Semble, that the misconduct of a clerk might deprive him of his right under the 48th section of the 6 Geo. 4, c. 16, to be paid six months' salary in full. *Ex-parte Hampson*, 2 Mont. D. & D. 462; 6 Jur. 376.

Where an affidavit, in opposition to a petition claiming this right stated, that on the clerk's accounts being taken it would appear that by his imprudence property of his employer had been lost, this passage in the affidavit was ordered to be expunged as scandalous and impertinent, the respondents not having proposed to take the accounts and sustain the charge. (Id.)

The payment in full was not to be made out of the first monies got in, but as soon as there is a sufficient fund for the purpose, after providing for the expenses of working the fiat. (Id.)

A clerk who had served the bankrupt more than six months was entitled to the allowance of six months' wages, although the bankrupt was not in fact a trader, within the bankrupt laws, for more than two months out of the six. *Ex-parte Gough*, 3 Deac. & Chit. 189.

A fiat did not operate as a dissolution of contract of hiring. 1 Ad. & E. 485; 3 Nev. & M. 548.

[3] By s. 182, 12 & 13 Vic. c. 106, "that no creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy, or have any claim entered upon the proceedings, without relinquishing such action or suit, and the proving or claiming a debt under a fiat or petition for adjudication of bankruptcy by any creditor shall be deemed an election by such creditor to take the benefit of such fiat or petition with respect to the debt so proved or claimed: Provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him, and that where any such creditor shall have brought any such action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: provided also, that any creditor who shall have so proved or claimed, if the fiat or petition for adjudication be afterwards superseded or dismissed, may proceed in the action as if he had not so proved or claimed, and in bailable actions shall be at liberty, under the authority of a judge's order for that purpose, obtained in like manner as may now by law be done, to arrest the defendant *de novo*, if he has not put in bail below or perfected bail above, or

(E) *Statements of Account to be Examined by Official Assignees, and List of Creditors who have Proved to be made.*

Official assignee to examine all statements of account, and make out list of creditors who have proved.

By sect. 147, 24 & 25 Vic. c. 134, "the official or creditors' assignee, as the case may be, shall examine all the statements of account aforesaid, and compare the same with the books, accounts, and other documents of the bankrupt, and shall from time to time make out a list of the creditors who have proved their debts, stating the amount and nature of such debts, which list shall be open to the inspection of any creditor who has proved under the estate."

(F) *Examination of Alleged Creditors.*

Power to examine upon oath alleged creditors, &c. tendering proofs.

By sect. 148, id. "the court may, on the application of the assignee, or of

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if the defendant has put in or perfected bail, to have recourse against bail, by requiring the bail below to put in and perfect bail above within the first eight days in term after notice in the *London Gazette* of the first superseding or dismissing such fiat or petition, and by suing the bail upon their recognizance, if the condition thereof is broken."

In 6 Geo. 4, c. 16, s. 59, the corresponding section, there were these words: "In case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid without giving a sufficient authority in writing for the discharge of such bankrupt." *Ex-parte Glover*, 1 Glyn & J. 270. *Ex-parte Taylor*, id. 399.

The proof itself operates as a discontinuance of the action or suit (*Ex-parte Woolley*, 1 Rose, 394; 2 Ves. & B. 253. *Ex-parte Glover*, 1 Glyn & J. 271); and the bankrupt is entitled to have a suggestion of the fact of the plaintiff having proved entered upon the record (*Kemp v. Potter*, 6 Taunt. 550); and if the proof is by a judgment creditor the bankrupt is entitled to a stay of the proceedings at law (*Geiker v. Hewson*, 4 Man. & G. 618); but to be so entitled the debt must be proved or a claim entered on the proceedings. *Ball v. Bowden*, 22 L. J. Ex. 249. And the plaintiff cannot discontinue upon the terms of this section, unless he either prove his debt or enter his claim on the proceedings (*Augarde v. Thompson*, 2 Mee. & W. 617; 5 Dowl. 762); and this section is not applicable where the bankrupt pleads his certificate *puis darreign continuance*. *Wollen v. Smith*, 9 Ad. & E. 505. If a creditor, however, who has proved his debt, were afterwards to bring an action for it, or proceed in an action already brought, this election could not be pleaded in bar; nor will the court in which the action is brought interfere to stay proceedings in it. *Ransford v. Barry*, 7 Dowl. 807. Proof in bankruptcy is an election and a waiver of all legal and equitable remedies in respect of the debt proved; the court of bankruptcy doubted its jurisdiction to restrain a creditor who has proved from suing the bankrupt at law for the same debt, but the court of law could stay the proceedings. *Ex-parte Boucer*, 1 Fonb. B. C. 157; but see the next two cases. Application may be made to the court for an injunction to restrain the action (*Ex-parte Diack*, 2 Mont. & Ayr. 675. *Ex-parte Bernasconi*, 2 Glyn & J. 381) or to expunge the proof. *Harley v. Greenwood*, 5 B. & A. 95.

Where the plaintiff at law is nonsuited, and then sues out a fiat against the defendant at law, it is not a case within this section so as to stay proceedings in the action to recover the costs. *Eike v. Nokes*, 2 Dowl. 820; 1 Bing. N. C. 69. Where the trader at the time of issuing the fiat was in custody under a *ca. sa.*, and procured his discharge by giving a warrant of attorney with two sureties for the amount of the judgment, and the plaintiff in the action, at the request of the sureties, proved the debt, this was held not to be within this section, so as to exonerate the sureties. *Duncan v. Sutton*, 1 Scott, 338; 1 Bing. N. C. 430.

If the bankrupt were in custody at the suit of the creditor who had proved his debt, the court, upon petition, would order him to be discharged, and make the creditor pay the costs. A creditor who has the bankrupt in execution at the time of the adjudication, has his election either to continue to hold the bankrupt in execution or to come in under the bankruptcy, but, in the latter case, he must discharge the bankrupt. If the creditor take the bankrupt in execution after the adjudication it is an election, and although the bankrupt is discharged from custody, the debt is satisfied, and the creditor will not be admitted to prove. *Ex-parte Hicklin*, 1 Cook, 156. *Ex-parte Bisson*, id. 157. *See* 13 Ves. 183.

The election of the creditor is confined to the debt actually proved, and does not extend to distinct debts *ejusdem generis* due at the same time. (Id.) Where two partners became bankrupt, and a joint creditor proved the amount of his debt, and afterwards brought an action against the solvent partner, in which the bankrupt was joined, the latter is entitled to be indemnified against the consequences of such action. *Ex-parte and re Stanton*, 1 Mont. D. & D. 273. *See* 1 Ves. & B. 847. The plaintiff at law is always directed to indemnify the bankrupt against the costs of the action. *Ex-parte Read*, 1 Ves. & B. 346; 1 Rose, 460. See *Dalby v. Wolferston*, 3 D. & R. 269.

any creditor, or of the bankrupt, or without any application, examine upon oath or otherwise any person tendering or who has made a proof, and may summon any person capable of giving evidence concerning such proof; and, in like manner, where the debt is tendered on affidavit or statement, as hereinbefore provided, may summon and examine on oath or otherwise the person who has made the affidavit or statement, and any other person capable of giving evidence concerning the debt sought to be proved."

(G) *False Declarations on Proof of Debts a Misdemeanor.*

False declarations a misdemeanor.

By sect. 145, 24 & 25 Vic. c. 134, "any person who shall wilfully and corruptly make any declaration for proof of debt as aforesaid, knowing the same, or the statement of account to which the same shall be appended, to be untrue in any material particular, shall be deemed guilty of a misdemeanor, and shall be liable to undergo the pains and penalties imposed upon persons guilty of wilful and corrupt perjury." *See post* as to Misdemeanors by Bankrupt.

(H) *Proof may be in Court, or in Chambers, or before Registrar, or by Affidavit.*

Proof in court, or in chambers, or before a registrar, or by affidavit.

By sect. 146, id. "every creditor of the bankrupt may also after adjudication prove his debt, by deposition in court or in chambers, or before a registrar at any meeting of creditors elsewhere than in court, or by affidavit, upon his own oath, or upon that of any clerk or other person in his employment: Provided that where such deposition or affidavit shall be made by any other person than the creditor, the deponent shall, in his deposition or affidavit, set forth that he is duly authorised by his principal to make the deposition or affidavit, and that it is within his own knowledge that the debt was incurred, and for the consideration stated, and that to the best of his knowledge and belief the debt still remains unpaid and unsatisfied."

XXXIX. As to Discharge of the Bankrupt instead of Certificate.[1]

Clasification of certificates abolished.

Form of discharge where suspended, or bankrupt sentenced to imprisonment.

By sect. 157, 24 & 25 Vic. c. 134, "from and after the commencement of this act all classification of certificates shall be abolished; and in every case where the discharge of a bankrupt shall be suspended, such discharge, when allowed, shall simply state the period for which it was suspended, and the reasons for such suspension; and if the bankrupt shall have been sentenced to imprisonment by any court under the provisions of this act the discharge shall also set forth the fact of such sentence and the period of such imprisonment."

Appointment of sitting for considering question of granting order of discharge.

By sect. 158, id. "after the bankrupt has passed his last examination, unless an order of discharge shall have been previously made as hereinbefore provided, the court shall appoint a sitting for the purpose of considering the question of granting to the bankrupt such order. Fourteen days' notice of such sitting shall be given in the *London Gazette* and such newspapers as the court shall direct. The assignees or any creditor who has proved may be heard against such discharge."

Rules as to granting orders of discharge.

By sect. 159, id. "in granting orders of discharge the following rules shall be observed:—

[1] The 24 & 25 Vic. c. 134, repeals all the sections in 12 & 13 Vic. c. 106, relating to the certificate of conformity, and substitutes the enactments given in the text.

1. If on the hearing of any application for an order of discharge the assignees or any creditor shall allege, and if with or without such allegation the court shall be of opinion that there is ground for charging the bankrupt with acts or conduct amounting to a misdemeanor under this act, the court shall, if the bankrupt consent thereto, direct a clear statement in writing of the charge to be delivered to the bankrupt, and shall appoint a day for trying the bankrupt on such charge, and, if the bankrupt require it, shall summon a jury for such purpose, and may direct the creditors' assignee, or the official assignee, or any of the creditors of the bankrupt, to act as prosecutor on such trial: Provided always, that in every case of accusation against a bankrupt of acts amounting to a misdemeanor, it shall be competent to the court to direct that the bankrupt be indicted and prosecuted in one of the ordinary courts of criminal justice; and in all other cases the order of discharge shall take effect immediately from its date, subject to the appeal herein provided:

2. If on such trial by a jury or by the commissioner alone the bankrupt shall be convicted of any offence by this act made a misdemeanor, the commissioner shall, in addition to the punishment awarded for the offence, have power to direct that the order of discharge be either wholly refused or suspended during such time and upon such conditions as he shall think fit:

3. If the bankrupt shall not be accused of acts amounting to misdemeanor, or if he shall have been accused and acquitted, but in either case there shall be made, or shall appear to the court to exist, objection to the granting of an immediate discharge, the court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted; and if the court shall be of opinion that the bankrupt has carried on trade by means of fictitious capital, or that he could not have had at the time when any of his debts were contracted any reasonable or probable ground of expectation of being able to pay the same, or that, if a trader, he has, with intent to conceal the true state of his affairs, wilfully omitted to keep proper books of account, or, whether trader or not, that his insolvency is attributable to rash and hazardous speculation, or unjustifiable extravagance in living, or that he has put any of his creditors to unnecessary expense by frivolous or vexatious defence to any action or suit to recover any debt or money due from him, the court may either refuse an order of discharge, or may suspend the same from taking effect for such time as the court may think fit, or may grant an order of discharge subject to any condition or conditions touching any salary, pay, emoluments, profits, wages, earnings, or income which may afterwards become due to the bankrupt, and touching after-acquired property of the bankrupt, or may sentence the bankrupt to be imprisoned for any period of time not exceeding one year from the date of such sentence:

Provided always, that no person shall be liable by virtue of this act to any criminal proceeding or penalty in respect of any matter which may have occurred before the passing of this act to which he would not have been liable if this act had not passed."

Application for order of discharge where certificate of

By sect. 160, id. "with respect to all persons heretofore bankrupt, and whose certificates of conformity shall have been refused, it shall be lawful for the court, at any time after the expiration of three years from the time of, and not-

withstanding such refusal, to hear and determine the application of any such bankrupt for an order of discharge, and thereupon, if the court shall think fit, to grant an order of discharge, either absolute or subject to any condition or conditions, in the same manner as if the bankruptcy of such applicant had taken place after the commencement of this act." conformity has been refused.

By sect. 161, id. "the order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands provable under his bankruptcy, save as herein otherwise provided; and if thereafter he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy, and the proceedings precedent to the order of discharge." Effect of order of discharge.

By sect. 162, id. "if a bankrupt, after the order of discharge takes effect, be arrested or detained in custody for a debt, claim, or demand provable under his bankruptcy, where judgment has been obtained before the order of discharge takes effect, the court, or a judge of a superior court of law, shall, on proof of the order of discharge, and unless there appear good reason to the contrary, direct the officer who has the bankrupt in custody to discharge him, which shall be done accordingly, without fee." Release of bankrupt when arrested after discharge.

By sect. 163, id. "the order of discharge shall not release or discharge any person who was a partner with the bankrupt at the time of the bankruptcy, or was then jointly bound, or had made any joint contract with him." Effect of order in case of partners, &c.

By sect. 164, id. "after the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim, or demand provable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication; and if he be sued on any such contract, promise, or agreement, he may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence." Contract, &c. pending proceedings in bankruptcy, not binding on bankrupt.

By sect. 165, id. "the order of discharge shall discharge the bankrupt from the effects of any process issuing out of any court for contempt of any court for non-payment of money or of costs or expenses in any court, and from all costs which he would be liable to pay in consequence of or on purging his contempt; and a bankrupt in custody under any such process as aforesaid shall, on obtaining an order of discharge, be entitled to be discharged from such custody forthwith." Order to operate as a discharge from effects of process for contempt.

By sect. 166, id. "any contract, covenant, or security made or given by a bankrupt or other person, with, to, or in trust for any creditor, for securing the payment of any money as a consideration, or with intent to persuade the creditor to forbear opposing the order for discharge, or to forbear to petition for a re-hearing of or to appeal against the same, shall be void, and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence: Provided always, that no such security, if a negotiable security, shall be void as against a *boná fide* holder thereof for value without notice of the consideration for which it was given." Contract or security with intent to induce creditor to forbear opposition, void. Proviso.

By sect. 167, id. "if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose, or for consenting to the allowance of the discharge of such bankrupt, or to forbear to petition for the recall of the same, every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money, goods, chattels, or security so obtained." Obtaining money, goods, &c. as an inducement to forbear opposition, or to consent to allowance of discharge. Penalty for.

Rehearing of order of discharge.

By sect. 168, id. "the order of discharge, whether suspended or not, shall not be reviewed by the court, unless the court see good cause to believe that the order was obtained on false evidence, or by reason of the suppression of evidence, or otherwise, fraudulently; in any of which cases the court may, if it think fit, upon the application of the bankrupt or of a creditor who has proved, and subject to such deposit for costs, and to such notices, by advertisement or otherwise, as the court shall think fit, grant a re-hearing of the matter, and re-hear it accordingly; and upon re-hearing the court shall make such order as shall seem just, in like manner as it might upon an original hearing."

If order suspended on rehearing, subsequent creditors to prove first against subsequent property.

By sect. 169, id. "if on such re-hearing the court shall annul or suspend the 'order' of discharge, all persons having *bonâ fide* become creditors of the bankrupt between the time of the order originally taking effect and the time of its being annulled or suspended on re-hearing shall, as against any property acquired by the bankrupt during the same period, and in priority to the original creditors, be admitted to prove and have dividends under the bankruptcy.

Order, when to be drawn up.

By sect. 170, id. "the order of discharge shall not be drawn up until after the expiration of the time allowed for appeal, or, if an appeal be brought, until after the decision of the Court of Appeal upon such appeal, and shall bear date either the day after the expiration of the time allowed for appeal, or the day of the decision of the Court of Appeal, as the case may require.

Appeal against decision, whether granting or refusing an order of discharge.

By sect. 171, id. "at any time within thirty days after any order of discharge shall have been allowed or refused, and subject to such order as to deposit of costs as General Orders shall direct, any creditor of the bankrupt, or any creditor's assignee, or the bankrupt, may, if the order of discharge has been made or refused by any commissioner or county-court judge, apply to the Court of Appeal in Chancery that such order of discharge may be granted, or recalled and delivered up to be cancelled; and such court may, on good cause shown, order such order of discharge to be granted, or to be recalled and cancelled."

Form of order.

Notice to be advertised.

By sect. 172, id. "the order of discharge shall be in such form as General Orders shall direct, and shall be under the hand of the Commissioner and the seal of the court; and notice of the granting thereof shall be advertised in the *London Gazette* and in two local papers."

XL. As to Audit.[1]

No public sitting for audit.

By sect. 173, 24 & 25 Vict. c. 134, "no public sittings of the courts shall be held for the sole purpose of auditing the accounts of the assignees, but such accounts shall be audited in such manner as is herein provided or as General Orders shall direct."

XLI. Court may direct Money to be Invested in Exchequer Bills.[2]

[1] By s. 185, 12 & 13 Vic. c. 106, a public sitting was required to be held after the last examination to audit the accounts of the assignees, ten days' notice being given in the *London Gazette*. The expenses of these proceedings, apart from the court fee, which is abolished, will thus be saved.

[2] By s. 186, id. "that the court may, as often as it shall appear expedient for the bankrupt's estate, direct any money, part of such estate, to be invested in the purchase of Exchequer bills, for the benefit of the creditors, and may direct where and with whom such Exchequer bills shall be kept, and cause such Exchequer bills to be sold when it shall appear to such court expedient, and may direct the proceeds thereof to be again laid out in the purchase of Exchequer bills, or to be applied for the benefit of the creditors, the making of any such purchase or sale to be subject to the rules or orders at any time in force under this act relating to the purchase, sale, or transfer of Exchequer bills by the Accountant in Bankruptcy."

XLII. As to Dividend, and Proceedings thereon.[1]

Dividend

By sect. 174, 24 & 25 Vic. c. 134, "at the expiration of four months from the date of the adjudication of bankruptcy, or as much earlier as the court shall appoint, the creditors' assignee shall submit to a meeting of creditors to be called for that purpose, and to be held before the registrar, of which meeting ten days' notice shall be given in the *London Gazette* and in two local newspapers, a statement of the whole estate of the bankrupt as then ascertained, of the property recovered, and of the property outstanding, specifying the cause of its being so outstanding, and of all the receipts, and of all payments thereout, made or to be made; and the official assignee shall, and any creditor who has proved may, attend and examine such statement, and compare the receipts with the payments; and upon ascertaining what balance is then in the Bank of England or other bank to the credit of the estate, the meeting shall, by resolution, declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided amongst the creditors. At the same meeting the majority in value of the creditors present shall determine whether any and what allowance shall be made to the bankrupt out of his estate, if he has obtained or shall obtain a discharge."

Allowance to bankrupt.

Assignee not to keep money in his hands.

By sect. 175, id. "if upon such examination it shall appear that the creditors' assignee has kept in his hands at any time during the space of one week more than the sum of fifty pounds belonging to the estate, the creditors may, upon establishing such fact to the satisfaction of the court, and if the assignee shall not show cause to the contrary, debit such assignee with interest for the amount so kept, at any rate not exceeding twenty pounds per centum by the year, for the time such monies were kept in his hands."

Provision to be made for creditors residing at a distance, and for pending claims.

By sect. 176, id. "in the calculation of a dividend, it shall be imperative to make provision for debts which shall appear from the bankrupt's balance-sheet to be due to persons resident in places so distant from the court that in the ordinary course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed; and also for debts, the subject of claims not yet determined by the court."

Joint and separate dividend sittings.

By sect. 177, id. "in every case where joint and separate estates have to be administered, and where the court shall not otherwise direct, dividends of the joint and separate estates shall be declared at one and the same sitting, and notice of the time appointed for such dividends, when advertised, shall be given in one and the same advertisement; and the costs, charges, and expenses of and incidental to the sitting shall be apportioned by the assignee between the joint and separate estates as may appear to be fair and reasonable, having regard to the work done for and the benefit received by each estate; and a single fee, and no more, shall be payable to the solicitor to the estate in respect of the sitting."

Dividend list to be prepared by official assignee.

By sect. 178, id. "within ten days after such meeting, or within such further time as the court may allow, the official assignee shall prepare lists of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved under the estate (subject to the provision herein contained as to dividends reserved) the dividend to which he is entitled, out of the net produce of the estate so set apart for a dividend, and shall forward by post to every such creditor a statement of the dividend to which he is so entitled, and such dividends shall be paid at the Bank of England or otherwise, in such manner as General Orders shall direct."

Like proceedings at suc-

By sect. 179, id. "the like proceedings for the making up and auditing of

[1] The ss. 187, 188, 189, in 12 & 13 Vic. c. 106, are repealed, and the above clauses substituted.

cessive periods of four months.

the accounts of the estate, and the declaration and payment of a dividend, which are herein directed to be had at the expiration of four months from the adjudication of bankruptcy, shall be had at the successive expirations of every period of four months, or earlier, as the case may be, until the whole of the estate is divided amongst the creditors, and a dividend is declared to be final: Provided that it shall be lawful for the majority in value of the creditors at any such meeting as aforesaid to postpone the period of declaring a dividend, or at any time, in declaring a second dividend, to declare also that such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignee, in which case he shall, as soon as may be, convert such estate and effects into money, and within two months after the same shall be so converted, the same shall also be divided in manner aforesaid."

No action to be brought for dividends, but the remedy to be by application to the court.

By sect. 190, id. "that no action for any dividend shall be brought against any assignee by any creditor who shall have proved under the bankruptcy; but if the official assignee shall refuse to pay any such dividend the court may order payment thereof, with interest for the time that it shall have been withheld, and may also order the costs of the application." [1]

XLIII. As to Unclaimed Dividends.[2]

Unclaimed dividends, &c. to be paid into the bank.

By sect. 181, 24 & 25 Vic. c. 134, "every creditors' assignee shall, before his discharge, transmit to the official assignee a list of unclaimed dividends on the estate, and of all debts remaining due to the estate, under his hand, and shall pay all monies and other estate of the bankrupt then in his hands into the Bank of England, to the account of the Accountant in Bankruptcy, to the credit of the estate."

By sect. 184, id. "all unclaimed dividends, save dividends declared before the passing of this act, and all monies unclaimed, the produce of any bankrupt's estate, shall, after the expiration of the period of twelve months from the dividend having been declared, or from the time at which any other monies unclaimed shall have come to the hands of the assignee, be transferred to the

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[1] See *Ex-parte Hall*, L. J. Bank. 10; 11 Jur. 369.

After a dividend had been declared, a party entitled in respect of a proof requested the assignees, by letter, to send him the amount of his dividend in a post-office order, promising to send a receipt by return of post. The assignees sent no answer. It was held, that this was such a refusal to pay the dividend as entitled the creditor to an order, upon petition, at the costs of the assignees personally. *Ex-parte Jackson*, 3 Mont. D. & D. 1.

[2] *Unclaimed Dividends, &c., were formerly directed to be paid into the Bank to the credit of the Accountant in Bankruptcy, and carried to "Unclaimed Dividend Account."*— By s. 191, 12 & 13 Vic. c. 106, "all unclaimed dividends, and also any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided amongst the creditors of any bankrupt, shall be paid into the Bank of England, to the credit of the Accountant in Bankruptcy, to be carried to the account intituled 'The Unclaimed Dividend Account,' subject to the order of the Lord Chancellor, or of the Vice-chancellor, or of any court acting in prosecution of any bankruptcy, for the payment thereout of any dividend due to any creditor."

How unclaimed Dividends, &c. in the hands of Assignees to be disposed of.— By s. 192, id. "that, subject to any rule at any time in force under this act relating to unclaimed dividends, if any assignee under any bankruptcy shall have, either in his own hands, or at any banker's, or otherwise subject to his order or disposition, or shall know that there is or are in the hands, or subject to the order and disposition, of himself and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends, or any such undivided surplus as aforesaid, such assignee shall, as to any such now-existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends within three calendar months next after the expiration of one year from the time of the declaration and order of payment of such future dividend or dividends, either pay the same to the creditor or creditors, or other the person or persons entitled to the same respectively, or cause a certificate thereof

credit of 'The Unclaimed Dividend Account,' subject to the order of the court for the payment thereout of any dividend due to any creditor, or for the distribution of any such other unclaimed money; and the interest and profit arising from the said account shall from time to time be paid over to the account of the chief registrar."

XLIV. As to the Discharge of the Creditors' Assignee.

Effect of discharge.

By sect. 180, 24 & 25 Vic. c. 134, "the order for discharge shall operate to release the creditors' assignee from all claims and demands of the creditors, or of any person who might have proved under the bankruptcy, subject, nevertheless, to such conditions, if any, as shall be expressed in such order of discharge."

Unclaimed dividends, &c. to be paid into the bank.

By sect. 181, id. "every creditors' assignee shall, before his discharge, transmit to the official assignee a list of unclaimed dividends on the estate, and of all debts remaining due to the estate, under his hand, and shall pay all monies and other estate of the bankrupt then in his hands into the Bank of England, to the account of the Accountant in Bankruptcy, to the credit of the estate."

Official assignee to act after discharge of creditors' assignee.

By sect. 182, id. "where the creditors' assignee has obtained an order of discharge, the official assignee first appointed in the matter of the bankruptcy shall, as to any estate and effects of the bankrupt not realised at the time of such order of discharge, and as to all debts then remaining uncollected, and which shall not have been sold in manner herein provided, and as to any future acquired property of the bankrupt, if made liable to the creditors under the conditions of discharge, represent the estate in all respects as the sole assignee thereof, and shall have and exercise all the rights, duties, powers, and authorities conferred by this act upon official and creditors' assignees."

Bank of England to receive from assignee and give a receipt for any sum mentioned in a certificate of the Accountant in Bankruptcy.

By sect. 183, id. "the Accountant in Bankruptcy shall, on the application of any assignee, give to him a certificate stating the amount and description of any sum of money, notes, bills, or other negotiable instruments which he may be desirous of paying into the Bank of England under the provisions herein contained; and on the production of such certificate the Governor and Company of the Bank of England shall receive the sum therein mentioned, and such bills, notes, or other negotiable instruments, and give a receipt for the same, and shall forthwith carry the same to the credit of the Accountant in Bankruptcy; and every such certificate and receipt shall be given without fee or reward."

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respectively to be filed in the office of the Lord Chancellor's Secretary of Bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively; and shall in like manner, as to any such now-existing undivided surplus as aforesaid, within one year after the passing of this act, and, as to any such future undivided surplus as aforesaid, within three calendar months next, after the expiration of one year after the final declaration of dividends, cause a certificate, stating the full and true amount of such surplus, to be filed in the office of the Lord Chancellor's Secretary of Bankrupts; and every certificate to be filed as aforesaid shall be signed by the assignee or assignees filing the same; and every assignee shall, within one year next after the filing of any such certificate as aforesaid, pay, or cause to be paid, into the Bank of England, to the name of the Accountant in Bankruptcy, to be carried to the account intituled 'The Unclaimed Dividend Account,' the full amount of the unclaimed dividends mentioned in such certificate, or so much thereof as shall not have been then paid to the creditor or creditors, or other person or persons entitled thereto, and also the full amount of such undivided surplus as aforesaid; and every official assignee shall cause a certificate to be filed of all unclaimed dividends and undivided surplus belonging to any bankrupt's estate under his care and management, in such manner, and subject to such provisions, as above prescribed with respect to unclaimed dividends and undivided surplus, and as if the official assignee had such dividends or undivided surplus in his own hands: Provided always, that no certificate of any unclaimed dividends shall be filed until the expiration of one year after the declaration and order for payment of such dividends."

XLV. As to Allowances to the Bankrupt,[1] and Surplus to be paid to him.[2]

[1] By s. 194, 12 & 13 Vic. c. 106, "it shall be lawful for the court, if it think fit, from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family: Provided always, that no such allowance shall be made by the court for any period after the adjournment of the last examination *sine die*."

The assignees had not any voice as to the allowance, which, under sect. 114 of 6 Geo. 4, c. 16, was their act, subject to the approval of the commissioner. Under the proviso in the next section the commissioner could reduce the allowance to which the bankrupt was entitled as of right, if he had only obtained a certificate of the second or third class.

By s. 195, id. "that every bankrupt who shall have obtained his certificate, if the net produce of his estate in hand shall by any order of dividend (with or without prior dividend) pay the creditors who before or at the time of making such order have proved under the bankruptcy ten shillings in the pound, shall be allowed and paid five pounds per centum out of such produce, provided such allowance shall not exceed four hundred pounds; and every such bankrupt, if such produce shall (with or without prior dividend) pay such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per centum, provided such allowance shall not exceed five hundred pounds; and every such bankrupt, if such produce shall (with or without prior dividend) pay such creditors fifteen shillings in the pound or upwards, shall be allowed and paid ten pounds per centum, provided such allowance shall not exceed six hundred pounds: Provided always, that no such allowance shall be payable to any bankrupt until after the expiration of twelve months from the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, and such allowance shall then be payable only in the event of the dividends paid to the creditors who at any time before the expiration of such twelve months shall have proved debts, being of the requisite amount in that behalf aforesaid; and if at the expiration of such time the dividends paid shall not amount to ten shillings in the pound, it shall be lawful for the court to allow such bankrupt so much as the assignees and court shall think fit, not exceeding three pounds per centum and three hundred pounds: Provided always, that the court shall, if it think fit, reduce any allowance in case it shall have only granted the bankrupt a certificate of the second or third class."

See 6 Geo. 4, c. 16, s. 128; 5 & 6 Vic. c. 122, s. 44. This was an absolute right dependent upon the dividends paid to the creditors. The allowance might be claimed by the bankrupt's representatives, or by his assignees upon a second bankruptcy. *Ex-parte Safford*, 2 Glyn & J. 128. *Ex-parte Miller*, 2 Cox, 213. But both these sections are virtually repealed by s. 109, 24 & 25 Vic. c. 134, which enacts, that at the first meeting of creditors a majority in value shall determine whether any or what allowance for support shall be made to the bankrupt up to the time of passing his last examination. And s. 174. id. that at the dividend meeting the majority in value of the creditors present shall determine whether any or what allowance shall be made to the bankrupt out of the estate, *if he has obtained or shall obtain a discharge*.

By s. 196, 12 & 13 Vic. c. 106, "that in all joint fiats or petitions for adjudication of bankruptcy under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although the other partner may not be entitled to any allowance."

See 6 Geo. 4, c. 16, s. 129, and 5 & 6 Vic. c. 122, s. 45. Each partner will be entitled to his separate allowance if there be a sufficient dividend in both estates. *Ex-parte Gibbs*, Mont. 105. It is calculated on the amount of the separate estate of each, and his share of the joint estate, not on the gross amount of the joint estate. *Ex-parte Lomas*, 1 Mont. & Ayr. 437. *See* 2 Rose, 95; 3 Mont. D. & D. 573; Buck, 345.

One of three partners who had paid 20*s.* in the pound on his separate estate was held to be entitled, under 6 Geo. 4, c. 16, s. 128, to an allowance of 5*l.* per cent, not exceeding 400*l.*, although 12*s.* 6*d.* in the pound had been paid on the joint-estate, but on the separate estates of the two other partners a sufficient dividend had not been paid. *Ex-parte Minchin*, Mont. & Mac. 135. *Ex-parte Holmes*, 2 Rose, 95. *Ex-parte Farlow*, 1 id. 421; 2 Ves. & B. 209. *Ex-parte Ferrell*, Buck, 345.

The bankrupt's right to his allowance cannot be prejudiced by an order to annul a separate fiat in favour of a joint fiat. *Ex-parte Llewellen*, 3 Mont. D. & D. 573.

Under a joint and separate fiat, the bankrupt's allowance is to be calculated on the amount of his separate estate, together with *his share* of the joint estate, and not on the gross amount of the joint estate. *Ex-parte Lomas*, 3 Mont. & Ayr. 525.

[2] By s. 197, 12 & 13 Vic. c. 106, "that if the produce of the estate of any bankrupt shall be sufficient to pay twenty shillings in the pound and interest as hereinafter mentioned, and to leave a *surplus*, the court may order such surplus to be paid to such bankrupt, his executors, administrators, or assigns; and every such bankrupt shall be entitled to recover the remainder, if any, of the debts due to him: but such surplus shall not be paid until all the creditors who

XLVI. As to Change from Bankruptcy to Arrangement.[1]

Power for creditors to resolve that estate ought to be wound up under deed of arrangement, &c., and proceedings stayed.

By sect. 185, 24 & 25 Vic. c. 134, "at the first meeting of creditors held after adjudication in manner herein provided, or at any meeting to be called for the purpose, and of which ten days' notice shall have been given in the *London Gazette*, three-fourths in number and value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, composition, or otherwise, and that an application shall be made to the court to stay proceedings in the bankruptcy for such period as the court shall think fit."

Resolution to be reported to the court.

By sect. 186, id. "the registrar shall report such resolution to the court within four days from the date of such resolution; and the bankrupt, or any creditor nominated in that behalf by the meeting, may then apply to the court that the proceedings in bankruptcy may be stayed in the terms of such resolution; and the court, after hearing the bankrupt, and such creditors as may desire to be heard for or against the resolution, and if it shall find that the resolution was duly carried, and that its terms are reasonable, and calculated to benefit the general body of the creditors under the estate, shall confirm the same, and make order accordingly, and in such order shall give such directions as to the interim management of the estate as it shall deem expedient."

Power for court to confirm.

Power for court to make a declaration of complete execution of deed of arrangement, and to direct it to be registered, and to annul bankruptcy.

By sect. 187, id. "if the proceedings in bankruptcy be stayed as herein provided, the bankrupt, or any creditor nominated in that behalf by the meeting aforesaid, may, at any time within the period during which the proceedings are so stayed, produce to the court a deed of arrangement, signed by or on behalf of three-fourths in number and value of all the creditors of the bankrupt; and the court may consider the same, and may examine on oath the bankrupt and any of the creditors who may desire to be heard in support of or in opposition to the deed, and may make such other inquiry as it may think necessary; and if the court shall be satisfied that the deed has been duly entered into and executed, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order make a declaration of the complete execution of the deed, and shall direct the same to be registered with the chief registrar, and shall also, if it thinks fit, annul the bankruptcy; and such deed shall thereafter be as binding in all respects on any creditor who has not executed the deed as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order."

Deed, if so registered, to be binding on creditors not executing.

Court to have jurisdiction to entertain applications of bankrupt or any party to the deed respecting bankrupt's estate and affairs.

By sect. 188, id. "either before or after such order, the court shall have jurisdiction to entertain any application of the bankrupt, or of any party to the deed, or of any creditor or person claiming to be a creditor, respecting the disclosure, distribution, inspection, conduct, management, or winding-up of the bankrupt's estate and affairs, or any act or thing relating thereto, or respecting the execution of any of the trusts or provisions of the deed, or the audit or examination of the accounts of a trustee or inspector, or the taxation or examination of the costs or charges of any attorney, solicitor, accountant, auctioneer, broker, or other person acting or employed under the deed, or

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have proved shall have received interest upon their debts, to be calculated and paid at the rate and in the order following, viz. all creditors whose debts are by law entitled to carry interest in the event of a surplus shall first receive interest on such debts at the rate of interest reserved or by law payable or provable thereon, to be calculated from the date of the fiat or the filing of the petition for adjudication of bankruptcy; and after such interest shall have been paid, all other creditors who have proved shall receive interest on their debts from the date of the fiat or of such petition, at the rate of four pounds per centum per annum."

As to calculation of interest, see *Re Higginbottom*, 2 Glyn and J. 123.

[1] These sections supersede the whole of the clauses in 12 & 13 Vic. c. 106, as to arrangements between debtor and creditor, under the superintendence and control of the court. As to option of creditors to receive proposal of bankrupt for settlement to stay bankruptcy, *see* ss. 109, 110, *ante*, p. 218. As to Scotland, 19 & 20 Vic. c. 79, s. 35.

Questions under the deed to be decided according to law of bankruptcy.

generally for the decision of any dispute or question, and shall also have jurisdiction to entertain any application of any such person as aforesaid, respecting any matter for the submission whereof to the court provision is made by the deed, or any matter arising between any of the said persons, and any other person appearing and submitting to the jurisdiction of the court; and the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and on entertaining any such application shall have power to make all such orders as shall seem just, and to enforce all such orders as in bankruptcy."

Power of the court to summon and examine bankrupt, &c.

By sect. 189, id. " the court shall have power, for the purpose of any application under these provisions, or for the better execution of any powers given to the court thereby, to summon, and to examine, upon oath or otherwise, the bankrupt, and any party to the deed, and any creditor or person claiming to be a creditor, and any person known or suspected to have any of the estate in his possession, or any person supposed to be indebted to the estate, or whom the court may deem capable of giving any information material to the full disclosure of the debtor's transactions and affairs, or to the carrying into effect the provisions of the deed; and the court may exercise, as to the examination of such persons, and the production by them of such books, papers, deeds, or documents as it shall deem requisite, the same powers that are vested in the court with relation to the examination of persons and witnesses, and the production of books, papers, deeds, and documents, in matters of bankruptcy."

Where bankruptcy to proceed as if no resolution had been passed.

By sect. 190, id. "if the resolution aforesaid shall not be duly reported, or if the court shall refuse the application to stay proceedings, or if the deed of arrangement shall not be duly produced, or if upon its production the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no such resolution had been passed; and the court may make all necessary orders for resuming the proceedings in bankruptcy, and the period of time which shall have elapsed between the date of such resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this act."

Where bankruptcy annulled.

By sect. 191, id. " if the bankruptcy be annulled, as herein provided, the order annulling the same shall be filed with the proceedings, and notice thereof shall be given in the *London Gazette*."

XLVII. As to Trust Deeds for Benefit of Creditors, Composition and Inspectorship Deeds executed by a Debtor.[1]

What deeds to be valid, and upon what conditions.

By sect. 192, 24 & 25 Vic. c. 134, " every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed; that is to say,

1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument:
2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same:
3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor:

[1] See *Tetley v. Taylor*, 1 E. & B. 521; 21 L. J. Q. B. 2, 346. *Drew v. Collier*, 6 Ex. 670; 20 L. J. Ex. 369.

4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered:
5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to ten pounds or upwards, have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed:
6. Such deed or instrument shall, before registration, bear such ordinary and *ad valorem* stamp duties as are hereinafter provided:
7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees.

Particulars of deed to be entered by the chief registrar.

By sect. 193, id. "the date, names, and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the chief registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within forty-eight hours after the deed shall have been left with the registrar as aforesaid, and a copy of such entry shall be published in the *London Gazette* within four days after the making of such entry."

Copy of entry to be published in the *Gazette*.

Deed to be registered in the Court of Bankruptcy, and in default, not to be received in evidence.

By sect. 194, id. "every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding-up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence."

Stamp duties on deeds.

No deed to be registered unless so stamped.

By sect. 195, id. "no deed or instrument whatever required to be registered as aforesaid shall be registered unless in addition to the ordinary stamp duty it also be impressed with or have affixed to it a stamp denoting a duty computed at the rate of five shillings upon every hundred pounds, or fraction of an hundred pounds, of the sworn or certified value of the estate or effects comprised in, or to be collected or distributed under, such deed or instrument: Provided, that the maximum of *ad valorem* duty payable in respect of any such deed or instrument shall be two hundred pounds."

Memorandum of registration

By sect. 196, id. "every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration."

Jurisdiction of the court, and rights and liabilities of the parties, after registration of deed.

By sect. 197, id. "from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights,

and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate or effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy."

Protection to debtor after notice of filing, &c. of deed.

By sect. 198, id. "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy."

Stay of proceedings in bankruptcy after execution of deed, pending time allowed for its registration.

By sect. 199, id. "in case any petition shall be presented for an adjudication in bankruptcy against a debtor after his execution of such deed or instrument as is hereinbefore described, and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed, if the court shall think fit; and in case such deed or instrument shall be duly registered as aforesaid, the petition shall be dismissed."

Provision in case debtor cannot obtain assent of requisite majority of creditors.

By sect. 200, id. "if a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities accepted, drawn, made, or endorsed by him are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, it shall be sufficient if he obtain the consent of a majority in number representing three-fourths in value of all his other creditors to such deed or instrument as aforesaid; provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place at which he shall have carried on business immediately prior to the date of such deed or instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument, by notice in writing addressed to the trustee or trustees thereof within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall state the circumstances of the case, and the same shall be allowed by the court, and provided the deed or instrument be in such form as is expressed in Schedule (D.) to this act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with."

XLVIII. As to Notices and Advertisements.

What notices to be sent by post.

Proviso.

By sect. 201, 24 & 25 Vic. c. 134, "all notices by this act or by general order required to be served on any person shall be sent by post addressed to the last-known place of business or abode of such person, subject to such regulations as to registration and otherwise as such general orders shall direct; provided that this present clause shall not apply to or affect notices by this act or by any general order required to be personally served."

General orders as to advertisements.

By sect. 202, id. "general orders respecting the form and contents of notices in the *London Gazette* and otherwise may provide for notices concerning more bankruptcies than one being comprised in one advertisement, and may fix the price to be paid to the printer of the *London Gazette* for advertisements, which price the said printer is hereby required to receive as such payment."

XLIX. As to Evidence[1] and disputing Bankruptcy.

By sect. 203, 24 & 25 Vic. c. 134, "any petition for adjudication, or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certificate, deposition, or other proceeding or order in bankruptcy, or

Petitions and other proceedings in bankruptcy, and

[1] *Officer of Court to produce Proceedings and give Copies thereof.*—By s. 232, 12 & 13 Vic. c. 106, "that the proper officer of the court in London and in the several districts in the country shall, on the reasonable request of any bankrupt or arranging debtor, or of any creditor of such bankrupt having proved his debt, or of any arranging debtor, when the debt of the arranging creditor has been admitted in the petition or proved, or on the like request of the attorney of any such bankrupt, debtor, or creditor, produce and show to such bankrupt, debtor, creditor, or attorney, at such times as the court shall direct, every fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, and petition for arrangement, against or by such bankrupt, and all orders and proceedings under any such fiat, petition, or adjudication, and the court shall order the official assignee or officer of the court, as the case may be, to permit such bankrupt, debtor, creditor, or attorney, to have inspection at all reasonable times of all books, papers and writings relating to the matters of such fiat, petition, or adjudication, and the estate of the bankrupt or debtor in the possession of the assignees, or filed in court in such matter, and permit him to inspect and examine the same; and such official assignee or such officer shall provide for any such bankrupt, debtor, creditor, or attorney requiring the same, an office copy of such fiat, petition, or other proceeding, books, papers and writings as aforesaid, or of such part thereof as shall be required, receiving such fee, or sum, or rate of charge as may be authorised in that behalf."

A discretion will be exercised as to the reasonableness of the request to inspect proceedings. *Ex-parte Rimel, re Brewer*, 1 De Gex, M. & G. 491; 1 id. B. C. 91.

Since the stat. 6 & 7 Vic. c. 85, the bankrupt is an admissible witness to prove the petitioning creditor's debt (*Groom v. Watson*, 8 C. B. 217; 19 L. J. C. P. 364. *Udall v. Walton*, 14 Mee. & W. 254); and the petitioning creditor is a good witness to support the fiat. *Johnson v. Graham*, 2 C. & Kir. 808. In an action by a bankrupt against his assignees to try the validity of the fiat against him, creditors of the bankrupt, whether they have or have not proved their debts, are rendered competent witnesses for the defendant by stat. 6 & 7 Vic. c. 85. *Colombine v. Penhall*, 19 L. J. Q. B. 302; 13 Q. B. 128.

If Bankrupt do not dispute the fiat or petition, the Gazette *to be conclusive evidence of the Bankruptcy as against the Bankrupt, and against persons whom the Bankrupt might have sued had he not been adjudged Bankrupt.*—By s. 233, 12 & 13 Vic. c. 106, "if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date."

This provision is imperative, and after the time specified the bankrupt cannot question the adjudication, either in the Court of Review, or by petition to the Lord Chancellor, or in any other way. The commencement of the action or suit will be the suing out the writ, the commencement of the proceeding by petition will be the presenting of the petition, although it may stand over at the suggestion of the court. See *Ex-parte Thorold*, 3 Mont. D. & D. 285; 1 Phil. 239; *Ex-parte Veysey*, 3 Mont. D. & D. 425. In *Ex-parte Lord*, 3 De Gex & S. 607; and *see* 6 Geo. 4, c. 16, s. 92, for the previous period. It must be an action which the bankrupt could have brought had no bankruptcy intervened (see *Kitchener v. Power*, 3 Ad. & E. 232. *Alsager v. Close*, 13 Mee. & W. 576); and therefore this section is not applicable in actions where the bankruptcy gives rise to the right of action, as in cases of fraudulent preference. (Id.) Trover and detinue are both within this section.

In an indictment against the bankrupt and others, the *Gazette* is only evidence against the bankrupt, and it is necessary to prove, as a condition precedent to putting it in, that the bankrupt has not taken the steps mentioned. The question of the sufficiency of such preliminary evidence is one of law for the judge to decide. The production by the registrar of the court of the books containing the entries and minutes of the proceedings relative to the bankruptcy, and the absence therein of all reference of any such step having been taken by the bankrupt, together with the evidence of the solicitor to the fiat that he had no knowledge of any action having been brought to dispute the fiat, was held sufficient. *R. v. Harris*, 4 Cox's C. C. 140.

copies, purporting to be sealed with the seal of the court admissible in evidence.

under any of the provisions of this act, appearing to be sealed with the seal of any court under this act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such

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Where a bankrupt does not contest the validity of an adjudication of his bankruptcy before a commissioner within the time prescribed by the 104th sect., for showing cause against such adjudication, the commissioner has, after that period, no authority to entertain an application to review the adjudication, either under that section or under this section. *Ex-parte Carter*, 1 De Gex, M. & G. 262; 1 id. B. C. 12. See *Re West*, 22 L. J. Bank. 71. If a bankrupt had failed to commence any action, suit or other proceeding to annul the fiat within the time limited for that purpose by the 24th sect. of stat. 5 & 6 Vic. c. 122, the Court of Review had no discretionary jurisdiction to entertain a petition, presented after that time had expired, to annul the fiat, however satisfactorily the delay might be accounted for. *In re Thorold*, 1 Phil. C. C. 239; 3 Mont. D. & D. 385.

By s. 234, id. "that in any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if defendant at or before pleading, and if plaintiff before issue joined, give notice in writing to such assignees or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person."

Notice (*see ante*, 288) to dispute under this section, served on the clerk of the assignee at his counting-house, is sufficient. *Widger v. Browning*, 2 C. & P. 533; Mee. & W. 27. The notice must specify what part of the proceedings the defendant disputes; a notice of an intention to dispute "the bankruptcy" is too general. *Trimley v. Uwins*, 6 B. & C. 537. *Porter v. Walker*, 1 Man. & G. 686.

The same in Suits in Equity.—By s. 235, id. "that in all suits in equity, other than a suit brought by the assignees for any debt or demand for which the bankrupt might have sustained a suit in equity had he not been adjudged bankrupt, and whether at the suit of or against the assignees, no proof shall be required at the hearing of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall within ten days after rejoinder give notice in writing to the assignees of their intention to dispute some and which of such matters; and where such notice shall have been given, if the assignees shall prove the matter so disputed, the costs occasioned by such notice shall, if the court see fit, be paid by the parties so giving such notice, and the service of such notice may be proved by affidavit upon the hearing of the cause."

By s. 136, id. "that any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof, and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided: Provided always, that all fiats and proceedings under the same which may have been entered of record before the passing of the act passed in the parliament holden in the second and third years of the reign of his late Majesty king William the Fourth, intituled, 'An Act to amend the Laws relating to Bankrupts,' or purporting to have been sealed before the commencement of this act with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of any such document, and purporting to have been so sealed, shall and may upon the production thereof, and in the case of any fiat or proceedings entered of record before the passing of the last-mentioned act, with the certificate thereon, purporting to be signed by the person duly authorised to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same, and of the same having been duly entered

proceedings and orders having respectively taken place or been made, and be deemed respectively records of such court, without any further proof thereof; and no such copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided."

Judicial notice to be taken of signature of commissioner or registrar and seal of court.

By sect. 204, 24 & 25 Vic. c. 134, "all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the courts, and of the seal of the courts, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this act."

Forging signature of commissioner or officer, or seal of court, &c. felony.

By sect. 205, id. "if any person shall forge the signature of any commissioner, registrar, or of the master or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such commissioner, registrar, master, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under the act of the session of parliament of the eighth and ninth years of the reign of her present Majesty, chapter one hundred and thirteen."

Evidence as to Insolvency.[1]

By sect. 206, id. "a copy of any petition filed in the Court for the Relief of Insolvent Debtors in England, or in any court having jurisdiction for the relief of insolvent debtors, or in bankruptcy, in any of her Majesty's dominions, colonies, or dependencies, and of any vesting order, schedule, order of adjudication, or other proceedings, purporting to be signed by the officer in whose custody the same shall be or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other order or proceedings, and appearing to be sealed with the seal of such court, shall at all times be admitted under this act as sufficient evidence of the same, and of such

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of record, and of such proceedings having respectively taken place, anything hereinbefore contained notwithstanding."

[1] *Evidence of Declaration of Insolvency.*—By s. 238, 12 & 13 Vic. c. 106, "that a copy of a declaration of insolvency under this act, purporting to be certified by the Lord Chancellor's secretary of bankrupts or any of his clerks as a true copy, shall be received as evidence of such declaration having been filed."

Advertisements, when Evidence.—By s. 240, 12 & 13 Vic. c. 106, "that a copy of the *London Gazette* and of any newspaper containing any such advertisement as is by this act directed or authorised to be made therein respectively shall be evidence of any matter therein contained, and of which notice is by this act directed or authorised to be given by such advertisement; and all proceedings or notices required by this act to be inserted in the *London Gazette* shall be marked with the seal of the court from which such proceedings or notices shall be issued and certified by one of the registrars of the said court."

Provisions of 6 & 7 Vic. c. 85, to be applicable to any Matter in Prosecution under this Act.—By s. 241, id. "that the provisions of an act passed in the parliament holden in the sixth and seventh years of the reign of her present Majesty, intituled 'An act for Improving the Law of Evidence,' shall be applicable to any matter or proceeding in prosecution under the provisions of this act, and to any matter, question, or inquiry arising in any court of law or equity out of or consequent upon any such matter or proceeding."

Under the stat. 6 & 7 Vic. c. 85, one defendant in a suit in equity is a competent witness in the same cause on behalf of another defendant; and it is not a just exception to his evidence that the title of the plaintiff to sustain the suit against both defendants depends upon the same issue, that fact can only be considered as affecting or tending to affect the credit of such defendant as a witness. *Wood v. Rowcliffe*, 6 Hare, 183.

By s. 242, id. "that in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter, or under any petition for arrangement, the deposition of any such deceased witness, purporting to be sealed with the seal of the court, or a copy thereof, purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained."

The 5 & 6 Vic. c. 122, s. 25, was nearly similar.

proceedings respectively having taken place, without any other proof whatever given of the same."

L. As to Affidavits, Declarations, and Affirmations.

Affidavits, declarations, &c. before whom to be sworn.

By sect. 207, 24 & 25 Vic. c. 134, "any affidavit, declaration, or affirmation required to be sworn or made in relation to any matter under this act may be lawfully sworn:

1. In England, Scotland, and Ireland, before any court acting in matters of bankruptcy, or before any registrar or taxing-master thereof, or before any commissioner for administering oaths in Chancery or any of the superior courts of common law at Westminster, or before any officer of the High Court of Chancery, duly authorised to administer oaths in such court, or before a magistrate of the county, city, town, or place where any such affidavit shall be sworn:
2. In any colony, island, plantation, or place under the dominion of her Majesty, before any court, judge, or person lawfully authorised to take and receive affidavits, affirmations, or declarations:
3. In any foreign parts out of her Majesty's dominions, before a judge or magistrate, his signature being authenticated by the official seal of the court to which he is attached, or by a public notary, or before a British minister, consul or vice-consul:

Judicial notice of seal or signature thereto.

And every such court, judge, officer, or other person is hereby authorised and required to administer the oath upon any such affidavit, or to take such affirmation or declaration; and all courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or signature (as the case may be) of any such court, judge, officer, or other person, attached, appended, or subscribed to any such affidavit or declaration, or to any other document to be used for the purposes of this act, or of other acts in relation hereto."

The courts of bankruptcy in England to be auxiliary for the purpose of taking affidavits, &c. to be used elsewhere.

By sect. 208, id. "the Court of Bankruptcy in London, and the district courts of bankruptcy in England, are in like manner authorised and required to administer oaths, or to receive affirmations or declarations, upon any affidavit or declaration, or affirmation, to be used in any matter of bankruptcy or insolvency under prosecution or hereafter to be prosecuted in any court in Scotland, Ireland, or in any colony, island, plantation, or place under the dominion of her Majesty; and all such courts shall take judicial notice of any affidavit, declaration, or affirmation so sworn or made."

As to fees on taking oaths, or making declarations in bankruptcy.

By sect. 209, id. "no fee shall be payable on the swearing of any oath, or the making of any affirmation or declaration, taken or made in the London court, or in any district court of bankruptcy, in any matter of bankruptcy, arrangement, or insolvency within the United Kingdom, or in any of her Majesty's dominions, colonies, or dependencies, and no fee or reward whatever shall be taken or received by any court or magistrate for or in respect of the taking of such oath, or the making of such affirmation or declaration, other than such fee or reward as general orders shall allow."

Affidavits by prisoners.

By sect. 210, id. "any affidavit of any prisoner in any of her Majesty's prisons or gaols in England, to be used in any matter under this act, may be sworn before the visiting or other justices, or if within twelve hours none shall attend then before the gaoler of such prison or gaol, and every such justice or gaoler is hereby required and authorised to administer the oath upon any such affidavit without fee or reward."

Bankrupts and bankrupts' wives to sign declaration in Sched. (E.), not to exempt from examination upon oath.

By sect. 211, id. "all bankrupts shall, and the wives of such bankrupts shall, when so required by the court, make and sign the declaration contained in the Schedule (E.) to this act annexed, but such declaration shall not in any case exempt such bankrupt or bankrupt's wife from being examined upon oath, if the court or any creditor shall so require."

LI. As to Solicitors.

By sect. 212, 24 & 25 Vic. c. 134, "every solicitor of the High Court of Chancery, now or hereafter admitted as a solicitor of the Court of Bankruptcy, may practise as such solicitor in the said court or in any district court, and as to all matters before the commissioners or in chambers may appear and plead without being required to employ counsel; and in case any person not being such solicitor shall practise in the court as a solicitor he shall be deemed guilty of a contempt of court and be liable to all the penalties incident thereto."

Solicitors of the Court of Bankruptcy may practise as such, and appear and plead without counsel.

In substance the same as s. 247, 12 & 13 Vic. c. 106.

LII. As to Costs.

By sect. 213, id. "any court acting under this act may in all matters before it award such costs as shall seem fit and just; and all costs so awarded shall be recoverable in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered, and the like remedies may be had, upon an order of such court, for costs, as upon a rule of any of the said superior courts for costs; but no such order shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until it shall be registered, and, if necessary, re-registered, pursuant to the provisions of the act of the session of parliament of the twenty-third and twenty-fourth years of the reign of her majesty, chapter thirty-eight, any notice of any such order to any such purchaser, mortgagee, or creditor in anywise notwithstanding.[2]

Power to award costs.

Remedies for recovering costs.

Order for costs must be registered under 23 & 24 Vic. c. 38.

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[1] It has been held that a solicitor not retained by the parties themselves has no right to appear as an advocate. *Re Bull*, 20 L. T. 24.

It has however been ruled, that an attorney may conduct a case as agent for another attorney, and that the bar was only entitled to precedence. *See* 20 L. T. 55.

The solicitor to the assignees ought not to act as solicitor to the bankrupt, nor should his partner be one of the assignees. Although the assignees have the sole power of appointing the solicitor to the estate, yet where the commissioner deemed the solicitors appointed objectionable on account of their relationship to the bankrupts, and the assignees intimated that if he made any order directing them to remove the solicitors they should disregard it, he was held to be justified in removing the assignees from their office, and directing a new choice. *Ex-parte Bates*, 21 L. J. Bank. 20; 16 Jur. 459.

As a rule he cannot be a purchaser of any of the bankrupt's property, either for himself or others (*Ex-parte Bennett*, 10 Ves. 381), but it has been permitted where the property had been put up for sale ineffectually, and the assignees considered that it would be beneficial to the estate to avoid another attempted sale. *Ex-parte Watts*, 1 De Gex, 265.

A solicitor under a separate fiat ought not to permit the joint debt of himself and his partners to be proved to the prejudice of the separate creditors. *Ex-parte Story*, Buck, 74.

A solicitor who is petitioning creditor, and acts as solicitor in the matter, is entitled to his costs in full, and not merely his costs out of pocket. *Ex-parte Chamberlayne*, 19 L. J. Bank. 10.

The solicitor has no lien upon the proceedings under the bankruptcy for his costs (*Anon.* 1 Rose, 207); but, under his general right of lien, he has a lien upon any papers of the bankrupt coming to his hands previously to the act of bankruptcy, or the filing of the petition without notice of a prior act of bankruptcy, for costs due to him from the bankrupt. *Lambert v. Buckmaster*, 2 B. & C. 616, and sect. 133.

[2] *Witnesses and Persons known or suspected to have Bankrupt's Property, &c., entitled to Costs of Attendance, &c.* — By s. 250, 12 & 13 Vic. 106, "that every person summoned to attend before the court as a person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall have such costs and charges as the court in its discretion shall think fit; and every witness summoned to attend before the court shall have his necessary expenses tendered to him in like manner as is now by law required upon service of a subpœna to a witness in an action by law."

A witness will, therefore, not be entitled to sue the solicitor to the petition if he attends without payment of his expenses. See *Robins v. Bridge*, 3 Mee & W. 114. As to how far a solicitor, being a witness, is privileged, *see* note to s. 261.

LIII. As to Orders of the Lord Chancellor and of the Court of Appeal in Chancery.

Provisions of 1 & 2 Vic. c. 110, to be applicable to orders of the Lord Chancellor and Court of Appeal.

By sect. 214, 24 & 25 Vic. c. 134, "the provisions of the act of the session of parliament of the first and second years of the reign of her Majesty, chapter one hundred and ten, so far as the same relate to orders of the Lord Chancellor, or of the Court of Review, therein referred to, in matters of bankruptcy, and the powers given by the same act to the Lord Chancellor and the said Court of Review in matters of bankruptcy, shall extend to and be applicable to orders of the Lord Chancellor and of the Court of Appeal in Chancery sitting in bankruptcy under this act." *See ante*, p. 153.

LIV. As to the Attendance of Witnesses out of the Jurisdiction.

Provisions of 17 & 18 Vic. c. 34, as to attendance of witnesses out of jurisdiction, extended to Court of Bankruptcy.

By sect. 215, id. "the provisions of an act passed in the seventeenth and eighteenth years of the reign of her present Majesty, chapter thirty-four, intituled 'An Act to enable the Courts of Law in England, Ireland, and Scotland to issue Process to compel the Attendance of Witnesses out of their Jurisdiction, and to give Effect to the Service of such Process in any part of the United Kingdom,' shall extend to and the powers thereof shall be exercised by the Commissioners of the Court of Bankruptcy."

LV. As to the Powers for Mutual Aid of the Courts in England and Elsewhere. *See ante*, p. 151.

LVI. As to Misdemeanors under 24 & 25 Vic. c. 134, and Misconduct of Parties.[1]

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[1] The following clauses in 12 & 13 Vic. c. 106, are still retained:—

By s. 260, id. "that if any bankrupt, or the wife of any bankrupt, shall refuse to make and sign the declaration contained in the Schedule (W.) to this act annexed, or if any other person shall refuse to be sworn, or shall refuse to answer any lawful question put by the court, or shall not fully answer any such question to the satisfaction of the court, or shall refuse to sign and subscribe his examination when reduced into writing (not having any lawful objection allowed by the court), or shall not produce any books, papers, deeds and writings, or other documents in his custody or power, relating to any of the matters under inquiry, which such bankrupt, wife of the bankrupt, or person is required by the court to produce, and to the production of which he shall not state any objection allowed by the court, it shall be lawful for the court, *by warrant, to commit such bankrupt, wife of such bankrupt, or other person*, in London to the Queen's Prison, or in the country to such prison as such court shall think fit (as the case may be in London or in any district in the country), there to remain without bail until he shall submit himself to such court to be sworn, and full answers make to the satisfaction of such court to all such lawful questions as shall be put by the court, and sign and subscribe such examination, and produce such books, papers, deeds, writings and other documents in his custody or power, to the production of which no such objection as aforesaid has been allowed."

See 6 Geo. 4, c. 16, ss. 24, 34, 36, 37; and s. 154, id.

In order to justify the commitment of a bankrupt under this section for not fully answering questions to the satisfaction of the court, the examination should be full, fair and searching, and not rambling or irrelevant, but limited to the matters in the 117th section. *Ex-parte Legge*, 17 Jur. 415; 22 L. J. Q. B. 345. Where a bankrupt, on a second or subsequent examination, states that he wishes to explain some of his former statements, but that he does not sufficiently recollect them, his memory should be refreshed by their being repeated to him. (Id.) A bankrupt on his examination before a commissioner, in answer to the question: "Not having kept any books, does your memory serve you as to how the 100*l.* (the proceeds of a cheque drawn by the bankrupt payable to the Rev. W. B.) was appropriated?" The bankrupt gave what amounted to no answer, that he could not tell what had become of the proceeds, and saying "he did not remember," without giving any reason for not remembering. The court held that the commissioner was justified in committing the bankrupt to prison for not fully answering to his satisfaction under this section. *Ex-parte Bradbury*, 18 Jur. 189. A refusal on the part of a witness to read an entry in an account-book put into his hands, is not such a refusal to answer a question as to come within this section. *Isaac v. Impay*, 3 Y. & J. 38; 4 Car. & P. 113.

By s. 262, id. "that if it shall at any time be made to appear to the court that any

Penalty on persons guilty of misdemeanors herein named.

By sect. 221, 24 & 25 Vic. c. 134, "from and after the commencement of this act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute:

1. If he shall not upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally or left at his usual or last-known place of abode or business, and after the notice herein directed in the *London Gazette*, surrender himself to the court (having

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assignee under any fiat issued on or at any time prior to the eleventh day of November, one thousand eight hundred and forty-two, has, either in his own hands or in the hands of any attorney, or at any bankers, or otherwise subject to his order or disposition, or knows that there is or are in the hands or subject to the order and disposition of himself or any co-assignee, any unclaimed dividends or any undivided surplus, and that such assignee has not caused a certificate thereof to be filed as in this act above required, containing a full and true account of the names of the creditors to whom such unclaimed dividends are due, and of the amount of such dividends, and as to any undivided surplus, caused a certificate stating the full and true amount of such surplus to be filed, and has not, as in this act above required, paid over to the account entitled 'The Unclaimed Dividend Account' the amount of such unclaimed dividends, or so much thereof as shall not have been paid to the creditors or other persons entitled thereto, and also the amount of such undivided surplus, every such assignee shall be *charged*, in account with the estate of the bankrupt, *with interest* upon the amount of such unclaimed dividends or undivided surplus at the rate of five pounds per centum per annum, to be computed from the time at which such certificate is required to be filed, for such time as he shall thenceforth, either solely or together with any co-assignee or other person, retain such dividends or undivided surplus, as the case may be, and also with such further sum as the court shall direct, not exceeding in the whole at the rate of twenty pounds per centum per annum, to be computed from the time aforesaid; and it shall be lawful for the court to order that such sum or sums be forthwith paid into the Bank of England to the credit of the Accountant in Bankruptcy, to the account entitled 'The Unclaimed Dividend Account,' and also to make such order as to costs as the justice of the case shall seem to require."

See 5 & 6 Wm. 4, c. 29, s. 7, which did not contain the words "in the hands of any attorney."

By s. 263, id. "that the *neglect of any official assignee* to file a certificate as required by this act of all unclaimed dividends and undivided surplus belonging to any bankrupt's estate under his care and management shall be subject to the provisions hereinbefore contained with respect to the unclaimed dividends and undivided surplus therein mentioned, and as if such official assignee had such dividends and undivided surplus in his own hands."

See 6 & 7 Wm. 4, c. 27, s. 7.

By s. 264, id. "that such last-mentioned unclaimed dividends and undivided surplus, and any *penalty payable* by any official assignee in respect thereof, shall be paid into the Bank of England, or carried to the credit of the Accountant in Bankruptcy to the said account intituled 'The Unclaimed Dividend Account.'"

See 6 & 7 Wm. 4, c. 27, s. 7.

By s. 265, id. "that if any *assignee* shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to *retain* or employ, any sum to the amount of more than one hundred pounds, part of the estate of any bankrupt, or shall neglect to invest any money in the purchase of exchequer bills when directed by the court, every such assignee *shall be liable* to be charged in his account with such sum as shall be equal *to interest* at the rate of twenty per cent per annum on all such money for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed, or during which he shall have so neglected to invest the same in the purchase of exchequer bills; and the court is hereby required to charge every such assignee in his account accordingly."

This section is in substance the same as 6 Geo. 4, c. 16, s. 104.

By s. 267, id. "that if the debt stated by the petitioning creditor in his affidavit or in his petition for adjudication and verified by affidavit, to be due to him from any trader, shall not be really due, or if after a fiat issued, or petition for adjudication of bankruptcy filed, it shall not have been proved that the person against whom such fiat has been issued or petition filed had committed an act of bankruptcy and was a trader at the time of the issuing of the fiat or filing of such petition, and it shall also appear that such

no lawful impediment allowed by the court), and sign or subscribe such surrender, and submit to be examined before such court from time to time:

2. If he shall not upon his examination fully and truly discover, to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned, or transferred any part thereof, except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or shall not deliver up to the court, or dispose as the court directs of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife and children; and deliver up to the court all books, papers, and writings in his possession, custody, or power relating to his property or affairs:

3. If he shall, after adjudication, or within sixty days prior to adjudication, with intent to defraud his creditors, remove, conceal, or embezzle any part of his property to the value of ten pounds or upwards:

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fiat was issued, or that such petition was filed, fraudulently or maliciously, the court shall and may, upon petition of the person against whom any such fiat or petition was so issued or filed, examine into the same, and order satisfaction to be made to him for the damages by him sustained."

This section is virtually repealed by s. 91, 24 & 25 Vic. c. 134, *ante*, p. 209.

By s. 268, id. "that if any *petitioning creditor* shall after the bankruptcy *receive any money*, satisfaction or security for his debt or any part thereof, whereby such petitioning creditor may receive more in the pound in respect of his debts than the other creditors, such petitioning creditor shall forfeit his whole debt, and shall also repay or deliver up such money, satisfaction or security, or the full value thereof, to the assignee or assignees of such bankrupt, for the benefit of the creditors of the bankrupt."

By s. 269, id. "that any person who shall wilfully *conceal any real or personal estate* of the bankrupt, and who shall not, within forty-two days after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, discover such estate to the court or to the assignees, shall forfeit the sum of one hundred pounds, and double the value of the estate so concealed; and any person who shall after such time voluntarily discover to the court or to the assignees any part of such bankrupt's estate not before come to the knowledge of the assignees shall be allowed five per centum thereupon, and such further reward as the assignees, with the consent of the court, shall think fit, to be paid out of the estate recovered on such discovery."

This section agrees in substance with the 120th section of 6 Geo. 4, c. 16.

By s. 272, id. "that any person who shall insert or cause to be inserted in the *London Gazette*, or in any newspaper, any *advertisement* under this act, without authority, or knowing the same to be *false* in any material particular, shall be guilty of a misdemeanor."

This is a new provision.

By s. 273, id. "that if any person shall *forge the signature* of any commissioner or registrar, or of the accountant, master or other officer of the court, or shall forge or counterfeit the seal of the court, or knowingly concur in using any such forged or counterfeit signature or seal, for the purpose of authenticating any such proceeding or document, or shall tender in evidence any such proceeding or document, with a false or counterfeit signature of any such commissioner, registrar, accountant, master or other officer, or a false and counterfeit seal of the court, subscribed or attached thereto, knowing the same signature or seal to be false or counterfeit, every such person shall be guily of felony, and shall be liable to the same punishment as any offender under an act passed in the parliament holden in the eighth and ninth years of the reign of her present Majesty, intituled 'An Act to facilitate the Admission in Evidence of certain Official and other Documents."

Persons convicted under 8 & 9 Vic. c. 113, are guilty of felony, and are liable, under the 4th section of that act, to transportation for seven years, or to imprisonment for any term not more than three years nor less than one year, with hard labour."

By s. 274, id. "that if any keeper of any prison or any *gaoler* to whose custody any bankrupt or other person shall be duly committed shall *refuse to receive* such *bankrupt* or other person, or shall suffer him to escape, every such keeper or gaoler shall forfeit five hundred pounds."

The 38th section of 6 Geo. 4, c. 16, did not provide for the refusal to receive the person committed, but only for the case of allowing an escape.

4. If, in case of any person having to his knowledge or belief proved a false debt under his bankruptcy, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof:
5. If he shall, with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever:
6. If he shall, after the filing of the petition for adjudication, with intent to conceal the state of his affairs, or to defeat the object of the law of bankruptcy, conceal, prevent or withhold the production of any book, deed, paper, or writing relating to his property, dealings, or affairs:
7. If he shall, after the filing of the petition for adjudication, or within three months next before adjudication, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy, part with, conceal, destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, paper, writing, or security, or document relating to his property, trade, dealings, or affairs, or make or be privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document, or writing relating thereto:
8. If, within the like time, he shall, knowing that he is at the time unable to meet his engagements, fraudulently and with intent to diminish the sum to be divided amongst the general body of his creditors, have made away with, mortgaged, encumbered, or charged any part of his property, of what kind soever, or if after adjudication he shall conceal from the court or his assignee any debt due to or from him:
9. If, being a trader, he shall, under his bankruptcy, or at any meeting of his creditors within three months next preceding the filing of the petition for adjudication, have attempted to account for any of his property by fictitious losses or expenses:
10. If, being a trader, he shall, within three months next before the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any person any goods or chattels with intent to defraud:
11. If, being a trader, he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge, or dispose of, otherwise than by *bonâ fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for."

Jurisdiction and powers of commissioners in proceeding in respect of bankrupt guilty of any of offences hereinbefore named.

By sect. 222, id. "if it shall at any time appear to any court under this act that the bankrupt has been guilty of any of the offences in the next preceding section set forth, such court shall have and may exercise such jurisdiction, rights, powers, and privileges, for the summoning, apprehending, committing, remanding, bailing, and otherwise proceeding in respect of such bankrupt, as are exercised by and vested in her Majesty's justices of the peace in respect of persons against whom a charge or complaint shall have been made before any one or more of the said justices in respect of any felony or indictable misdemeanor committed within the limits of the jurisdiction of such justice or justices; and all the provisions of the act of the session of parliament of the eleventh and twelfth years of the reign of her present Majesty, chapter forty-two, shall, with such variations as the nature of the case may require, extend and apply to the court, and to the commissioners of the London and other district courts of bankruptcy, and to the judges of the county courts acting in matters under this act, and their proceedings, as well as to justices of the peace and their proceedings."

Provisions of 11 & 12 Vic. c. 42, extended to this Act.

Court may appoint prosecutor.

Costs of prosecution.

By sect. 223, 24 & 25 Vic. c. 134, the court may direct that the creditors' assignee, or, if there be no creditors' assignee, the official assignee, or any of the creditors of the bankrupt, shall act as the prosecutor in respect of such offence, and shall give to such assignee or creditor a certificate of the court having so directed, which certificate shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production of such certificate the costs of such prosecution shall be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction, unless such last-mentioned court shall specially otherwise direct, and when allowed by any such court such sum so allowed shall be ordered by the said court to be paid and borne in all respects in the same manner as the expenses of prosecutions for felonies are now paid and borne, and the same shall be paid and borne accordingly; and any expenses incurred by such prosecutor, other than those so defrayed in accordance with the next following clause, shall be paid out of the account intituled 'The Chief Registrar's Account.'"

Power to court to direct reference to attorney-general.

By sect. 224, id. "the court may direct the assignees to lay the papers before the Attorney-General (or the Solicitor-General during a vacancy in the office of attorney-general) for his direction thereon, either while the bankruptcy is pending before the court or when it has been brought to a conclusion."

Indictment.

By sect. 225, id. "in any indictment or information for any misdemeanor under this act it shall be sufficient to set forth the substance of the offence charged, without alleging or setting forth any debt, act of bankruptcy, petition, or adjudication, or any summons, warrant, order, rule, or proceeding of or in any court acting under this act."

LVII. Power of Court to Commit Persons wilfully Disobeying Rules or Orders.

Power for court to commit persons wilfully disobeying any rule or order of court.

By sect. 226, id. "if any person shall wilfully disobey any rule or order of the court duly made, by enforcing any of the purposes and provisions of this act, the court may, by warrant in the form contained in the Schedule (F.) to this act annexed, commit the person so offending to the Queen's prison, or to the common gaol of any county, city, or place where he shall be found or where he shall usually reside, there to remain, without bail or mainprise, until such court, or the Court of Appeal in Chancery sitting in bankruptcy, shall make order to the contrary."

LVIII. Money Forfeited to be Sued for by Assignees.

Money forfeited under this act, how to be sued for.

By sect. 227, id. "all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath, affirmation, or declaration thereby directed or authorised, may be sued for by the creditors' assignee or trustee, or such other person as the court shall by order direct, in any of her Majesty's superior courts of record."

LIX. Protection of Officers acting in Execution of Process.

Sections 114, 115, 116, and 117 of 9 & 10 Vic. c. 95, to apply to officers acting in execution of warrants and orders of the courts.

By sect. 228, id. "the several provisions contained in the one hundred and fourteenth, one hundred and fifteenth, one hundred and sixteenth, and one hundred and seventeenth clauses of the act passed in the ninth and tenth years of her Majesty, chapter ninety-five, shall apply to all officers of the court and of the county courts sitting in bankruptcy, who act in execution of warrants and orders of such courts, as if these several clauses had been enacted hereby."

LX. As to Bankrupt's Privilege from Arrest, and how to Surrender if in Custody.[1]

[1] By stat. 12 & 13 Vict. c. 106, s. 112, whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence, the court

LXI. No Rule, Order, Warrant, etc. to be bad for want of Form.

By sect. 65, 24 & 25 Vic. c. 134, "no rule, warrant, or other proceeding or document required by this act to be in a form given in the schedules to this act, or to be given by any general order, shall be invalidated by reason of any want of form or omission therein, if such want of form or omission shall not, in the opinion of the court before which the same shall be brought, be calculated to mislead or prejudicially affect any party.

Want of form, not to invalidate proceedings when not mislead or prejudice party.

LXII. Arrangements between Non-traders and their Creditors under 7 & 8 Vic. c. 70.[1]

may, by warrant directed to the person in whose custody he is confined, cause him to be brought before it at any sitting, either public or private, and if he be desirous to surrender he shall be so brought up, and the expenses thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the court for bringing up such bankrupt.

And by the same section, if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination, until his certificate be allowed by the court, as the court shall from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint.

And by s. 113, if any bankrupt shall be arrested for debt, or on any escape warrant in coming to surrender, or shall after his surrender and while protected by order of the court be so arrested, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shown such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt, for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit.

This protection from arrest extends to all arrests by creditors, whether for debts provable under the bankruptcy or not (*Darby v. Baughan*, 5 T. R. 209); to arrests under attachments for the non-payment of money (*Re M'Williams*, 1 Sch. & Lef. 169. *Ex-parte Parker*, 3 Ves. 554 *Ex-parte Jeyes*, 3 Deac. & C. 764); and even to arrest under extents at the suit of the crown (*Ex-parte Russell*, 1 Rose, 278; 19 Ves. 163. *Ex-parte Temple*, 2 Rose, 22; 2 Ves. & B. 391); and to an arrest upon a *capias utlagatum* (*Ex-parte Helsby*, 1 Deac. & C. 16; Mont. 355); and to an attachment issued for contempt in not paying money into Insolvent Debtors' Court (*Ex-parte Bury*, 7 Jur. 406; 3 Mont. D. & D. 309); and to a committal under the Insolvent Debtors' Act, for non-payment of a balance due from the bankrupt as assignee under that act. *Ex-parte Bury*, id. But it does not extend to a taking of the principal by his bail, for the bail are not creditors; and besides, in contemplation of law, he was in their custody the moment they became bail. *Ex-parte Gibbons*, 1 Atk. 238; and *see* 1 Arch. Pr. B. R. 49; see *Ex-parte Leigh*, 1 Glyn & J. 264. Nor does it extend to retaking a prisoner for any escape, by the marshal of the Queen's Bench prison, without an escape warrant; what is said of a taking upon an escape warrant in the statute relating to a retaking by a creditor. See *Anderson v. Hampton*, 1 B. & A. 308; and see *Ex-parte Johnson*, 14 Ves. 36.

The sheriff is justified in immediately discharging a person arrested for debt, or on an escape warrant, on his producing a summons, as required by the statute, to the officer who arrests him, and on giving him a copy thereof. In such a case, the validity of the bankruptcy is immaterial; it is sufficient if the party be bankrupt *de facto* although not *de jure*. *Norton v. Walker*, 3 Ex. 480; 6 D. & L. 204; 18 L. J. Ex. 234. A bankrupt at large on bail is not "in custody" within the meaning of the exception in this clause. *Ex-parte Leigh*, 1 Glyn & J. 264.

And where a bankrupt is entitled to his discharge upon an arrest, he will be discharged also from all detainers lodged against him after it took place (*Ex-parte Hawkins*, 4 Ves. 691. *Ex-parte Ross*, 1 Rose, 260); but if in custody at the time he surrenders, it is otherwise (*Ex-parte Goldie*, 2 Rose, 343; 1 Mer. 176); and the discharge must be unconditional; the court cannot impose terms, that the bankrupt shall not bring an action (*Ex-parte Helsby*, Mont. & Bligh, 79); nor can the court order the costs of an application for the discharge to be paid out of the estate. (Id.)

[1] The following note is taken from Mr. Lewis's useful manual:—"By the 7 & 8 Vic. c. 70, intituled 'An Act for facilitating Arrangements between Debtors and Creditors,' amended by the 23 & 24 Vic. c. 147, any debtor (whether in custody for debt or not) *who is not a trader*, with the concurrence

of one third in number and value of his creditors (testified by their signing his petition) may present a petition to the Court of Bankruptcy[1] setting forth:—

1. A full account of his debts, and the consideration thereof.

2. The names, residences, and occupations of his creditors.

3. A full account of his estates and effects, whether in possession or reversion.

4. All debts and rights due to, or claimed by him, and a statement of all property, of what kind soever, held in trust for him.

5. Setting also forth his inability to meet his engagements, and the true cause of such inability.

6. And setting forth his proposal for the payment or compromise of such debts or engagements, and that one third in number and value of his creditors have assented thereto, and praying that such proposal (or such modification thereof as by the majority of his creditors should be determined), should be carried into effect under the superintendence and control of the court.

Such petition now requires a 5*l.* stamp. Upon presentation the petitioner makes affidavit of the truth of the petition; and the signature thereof, by the several assenting creditors, is proved by affidavit of the persons who saw the same respectively affixed.

Upon the presentation of such petition the commissioner privately examines into the petition, and for that purpose has power to examine the debtor upon oath, and any creditor concurring in his petition, and any witness produced by the debtor. The commissioner has to be first satisfied of the truth of the petition, and that the debts have not been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a petition in bankruptcy, or malicious trespass; and also that the debtor has made a full disclosure of his debts and credits, estate and effects, and is desirous of making a *bonâ fide* arrangement with all his creditors, and that his proposal to that effect is reasonable and proper to be executed under the direction of the said court.

If the commissioner be so satisfied he directs that a meeting of the creditors shall be convened, notice of which meeting is given by the messenger of the court in writing to every creditor, not less than seven, nor more than twenty-eight days before the same is held.

If the debtor be in custody, the commissioner may discharge him therefrom, either with or without giving notice to and hearing the detaining creditor, and the commissioner may grant the debtor a temporary and limited protection for such time and with such limits and conditions as are specified in the protection. The commissioner may, however, require the debtor to give bail for his appearance at the meetings of his creditors. Every petitioning debtor has the same protection from arrest when going to, remaining in, and returning from his necessary attendance on the commissioner, or the meetings of creditors, as is enjoyed by any party or witness attending any court of record.

The commissioner, in his order directing such meeting, appoints a fit and proper person, either a registrar or official assignee of the said court, or one of the principal creditors of the debtor (usually the official assignee), to preside at the meeting of creditors, and to report the resolutions.

If at such first meeting of creditors,

1. The major part in number and value; or,

2. Nine tenths in value; or,

3. Nine tenths in number, whose debts exceed 20*l.*, assent to the proposal, or to any modification thereof, the president appoints another meeting of the creditors to be held, not earlier than seven, nor later than twenty-eight days from the first meeting.

Of the second meeting notice in writing must be *personally served on every creditor who was not present by himself or his appointed agent at the first meeting*, three clear days at least before the day appointed for the second meeting, but the commissioner may make an order, in any special case, that service of such notice at the last place of abode or business of any creditor shall be deemed good service.

It is essential to observe the provisions of the statute with regard to service, as the virtue of the whole proceedings, in binding absent and dissenting creditors, entirely depends upon the due giving of notice to the *actual creditor*. It is, therefore, obvious that in all cases where the debtor has given bills of exchange, or promissory notes, it is essential to give notice to the *actual holder*, and (as a matter of advisable precaution) also to the person to whom the bill or note was given by the debtor.

If, at the second meeting,

1. Three fifths in number and value of the creditors present; or,

2. Nine tenths in value; or,

3. Nine tenths in number whose debts exceed 20*l.*, accept the arrangement or composition assented to at the first meeting, and reduce the terms thereof into writing, and sign the same, the resolution or agreement (subject to confirmation by the commissioner) shall thenceforth be binding, and of full force, as well against the debtor as against all persons who were creditors of the debtor at the date of the petition, *and who had notice of the several meetings of creditors*. It is, however, an absolute condition, precedent to the validity of the resolution or agreement, that one full third in number

[1] It would seem that no county-court judge has any jurisdiction under this act.

and value of all the creditors of the debtor be present at the second meeting, either in person or by authorised agent.

The agent may be authorised in writing, and no power of attorney under seal is necessary.

Within fifteen days after the passing of the resolution the same must be submitted to the commissioner, who, if he thinks the same reasonable and proper to be executed under the direction of the court, shall cause the same to be filed, and grant to the debtor a certificate of such filing, and from time to time indorse thereon his protection from arrest, or, if need be, his discharge from custody, and the debtor shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had the notice or several notices before mentioned. Any officer arresting the debtor at the suit of any such creditor, and on sight of the certificate and protection not releasing the debtor, is liable to a penalty. It is provided, however, that no such protection shall be valid in favour of any petitioning debtor who shall be proved to have been about to abscond beyond the jurisdiction of the Court of Bankruptcy, or who has concealed, or is concealing, any part of his estate or effects, *nor against any creditor whose debt is not truly specified in the petition, nor against any creditor whose debt has been contracted by reason of any manner of fraud or breach of trust.*

This provision points to the absolute necessity of accuracy in describing the debt, as a substantial inaccuracy (neither wilful nor fraudulent, but negligent) would invalidate the protection as to such debt, and the creditor interested.

From and after the date of the filing of the resolution and agreement, all the estate and effects of the debtor vests in the trustee (if any such be appointed), by virtue of such resolution, and without any deed, as fully as if the trustee were an assignee of a bankrupt, and every trustee may sue and be sued as if he were an assignee in bankruptcy.

Every trustee is bound, once at least in every six months, or oftener, if the commissioner, or any two or more of the creditors whose debts amount to one tenth of the amount of the debts of such debtor, require it, to produce to the commissioner on oath, or solemn declaration, a full and true account of all moneys, property, and effects of the debtor which have come to his hands, and of the disposal thereof, and the commissioner, after examining the same, shall, if need be, order payment to the creditors, according to the terms of the resolution or agreement.

The commissioner has power, on the representation of the trustee, or of any two creditors as aforesaid, that the debtor has not made a true discovery of his estate or effects, or has not duly accounted for any subsequently acquired property [if required so to do by the true intent and meaning of the resolution or agreement assented to by the creditors], or has wilfully made any false return of creditors, to summon the debtor to be examined.

If any difficulty arise in the execution of the resolution or agreement, the commissioner can summon a special meeting of the creditors, and the resolution of the majority of the creditors at such meeting to confirm, alter, or annul, the whole or any part of the original resolution or agreement, will be as valid as if it had been part of such original resolution or agreement, without the sanction of the commissioner, whose approval is not even required to the amended resolution; but if one third in number and value of the creditors do not attend such meeting (by himself or their appointed agents) the resolution will not be valid unless approved and confirmed by the commissioner.

As soon as the resolution or agreement shall have been carried into effect, and the creditors satisfied, according to its tenor, a meeting of the creditors is held before the commissioner, and on his being satisfied that the trustee has fully performed his trust, the commissioner gives a certificate in the nature of a full release to the trustee. The trustee may receive for his services in the execution of his trust such sum of money as the major part in number and value of creditors assembled at the meeting last referred to shall appoint, subject to the approval of the commissioner.

At the same meeting the commissioner gives to the debtor a certificate, which operates, to all intents and purposes, as fully as an order of discharge of a bankrupt. No debt, however, excepted from the operation of the act, as before mentioned, is barred thereby.

The whole of the proceedings under this act are private, and no public notification of the proceedings or filing of the petition appears either in the *Gazette*, or other papers.

APPENDIX.

SCHEDULES to 24 & 25 Vic. c. 134.

SCHEDULE (A).

To the Persons filling the under-mentioned Offices in the Court of Bankruptcy, the following Salaries shall be payable:—

The Chief Registrar	£1400
The Registrars acting in London, each	1200
The Registrars acting in the country, each	1000
The Registrar in attendance upon the Chief Judge	1200
The Taxing-Master	1400
The Accountant in Bankruptcy	1500
The Registrar of Meetings	250

The clerks in the several offices of the accountant in bankruptcy, the chief registrar, the taxing-master, the ushers of the court, the clerk and trainbearer, ushers, and assistant ushers of the Lords Justices of the Court of Appeal in Bankruptcy, shall continue to receive the same salaries, and out of the same funds, as if this act had not been passed.

SCHEDULE (B).

Document.	Stamp Duty in lieu of Fees. £	s.	d.
Every petition presented to a Court of Bankruptcy for adjudication of bankruptcy, or for arrangement between any debtor and his creditors	5	0	0
Every such petition when presented to the London court, or to a county court, by traders whose debts do not exceed 300*l.*	1	0	0
Every order of discharge	1	0	0
Every declaration of insolvency	0	2	6
Every registration of trust deeds	0	10	0
Every summons of judgment-debtor or debtor	0	2	6
Every admission of such debtor	0	2	6
Every deposition of good defence	0	2	6
Every bond with sureties	0	5	0
Every application for search for petition or other proceeding	0	1	0
Every application for any meeting in any matter under this act	0	5	0
Every allocatur by any officer of the court for any costs, charges, or disbursements,—where such bill of costs shall not exceed 5*l.*	0	1	6
Exceeding £5 and not exceeding £10	0	2	6
„ 10 „ 20	0	5	0
„ 20 „ 30	0	7	6
„ 30 „ 50	0	10	0
„ 50 „ 100	0	15	0
„ 100 „ 150	1	0	0
„ 150 „ 200	1	10	0
„ 200 „ 300	2	0	0
„ 300 „ 500	3	0	0
„ 500	5	0	0

SCHEDULE (C).

"The Bankruptcy Act, 1861."

(In Bankruptcy.)

Warrant of Committal of Bankrupt or other Party for unsatisfactorily answering, or for refusing to sign his Examination.

Court of Bankruptcy.

} Whereas, E. F. the said [*or* G. H., of in the county of] was on the day of duly sworn and examined in this court; and the said was again, on the day of duly sworn and examined in this court, as by the examination and deposition of the said now on the file of proceedings in this matter will appear:

And whereas the answers of the said as now so appearing in said examination and deposition, are unsatisfactory [*or* the said refused to sign and subscribe his said examination and deposition]:

These are therefore to authorise and require you, immediately upon the receipt hereof, to take into custody the said and him safely convey to her Majesty's prison of and him there to deliver to the governor of the said prison, who is hereby authorised and required to receive the said into his custody there, and him safely keep and detain, without bail, until this court, or the Court of Appeal in Chancery sitting in bankruptcy, shall make an order to the contrary, and for so doing this shall be your sufficient warrant.

Given under the seal of the court, this day of 18

J. K., Judge.

To

and to

Governor of the said prison, or his deputy there.

SCHEDULE (D).

This deed, made the day of between A. B. [the debtor], and C. D. and E. F. [the trustees], on behalf and with the assent of the undersigned creditors of A. B., witnesseth that A. B. hereby conveys all his estate and effects to C. D. and E. F. absolutely, to be applied and administered for the benefit of the creditors of A. B. in like manner as if A. B. had been at the date hereof duly adjudged bankrupt. In witness, &c.

Schedule of Creditors.

SCHEDULE (E).

"The Bankruptcy Act, 1861."

Form of Declaration to be made by the Bankrupt or the Bankrupt's Wife.

I, A. B., the person declared a bankrupt under a petition for adjudication of bankruptcy filed on the day of in the year of our Lord [*or* I, C. D., the wife of A. B., declared a bankrupt under a petition for adjudication filed on the day of], do solemnly promise and declare, that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

(Signed) A. B.

[*or* C. D., the Wife of the said A. B.]

SCHEDULE (F).

"The Bankruptcy Act, 1861."

Warrant against any Person disobeying any Rule or Order of Court.

Whereas by a rule [*or* an order] of this court, bearing date the day of made for enforcing the purposes and provisions of the Bankruptcy Act, 1861 [*or* if of any other act hereafter in force relating to the subject-matters of this act, or made or entered into by consent for carrying into effect any of such purposes or provisions, alter the recital accordingly,] it was ordered that [&c. &c. as in the rule or order]:

And whereas it is now proved that after the making of the said rule [*or* order], that is to say, on this day of a copy of the said rule [*or* order] was duly served on the said personally, and the original rule [*or* order] at the same time shown to him, but the said then refused [*or* neglected] to obey the same and hath not as yet obeyed the said rule [*or* order].

These are therefore to will, require, and authorise you immediately upon receipt hereof to take into your custody the body of the said A. B., and him safely to convey to her Majesty's gaol [*or* prison] of [*or* called], and him there to deliver to the keeper of the said prison, together with this precept, and the keeper of the said prison is hereby required and authorised to receive the said A. B. into his custody, and him safely to keep and detain, without bail or mainprise, until this court, or the Court of Appeal in Chancery sitting in bankruptcy, shall make order to the contrary: and for so doing this shall be your sufficient warrant.

Given under my hand and the seal of the court at the Court of Bankruptcy, London, this day of in the year of our Lord one thousand eight hundred and A. B. [L.S.]

Judge.

To or his assistant, and to the keeper of her Majesty's prison [*or* gaol] of [*or* called], or his deputy there.

SCHEDULE (G).

Acts and Parts of Acts Repealed.

See ante, p. 142.

SCHEDULE (H).

Medical Certificate.

I, the undersigned, being a[1] and being in actual practice as a[2] hereby certify, that I, on the day of at the gaol of at in the county of separately from any other medical practitioner, personally examined a prisoner for debt in the said gaol, and that the said is a[3] and a proper person to be taken charge of and detained under care and treatment, and that I

[1] Set forth the qualification entitling the person certifying to practise as a physician, surgeon, or apothecary: *ex. gra.* Fellow of the Royal College of Physicians in London, Licentiate of the Apothecaries' Company, or as the case may be.

[2] Physician, surgeon, or apothecary, as the case may be.

[3] Lunatic, or an idiot, or a person of unsound mind.

have formed this opinion upon the following grounds, viz.:—

1. Facts indicating insanity observed by myself.[1]

2. Other facts (if any) indicating insanity communicated to me by others.[2]

(Signed) [Name]
[Place of abode]

Dated this day of one thousand eight hundred and

[1] Here state the facts.

[2] Here state the information, and from whom.

GENERAL ORDERS

MADE PURSUANT TO

"THE BANKRUPTCY ACT, 1861."

(24 & 25 Vic. c. 134.)

It is ordered as follows, that is to say,—

As to Petitions.

1. Petitions for adjudications of bankruptcy filed in the Court in London shall forthwith after the filing thereof be directed by the Chief Registrar or Registrar acting for him to the Commissioners of the Court in rotation. A second petition by or against the same debtor, either alone or jointly with any other person or persons, shall be directed to the Commissioner who shall have acted in the matter of the first petition, or to whom the same shall have been directed.

2. The memorandum required to be endorsed on a petition for adjudication of bankruptcy, before any adjudication shall be made under section 70 of "The Bankruptcy Act, 1861," shall be as follows:

"*Take Notice.*

"Within is a copy of a petition for adjudication of bankruptcy verified by the oath of the petitioner, and under the seal of Her Majesty's Court of Bankruptcy in London [*or* for the district], filed in the said Court against you the within-named E. F. The said Court has ordered that you do appear on this petition at or before the expiration of days after the day of service thereof. The petition will be heard at the said Court at on the day at which time and place you are to appear by yourself or your solicitor on such petition.

Dated the day of A.D.

Seal of the Court.

——— Registrar.

——— Solicitor in the matter of the within petition."

As to First Meeting of Creditors.

3. If the petitioning creditor or any creditor or the bankrupt desire that the first meeting of creditors under s. 109 of "The Bankruptcy Act, 1861," should be held at any other place than the place where the Court of Bankruptcy having jurisdiction in the matter usually holds its sittings, application, supported by affidavit, must be made to the Commissioner, within seven days after adjudication. If such application be by any other person than the petitioning creditor, one clear day's notice thereof must be given to the petitioning creditor.

4. The statement required to be filed in Court under section 93 of "The Bankruptcy Act, 1861," by every debtor petitioning for adjudication of bankruptcy against himself, and verified by the oath of the petitioner, shall be so filed and verified by such debtor within three days after filing his petition, or within such further time as the Commissioner may, under special circumstances, allow, and shall be in the form specified in the Schedule to these orders annexed, and if such statement be not so filed and verified, the said petition shall be dismissed.

As to Judgment-Debtor Summons.

5. Every creditor applying for a judgment-debtor summons shall file an affidavit of debt, and such affidavit shall be in the form specified in the Schedule 3 to these orders annexed.

6. Every judgment-debtor summons shall be in the form specified in the Schedule 4 to these orders annexed.

7. Every such summons shall be endorsed with a notice as follows:

Notice to the Party summoned.

"This summons is served upon you pursuant to the provisions of "The Bankruptcy Act, 1861," and is founded on an affidavit of debt which was filed in the Court of Bankruptcy in London [*or* for the district, at] on the day of 186 , and you are hereby informed that, if after service of this summons, or due notice thereof, you do not pay the debt and costs within mentioned, or secure or compound for the same to the satisfaction of the creditor, then, on your appearance to this summons, or if you shall not appear, having no lawful impediment allowed by the Court, and in either case, without the presentation

of a petition for adjudication or other proceeding, the Court may adjudge you bankrupt.

"This summons was issued by of solicitor for the plaintiff [*or* plaintiffs] within-named [*or, if by a solicitor for a person entitled to receive money under a peremptory order, or interested in enforcing payment of it, alter accordingly*].

or,

"This summons was issued in person by the plaintiff [*or* plaintiffs] within-named, who resides [*or* reside] at, &c. [*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any such there be*]."

8. Every such summons is to be served personally between the hours of nine o'clock in the forenoon and nine o'clock in the afternoon, unless the Court issuing the same shall in any case direct that service in some other manner shall be good service, in which case the order of Court in that behalf shall be served in like manner as the summons; and such summons is to be served four days at least before the time for appearance therein mentioned, and within two months from the date thereof, including the day of such date and not afterwards.

As to Forms.

9. The several forms specified in Schedules 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, inclusive, respectively to these orders annexed, for the several purposes therein stated, shall be observed, and used with such alterations as may be necessary to meet the circumstances of any particular case.

As to Letters of Attorney.

10. Every creditor may by letter of attorney, which may be in the form set forth in Schedule 19, authorise the Official Assignee in the bankruptcy, or any other person, to represent him at any meeting of the creditors, and to vote for him on any question submitted to the creditors at such meeting, or any adjournment thereof, and also in the choice of the creditors' assignee.

11 Petitions may be printed on paper or parchment. Under special circumstances the Commissioner or Registrar may, if he shall think fit, receive a written petition.

As to the Messenger.

12. The Official Assignee in performing the duty required by s. 108 of "The Bankruptcy Act, 1861," shall act by the messenger of the Court, who shall in all respects, but subject to the directions of the Court in any particular case, observe the directions of the Official Assignee in taking and retaining possession of the bankrupt's estate, and shall act as his deputy; and after the appointment of the creditors' assignee, the messenger shall act under his instructions in keeping or discontinuing possession.

13. Each messenger of the Court of Bankruptcy shall give security to the extent of 1000*l.*, and such security shall be either by way of a joint and several bond with two sureties to be approved of by the Commissioner, to the Chief Registrar, in the penal sum of 2000*l.*, —or by way of the guarantee of any guarantee society established by Charter or Act of Parliament in England. Where such security is by way of bond each messenger shall on the first day of January in every year, or within one week then next following, make a declaration in writing, to be filed with the Chief Registrar, that to the best of his knowledge and belief his sureties are alive and solvent, and in such declaration state to the best of his knowledge and belief any change of residence of any or either of such sureties. Where such security is by way of guarantee, the messenger shall within the like period produce and show to the Chief Registrar the receipt for the premium or premiums paid to such guarantee society during the preceding year.

Where such security is by way of bond, the messenger shall on pain of dismissal give immediate notice in writing to the Chief Registrar of the death or bankruptcy of any or either of his sureties, and shall in such case, if required, cause a new bond to be executed, to the like amount, by another surety or sureties.

14. The messenger shall from time to time render to the Official Assignee an account of the fees due to him (according to the existing scale) and of payments made by him for assistance in each bankruptcy, and such bill shall be taxed by the proper taxing officer, who shall certify separately the amount of fees due and the amount of additional payments proper to be allowed. The messenger and creditors' assignee, if any, and if none the Official Assignee, may attend the taxation. The amount of such fees and additional payments shall be forthwith paid to the messenger by the assignee out of any monies belonging to the estate, or standing to its credit at the Bank of England, and if the same be insufficient, out of the first monies that shall come to his hands in respect of the estate. Each messenger shall quarterly, on the 13th of January, the 13th of April, the 13th of July, and the 13th of October in every year, transmit to the Chief Registrar an account of the fees received by him in the preceding quarter.

15. On the 13th of October 1862, and each succeeding 13th of October, every messenger shall render to the Chief Registrar an account of the fees received by him during the preceding year, and shall verify the same by oath, and after deducting his salary under the 32nd section shall pay over the surplus to the credit of the Chief Registrar's account, at such time and in such manner as the Chief Registrar shall direct.

16. It shall be the duty of the messenger to make an inventory of the bankrupt's estate in cases where such inventory shall be deemed requisite by the Official Assignee. No broker shall be employed for the purpose. Where such inventory has not been made prior to the choice of creditors' as-

signee, the inventory shall only be made upon an express direction in writing from the creditors' assignee.

As to Matters to be heard in Chambers.

17. The following matters may, unless the Court shall in any case otherwise direct or allow, be heard and determined by the Commissioner in chambers, that is to say,—

Trader-debtor summons.
Judgment-debtor summons.
Petition for adjudication of bankruptcy on the petition of a creditor.
Disputed adjudication by debtor.
Applications,—
To enlarge time for proceeding on petition for adjudication, or for bankrupt to surrender, or for last examination, or for leave to surrender, where time expired.
To release bankrupt from custody.
To pay taxes, or salary or wages, or sum in respect of apprentice fee.
To order letters to be re-directed or delivered to the Official or creditors' assignee, or other person named in the order.
For leave to commence, prosecute, or defend any action or suit.
For order to bankrupt to join in any conveyance, &c.
For assignees to deliver up conveyance or agreement for conveyance, or lease or agreement for lease, or agreement for purchase of estate, in case assignees decline or refuse to elect to take the same.
To take mortgagee's account.
For order under section 114.
Questions as to costs referred to Commissioner by the Taxing Master.
To allow amendments, or copies or extracts of proceedings.
For investment of money or the sale or transfer of any stocks or securities belonging to the estate.
For appointing the bankrupt to superintend the management of his estate, or to carry on the trade for behoof of the creditors.
For sittings to examine parties or witnesses.
For order to mortgage or pledge any part of the bankrupt's estate upon a resolution of creditors, under section 133.
For order to sell book debts under section 137, or for disposal or custody of books and papers, under section 138.
Any matter adjourned by the Registrar for the consideration of the Commissioner, under section 52, or any point or matter arising in the course of proceedings before the Registrar, and stated by him in a certificate to the Commissioner, and upon which any party is desirous of obtaining the opinion of the Commissioner, under section 53.

But if in any of the aforesaid matters, the contending parties shall all desire that any question be heard and decided in open Court, or if the Commissioner shall be of opinion that any matter before him ought to be so heard and decided, it shall be adjourned for that purpose.

18. The following matters may, unless the Court shall in any case otherwise direct or allow, be heard and disposed of by the Registrar in chambers, that is to say,—

Petitions for adjudication of bankruptcy.
Swearing affidavits.
Application for trader-debtor's summons, or judgment-debtor's summons.
Receiving the surrender of a bankrupt; granting protection thereupon.
Giving requisite directions for notices and advertisements, &c.
Auditing and passing accounts of assignees.
Proceedings for declaration and payment of dividends.

Any of the following matters, when uncontested:—

Admitting, expunging, or reducing proofs or claims; ordering payment of taxes or salary or wages, or sum in respect of apprentice fee; ordering amendments or inspection or copies or extracts of any proceedings, and taking mortgagee's accounts, and giving leave to mortgagee to bid.

As to Trust Deeds for Benefit of Creditors; Composition and Inspectorship Deeds executed by a Debtor.

19. In order to facilitate the making of entries under s. 193, the attorney or solicitor or party producing such deed or instrument, may deliver to the Registrar a memorandum containing the following particulars, or as near thereto as may be:—

Memorandum of Deed or other Instrument to be registered pursuant to "The Bankruptcy Act, 1861."

Title of deed, whether deed of assignment, composition, or inspectorship.
Date of deed.
Date of execution by debtor.
Name and description of the debtor as in the deed.
The names and descriptions of the trustees or other parties to the deed, not including the creditors.
A short statement of the nature of the deed.

And such memorandum shall be signed by the attorney or solicitor or party producing the deed.

The affidavit required by s. 192 of "The Bankruptcy Act, 1861," paragraph 5, may be in the following form:

"The Bankruptcy Act, 1861."

"I, A. B. [*the debtor or some person able to depose thereto*] make oath and say as follows, that the deed or instrument now produced and marked with the letter A, bearing date the day of and made between [*state the parties to the deed, not including the names of the creditors*] being a deed [*describe*

its nature] has been executed or by writing assented to or approved of, by a majority in number, representing three fourths in value of the creditors of me [*the debtor, when the debtor deposes, or* of *the debtor, where some other person deposes*] whose debts amount to ten pounds and upwards, and I [*the debtor, where the debtor deposes*] verily believe that the amount in value of my property, credits, estate, and effects comprised in such deed is [*and where another person deposes, he must state that after due inquiry made, to the best of his knowledge, information, and belief*, the amount in value of the property, credits, estate, and effects of the said debtor, comprised in such deed is]."

Form of Certificate by Trustee in the Court of Bankruptcy.

The certificate required by s. 192 of "The Bankruptcy Act, 1861," may be in the following form:

"The Bankruptcy Act, 1861."

"I, the undersigned [*if more than one trustee alter accordingly*], being a trustee under a deed or instrument bearing date the day of and made between [*state the parties, not including the names of creditors*], being a deed [*describe the nature thereof*], do hereby certify that a majority in number, representing three fourths in value of the creditors of the said C. D. [*debtor*], whose debts amount to ten pounds or upwards, have executed or in writing assented to or approved of such deed or instrument; and I also certify that after full inquiry made to the best of my knowledge, information, and belief, the amount in value of the property, credits, estate, and effects of the said C. D. [*debtor*] comprised in such deed is [ ]."

The memorandum of registration required by "The Bankruptcy Act, 1861," to be written on the face of every deed or instrument on being registered, shall be in the following form:—

"The Bankruptcy Act, 1861."

"This deed or instrument was brought into the office of the Chief Registrar of the Court of Bankruptcy for registration on the day of at the hour of on that day, and was duly registered pursuant to the provisions of 'The Bankruptcy Act, 1861.'"

"*Certificate of Registration of Deed and Protection to Debtor.*

"The Bankruptcy Act, 1861."

"I, being the Chief Registrar of her Majesty's Court of Bankruptcy, do certify that on the day of a certain deed or instrument bearing date the day of and made and executed by and between [*set forth parties, not including the names of the creditors*], being a deed or instrument [*set forth the nature and effect thereof*], was on the day of and at the hour of on such day brought into my office for registration, and was duly registered pursuant to the provisions of 'The Bankruptcy Act, 1861.'

"Given under my hand and seal of the Court, at the Court of Bankruptcy, London, the day of 1861.

(Seal of the Court.) A. B.

"*Note.*—This certificate is available to the said A. B. [*the debtor*] for all purposes as a protection in Bankruptcy."

20. If a deed be registered under section 187 or section 194 of "The Bankruptcy Act, 1861," the above forms may be observed, so far as may be applicable.

As to Prisoners for Debt.

21. The gaoler of every gaol situate within the Metropolitan and London Districts shall transmit the return required of him by sections 100 and 104 to the Chief Registrar of the London Court.

22. The gaoler of every gaol situate within a Country District, *but not situate in the county within which a country Commissioner of Bankruptcy usually holds his Court*, shall make the return required of him by sections 100 and 104 to that County Court having jurisdiction in Bankruptcy within the jurisdiction of which the gaol is situate, and shall transmit the same to the Registrar of such Court.

23. The gaoler of every gaol situate in the county within which a District Commissioner of Bankruptcy usually holds his Court, shall make the return required of him by sections 100 and 104 to such District Court of Bankruptcy, and transmit the same to the Registrar of such Court.

24. With respect to returns from gaolers of prisons within the Metropolitan District, the Chief Registrar shall assign the same to the Registrars of the London Court in rotation, and they shall respectively attend the gaols the returns from which are so assigned to them respectively.

25. With respect to returns from gaolers of prisons within the London District (exclusive of the Metropolitan District), the Chief Registrar shall assign such returns, and the duty of attending at the Gaols therein mentioned, to the Registrars of the several County Courts of the Districts within which such gaols are severally situate, and the Registrars shall respectively attend at such gaols accordingly.

26. The return and order required by sections 100 and 101 of "The Bankruptcy Act, 1861," may respectively be in the form following:

"*Gaoler's Return.*"

"The Bankruptcy Act, 1861."

"RETURN made by gaoler of gaol [*or* keeper *or* governor of prison], in the county of this first day of 18 [*or* this second day of 18 the first day of the month being a Sunday], in pursuance of the above Act,

of every person now within the walls, rules, or liberties of the said gaol [*or* prison], in custody upon any process whatsoever for or by reason of any debt, claim, or demand whatsoever, and not being within any of the exceptions mentioned in section 104 of 'The Bankruptcy Act, 1861.'

1. Name of person detained, and date of his imprisonment.
2. Name and address of every creditor at whose suit such prisoner is imprisoned or detained.
3. Nature and amount of debt or demand, or debts and demands, for which such prisoner is detained in custody.
4. Whether such prisoner is willing or refuses to petition the Court of Bankruptcy, or is unable to do so by reason of poverty.

"A true return,
(Signed) ——— Gaoler,
[*or* Keeper *or* Governor]."

"The Bankruptcy Act, 1861."

"In the Court of Bankruptcy for the District [*or* in the County Court for]
day the day of 18

"I, A. B., a Commissioner [*or* Judge] of in pursuance of the power conferred upon me by 'The Bankruptcy Act, 1861,' order that Esquire, a Registrar of the Court of Bankruptcy [*or* Gent., a Registrar of the County Court] do attend at gaol [*or* prison] in the county of at o'clock in the noon, then and there to examine [*here insert the name or names*] returned to me by gaoler of the said gaol [*or* keeper or governor of the said prison] as a prisoner [*or* prisoners], confined in the said gaol [*or* prison] for debt, and to proceed thereon and make order as the said Act directs.

(Signed)
——— Commissioner [*or* Judge]."

And a copy of such order shall be forthwith sent through the General Post by the Registrar therein named to the gaoler, and also to the execution and detaining creditors of every prisoner included in such return.

27. On the day named in such order the Registrar shall attend at the prison and examine every prisoner included in such return pursuant to the directions contained in s. 101 of the Bankruptcy Act, 1861, and if, upon the result of such examination, he shall think fit to make an order in pursuance of such section, such order may, *mutatis mutandis*, be in the following form:—

"The Bankruptcy Act, 1861."

"In the matter of late of in the county of and now a prisoner for debt in gaol [*or* prison] Monday, the day of 18

"Whereas in pursuance of an order of the Court of Bankruptcy for [*or* of the County Court for], dated the day of 18 , I, being a Registrar of the said Court, attended on the day first abovementioned at gaol [*or* prison], and there examined A. B., of whose examination in writing is filed herewith, whereby it appears that the said A. B. being a trader had been in prison for debt [*or as the case may be*], at the suit of of for fourteen days [*or*, not being a trader had been in prison for debt, *or as the case may be*], at the suit of of for two calendar months, on the said day of [*the day of the Registrar's order*], and that the last place of his abode and place of business [*or* place of abode] within six months of his imprisonment [*or* within] was

"And having evidence before me of the service of notice of the said order of the said Court upon the gaoler of the said gaol [*or* keeper *or* governor of the said prison], and upon the execution [and detaining] creditor, I do adjudge the said A. B. a bankrupt, and do declare that the said A. B. became and was bankrupt on the day of [*the day of the debtor's commitment or detention*]; and I do hereby grant the said A. B. protection from arrest from any claim, debt, or demand now due or owing by the said A. B. And I do hereby order that the said A. B. be forthwith discharged from custody as aforesaid; and I do hereby direct that the said bankruptcy be prosecuted in the Court of Bankruptcy for the district [*or* in the County Court for].

"All which I certify.
(Signed)
——— Registrar."

28. In addition to the certificate which the Registrar is directed to make by the 101st section, to the Court of which he is Registrar, he shall, if a Registrar of a County Court at the same time, send a copy of his certificate to the Court of Bankruptcy having jurisdiction in the district where the gaol is situate, and if a Registrar of the Court of Bankruptcy he shall send a copy of such certificate to the County Court having jurisdiction over the same district.

29. Where adjudication of bankruptcy is made against a debtor on his own petition or against a debtor in gaol without petition, the first meeting of creditors shall be holden on the 14th day after the day of such adjudication, unless such 14th day shall happen to be one of the days excepted by the 48th section, and in that case on the day after.

30. Advertisements of adjudication and of the first meeting of creditors shall, in cases of adjudication against debtors on their own petition, and of adjudication against debtors in prison without petition, be published within four days after such adjudication in the *London Gazette*, and in such provincial newspaper or other publication as the Commissioner, Judge, or Registrar shall direct.

31. Bankruptcies of prisoner debtors upon adjudication made by Registrars which are to be prosecuted in the Court of Bankruptcy shall in the London district be allotted to the Commissioners in rotation. Such allotment shall be made in London by the Chief Registrar or Registrar acting for him. The Commissioner upon each bankruptcy being

allotted to him shall appoint an Official Assignee to act in such bankruptcy. After the first meeting of creditors, if no creditors' assignee be appointed, the Lord Chancellor shall appoint a solicitor to act in the prosecution of the bankruptcy.

As to Appeals.

32. All appeals to the Court of Appeal shall be brought on by motion, and no new evidence shall be received on any appeal unless the Court of Appeal shall on the hearing thereof so direct.

33. The office of the Accountant in Bankruptcy shall be open throughout the year for the payment of dividends and money orders, except on the days mentioned in the 48th section of the Act.

As to Stamps.

34. Every officer of the Court of Bankruptcy who shall receive any document to which a stamp shall be affixed, or upon which a stamp shall be impressed, shall immediately upon the receipt of such document deface the stamp thereon, by writing or impressing upon such stamp the words "Court of Bankruptcy;" and no such document shall be filed or delivered until the stamp thereon shall have been defaced in manner aforesaid, and it shall be the duty of the party presenting such document to see that such defacement has been duly made.

As to Shorthand Writers.

35. Whenever a shorthand writer shall be employed pursuant to s. 61 of "The Bankruptcy Act, 1861," such shorthand-writer shall, if required within [two] days after the taking of any examination, or the evidence of parties, deliver to the Registrar a faithful and true transcript of such examination or evidence, and shall be paid in respect thereof a fee of one guinea for attendance, and 8*d.* per folio of every [90] words contained in such transcript, and such payment shall be made by the party on whose application the employment of a shorthand writer has been directed by the Court, or, if the Court thinks proper, out of the estate.

The Shorthand Writers shall be appointed by the Commissioner or Judge.

36. Until further order and in cases not otherwise provided by these Orders the rules and orders in bankruptcy bearing date respectively the 19th October, 1852; the 3d February, 1855; the 19th May, 1855; the 19th June, 1856; and the 24th March, 1857, shall, where applicable, and with such variations in the forms specified in the Schedules thereof as may be necessary, be acted upon for the several purposes mentioned in the 45th section of "The Bankruptcy Act, 1861."

WESTBURY, C.
JOHN S. M. FONBLANQUE, Commissioner.
EDWARD HOLROYD, Commissioner.
M. D. HILL, Commissioner.

SCHEDULES referred to in the foregoing Orders.

SCHEDULE 1.

"The Bankruptcy Act, 1861."

Petition by a Creditor for Adjudication of Bankruptcy.

To the Court of Bankruptcy, for the District.

The humble petition of
Showeth,

That having resided [*or* carried on business, *as the case may be*] for six [*or* for the longest period, that is to say, months during six] calendar months next immediately preceding the date of this petition, within the district of this Honourable Court, that is to say, at [*insert the name of the place*], is indebted to your petitioner in the sum of [*proceed as in the form now in use*].

SCHEDULE 2.

"The Bankruptcy Act, 1861."

Petition by a Debtor for Adjudication of Bankruptcy against himself.

To the Court of Bankruptcy, for the District.

The humble petition of
Showeth,

That your petitioner having resided [*or* carried on business, *as the case may be*] for six [*or* for the longest period, that is to say, months during six] calendar months next immediately preceding the date of this petition, within the district of this Honourable Court, that is to say, at [*insert the name of the place*] is unable to meet his engagements with his creditors: [*If the petitioner be in prison, add,* "and that your petitioner being a prisoner in [*state the prison or gaol*] has given notice in writing to the keeper of such gaol [*or* prison] of his intention to file this petition."]

Your petitioner therefore humbly prays that adjudication of bankruptcy may be made against him. And your petitioner shall ever pray, &c.

Signed by the petitioner on the day of 18 in the presence of ——

Solicitor in the matter of this petition.

If the petitioner knows or verily believes that the debts justly due and provable in bankruptcy against his estate amount in the whole to a sum not exceeding 300l., such fact should be stated on oath by the petitioner in his affidavit of the truth of the allegations in the petition thus: "And this deponent further saith, that he verily believes the debts justly due and provable in bankruptcy against his

estate amount in the whole to a sum not exceeding 300*l.*"

If the petition be by partners alter the form accordingly, and state the names of the several petitioners in the attestation or attestations relating thereto respectively.

If the petition be in formâ pauperis, *the affidavit required by Sect.* 98, 24 & 25 *Vic. c.* 134, *should be annexed.*

SCHEDULE 3.

"The Bankruptcy Act, 1861."

Affidavits for Summoning a Judgment Debtor.

Sects. 76, 77, 78, *and* 90, 24 & 25 *Vic.* c. 134.

In the Court of Bankruptcy, London.

(*Or*, "In the Court of Bankruptcy for the District, at .")

I, A. B. of make oath and say as follows:—

First, I say that C. D. is justly and truly indebted to me in the sum of £ upon and by virtue of a judgment of the Court of for the said sum of £ recovered by me against the said C. D. on the[1] day of last past, and of which said sum the sum of £ exclusive of costs, is due to me, and the sum of £ for taxed costs is due to me, making together the said sum of £

Second, I say that I verily believe that I am entitled to sue out against the said C. D. a writ of *capias ad satisfaciendum*, or to charge him in execution in respect of the said debt.

Third,[2] I say that I have known the said C. D. for the space of now last past, during which time the said C. D. did use and exercise the said trade of [*here insert the particular trade*], and sought to get his livelihood thereby, as others of the same trade usually do.

Fourth,[3] I say that the said C. D. usually lives [*or*, "as I am informed and believe, now is,"] within the district of this Honourable Court, that is to say, at [*or* "as I am informed and believe, is not in England," but I say that the usual or last-known place of abode of the said C. D. in England was at].

Sworn at, &c.

The following Form to be used in Cases of Disobedience to Decree in Equity or Order in Bankruptcy, Insolvency, or Lunacy.

In the Court of Bankruptcy, London.

(*Or* "In the Court of Bankruptcy for the District, at .")

We, A. B. of and C. D. of severally make oath and say:—

First, I, A. B., for myself say that E. F. is justly and truly indebted to me in the sum of £ upon and by virtue of a decree of the High Court of Chancery [*or* "an Order of the Lord High Chancellor," *or* "of the Right Honourable the Master of the Rolls," *or* "of his Honour Vice Chancellor &c. &c., bearing date the day of and made in a certain suit then pending, wherein I the said A. B. was plaintiff, and the said E. F. defendant [*or* in a certain matter in bankruptcy, insolvency, or lunacy,] whereby the said E. F. was decreed [*or* "ordered"] to pay to me the sum of £ exclusive of costs, and the sum of £ for taxed costs [*give the substance of the decree or order*], making together the said sum of £ and upon which a peremptory order made by the said Lord Chancellor [*or*, &c.] was obtained by me on the day of directing, &c., *as in the peremptory order* [*Paragraphs as to the trading and residence deposed to by the creditor or some other person, here follow. If the summons be not applied for until after the expiration of two calendar months after service on the debtor of the peremptory order, or, such order having been duly served after the expiration of seven days after the day fixed by the peremptory order for payment (which shall last happen), the paragraph as to the trading may be omitted.—See sect.* 77.]

Second, I, C. D., for myself say that I did on the day of duly serve the said E. F. with a true copy of the said decree [*or* "order"] by delivering to or leaving the same with the solicitor [*or* "a clerk of the solicitor"] of the said E. F. at his office at

Third, I, C. D., further say that I did on the day of personally serve the said E. F. with a true copy of the said peremptory order.

Fourth, I, A. B., further say that the said E. F. has not paid, or secured, or tendered, or compounded for the said debt, but the said debt still remains wholly due and unpaid.

Sworn by at

SCHEDULE 4.

"The Bankruptcy Act, 1861."

Summons of Judgment Debtor, sec. 76, *&c.* 24 & 25 *Vic. c.* 134.

These are to will and require you to whom this summons is directed, personally to be and appear before the Commissioner in attendance in Chambers, at the Court of Bankruptcy in Basinghall Street, in the City of London [*or* at the Court of Bankruptcy for the district at in the county of] on the day of at o'clock, to be examined respecting your

[1] The day of signing final judgment, which must be after the passing of "The Bankruptcy Act, 1861."

[2] If the summons be not applied for until after the expiration of one calendar month from the signing of judgment, this paragraph may be omitted.

[3] If the residence or the trading be sworn to by some other person, alter the affidavit accordingly.

ability to satisfy a debt of £ claimed of you by A. B. of [1]upon and by virtue of a judgment of the Court of for the said sum of £ recovered by the said A. B. against you on the day of last, and of which said sum the sum of[2] £ exclusive of costs, is sworn to be due from you to the said A. B., and the sum of £ for taxed costs, making together the said sum of £ You are to be examined also for the discovery of property applicable to satisfy the said debt. You are moreover to observe the[3] notice endorsed hereon, and hereof you are not to fail at your peril.

Given under my hand and the seal of the Court, the day of in the year of our Lord

(Signed)

To E. F. of ——— Registrar.

Seal of the Court.

———

SCHEDULE 5.

"The Bankruptcy Act, 1861."

Form of the Statement to be filed in Court by every Debtor petitioning for Adjudication of Bankruptcy against himself, and to be verified by the Oath of the Petitioner, under sect. 93, 24 *&* 25 *Vic. c.* 134.

N.B.—This is to be a full, true, and accurate statement, verified by the oath of the petitioner, of his debts and liabilities of every kind, and of the names and residences of his creditors, and of the causes of his inability to meet his engagements, reckoning as debts:—

1. Sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages, securities, or liens.
2. Such interest and costs as shall be due in respect of any of the debts.

But not reckoning:—

1. The amount of the debts in respect of which the petitioner has already taken the benefit of insolvency, protection, or bankruptcy.
2. Debts barred by any statute of limitations.

The statement must be filed and verified within three days after filing the petition for adjudication, and in default thereof the petition will be dismissed.

A full, true, and accurate statement, verified by the oath of the petitioner, of the debts and liabilities of every kind, reckoned in manner above directed, of of a debtor petitioning for adjudication of bankruptcy against himself, and of the names and residences of his creditors, and of the causes of his inability to meet his engagements.

Creditors.		Amount of Debts, after deducting the Value of Property comprised in Mortgages, Securities, or Liens.	Debts secured by Mortgages or other available Securities or Liens, showing the Amount secured, and the value or estimated Value of the Property comprised therein.	Causes of the Petitioner's inability to meet his Engagements.
Names.	Residences.			

To be signed by the petitioner.

[1] If upon a decree in equity, &c. say "upon and by virtue of a decree" [*or* "order"] and peremptory order, dated respectively the day of and the day of and sworn to have been duly served upon you, whereby you were directed to pay to the said A. B. the sum of £ exclusive of costs, and the sum of £ for taxed costs, making together the said sum of £

[2] The debt, exclusive of costs, must not be under 50*l.*

[3] See Order 7.

SCHEDULE 6.

"The Bankruptcy Act, 1861."

Affidavit of Truth of Statement to be filed under sect. 93.

day of A.D.

E. F. of in the of the petitioner named in the statement hereunto annexed, maketh oath and saith, that the said statement contains a full, true, and accurate account of his debts and liabilities of every kind, reckoned as required by "The Bankruptcy Act, 1861," and the General Orders in Bankruptcy, and of the names and residences of his creditors, and of the causes of his inability to meet his engagements.

Sworn at, &c.

Before me

SCHEDULE 7.

"The Bankruptcy Act, 1861."

Declaration of Insolvency by Debtor.—Sect. 72, 24 *&* 25 *Vic. c.* 134.

I, the undersigned E. F. of do hereby declare that I am unable to meet my engagements with my creditors.

Dated at the hour of [*in the forenoon, or at noon, or in the afternoon, as the case may be*] this day of in the year of our Lord

(Signed) E. F.

Witness,
G. H., Registrar of the Court of Bankruptcy, [*or*, Attorney or Solicitor of the Court of]

SCHEDULE 8.

"The Bankruptcy Act, 1861."

Order for substituted Service of Judgment-Debtor Summons when the Debtor is in England but cannot be found.—24 *&* 25 *Vic. c.* 134, *s.* 79.

In the Court of Bankruptcy, London,
[*or*, "for the District at ."]
Ex-parte
In the matter of
day of 1861.

Upon the application of [of counsel *or* solicitor] for and upon proof to the satisfaction of the Court that E. F., the debtor named in the summons hereunto annexed, is in England but is not to be found, it is hereby ordered by the Court that service of the said summons, &c. [*stating the mode*] shall be good service.

By the Court,
——— Registrar.

SCHEDULE 9.

"The Bankruptcy Act, 1861."

Order for Mode of Service of Judgment-Debtor Summons, where the Debtor is not in England.—24 *&* 25 *Vic. c.* 134, *s.* 79.

In the Court of Bankruptcy, London,
[*or*, "for the District at ."]
Ex-parte
In the matter of
day of 186

Upon the application of [of counsel *or* solicitor] for and upon proof to the satisfaction of the Court that E. F., the debtor named in the summons hereunto annexed, is not in England, and that service in the manner and form hereinafter mentioned will be effectual to give notice to the said E. F., it is hereby ordered by the Court that service of the said summons shall be made by, &c. [*stating the mode*]: And it is hereby further ordered that[1] the time and place at which the said E. F. is required to appear by the said summons, shall be the time and place for the appearance of the said E. F. under this order, and such time and place is hereby appointed accordingly.

By the Court,
——— Registrar.

SCHEDULE 10.

"The Bankruptcy Act, 1861."

Order for Notice of Judgment-Debtor Summons in Gazette and Newspapers, where service of the Summons cannot be effected.—24 *&* 25 *Vic. c.* 134, *s.* 81.

In the Court of Bankruptcy, London,
[*or*, "for the District at ."]
Ex-parte
In the matter of
day of 186

Upon the application of [of counsel *or* solicitor] for and upon proof to the satisfaction of the Court, that E. F., the debtor named in the summons hereunto annexed, is keeping out of the way to avoid service thereof, and that service of the said summons cannot be effected, it is hereby ordered that a notice be inserted [*stating the number of times*] in the *London Gazette*, and in [*stating the newspapers*], requiring the said E. F. personally to be and appear before[2] &c. [*as in the summons*] on the day of at o'clock, to be examined respecting his ability to satisfy a debt of, &c. [*as in the summons*], and for the discovery of property applicable in that behalf: And it is further ordered, that by such advertisement the said E. F. be informed, that if after service of the said summons or due notice thereof by the said advertisement, he does not pay the said debt and costs, or secure or compound for the same to the satisfaction of the creditor, then on his appearance to the said notice in the said *Gazette* and newspapers, or, if he shall not appear, having no lawful impediment allowed by the Court, and in either case without the presentation of a petition for adjudication or other proceeding,

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[1] If any other time be appointed, alter form accordingly.

[2] This must be a day not less than fourteen days after publication of the first notice.

the Court may adjudge the said E. F. bankrupt. By the Court,

——— Registrar.

SCHEDULE 11.

"The Bankruptcy Act, 1861."

Advertisement of Notice in London Gazette, &c. where service of Judgment-Debtor Summons cannot be effected.

In Bankruptcy:—Statutory Notice of Judgment-Debtor Summons.

To E. F. of

Take notice that a Judgment-Debtor Summons, dated the day of was issued by of attorney for the Plaintiff [*or* Plaintiffs] hereinafter named [*or* by the Plaintiff *or* Plaintiffs hereinafter named who resides at &c. [*as endorsed on the summons*], and is under seal of Her Majesty's Court of Bankruptcy in London [*or* Her Majesty's Court of Bankruptcy for the District], requiring you personally to be and appear before, &c. on the day of at o'clock, to be examined respecting your ability to satisfy a debt of, &c. [*as in the summons*], and for the discovery of property applicable in that behalf. And whereas it has been proved to the satisfaction of the said Court of Bankruptcy, that you have been keeping out of the way to avoid service of the said summons, and that service thereof cannot be effected: This notice is given by order of the same Court, and in pursuance of "The Bankruptcy Act, 1861," and you are hereby required personally to be and appear before the Commissioner in attendance in chambers at the same Court at on the day of at o'clock, to be examined respecting your ability to satisfy the said debt and for the discovery of property applicable in that behalf; and you are hereby informed, that if after service of the said summons or notice thereof by this advertisement, you do not pay the said debt and costs, or secure or compound for the same to the satisfaction of the creditor, then, on your appearance to this notice, or, if you shall not appear, having no lawful impediment allowed by the Court, and in either case without the presentation of a petition for adjudication, or other proceeding, the Court may adjudge you bankrupt.

——— Registrar.

——— Solicitor for the said A. B.

SCHEDULE 12.

"The Bankruptcy Act, 1861."

Adjudication of Bankruptcy on Proceeding under Judgment-Debtor Summons,

[*or*, "for the district at ."]

day of 186

I, a Commissioner [*or* Registrar] of the said Court, upon good proof upon oath before me this day had and taken, do find that the said is liable to be adjudged bankrupt under the 83rd section of "The Bankruptcy Act, 1861," and I do therefore adjudge him bankrupt accordingly.

A. B., Commissioner [*or* Registrar.]

SCHEDULE 13.

"The Bankruptcy Act, 1861."

Order Annulling or making Absolute Adjudication of Bankruptcy made under the 83rd Section.

In the Court of Bankruptcy, London,

[*or*, "for the district at ."]

In the matter of

day of 186 .

Upon reading the proceedings in the above matter, and upon hearing [the evidence now adduced, *if the case be so*, and] what was alleged by and being satisfied that sufficient [*or* no sufficient] cause has been shown for annulling the adjudication of bankruptcy made against the said on the day of I do order that such adjudication be annulled [*or* be confirmed], and the same is hereby annulled [*or* confirmed and made absolute] accordingly.

A. B., Commissioner.

SCHEDULE 14.

"The Bankruptcy Act, 1861."

Declaration to be made when Petition for Adjudication of Bankruptcy or a Judgment-Debtor Summons is filed or sued out by Public Officer or Agent of Copartnership, under Section 92, 24 & 25 Vic. c. 134.

In the Court of Bankruptcy, London,

[*or*, "for the district, at ."]

In the matter of

day of A.D. 186 .

I, the undersigned do solemnly declare that I am a Public Officer [*or* Agent] [*name of copartnership*] duly authorised to sue and be sued in the name of a Public Officer or Agent of such copartnership, and that I am authorised to sue as the nominal Petitioner for and on behalf of such copartnership. (Signed) ———

Declared before, &c. *See sect.* 207.

SCHEDULE 15.

"The Bankruptcy Act, 1861."

Declaration of Proof of Debt by Creditor under Section 144, 24 & 25 Vic. c. 134.

In the Court of Bankruptcy, London,

[*or*, in the Court of Bankruptcy for the district at].

In the matter of Bankrupt.

I, A. B., of do solemnly declare that the statement of the debt [and of the account, *if any*] between me and the said Bankrupt, hereunto annexed, is a full, true, and complete[1] statement of account between me and the said Bankrupt, and that

[1] Any bills, notes, or other securities held in respect of the debt must be set forth in the statement of account, and if there be any set-off, the balance only should be claimed.

the debt thereby appearing to be due from the estate of the said Bankrupt to me was on or before the day of [*the date of the bankruptcy*] and still is justly due.

(Signed,) A. B.
the Creditor above named.

Declared before me at
this day of 18

Declaration for Proof of Debt by Agent of Company incorporated, or authorised to sue and bring Actions under Section 144, 24 *&* 25 *Vic. c.* 134.

In the Court of Bankruptcy, London,
[*or* in the Court of Bankruptcy for the district at .]
In the matter of Bankrupt.

I, A. B., of Agent of being a Public Company incorporated [*or* authorised to sue and bring actions] and carrying on business at do solemnly declare that I am such Agent, and duly authorised to make this proof, and that the statement of the debt [and of the account, *if any*] between the said Company and the said Bankrupt, hereunto annexed, is a full, true, and complete[1] statement of account between the said Company and the said Bankrupt, and that it is within my own knowledge that the debt thereby appearing to be due from the estate of the said Bankrupt to the said Company was incurred on or before the day of [*the date of the bankruptcy*], and for the consideration therein stated, and that to the best of my knowledge and belief the said debt still remains unpaid and unsatisfied.

(Signed) A. B.
Agent of the Company above named.

Declared before me at
this day of 18

[The declarations may be made before any Court or person authorised to take affidavits, &c. in bankruptcy, under sect. 207.]

[1] Any bills, notes, or other securities held in respect of the debt must be set forth in the statement of account, and if there be any set-off, the balance only should be claimed.

SCHEDULE 16.

"The Bankruptcy Act, 1861."

Statement of Accounts to be filed by the Bankrupt Ten Days at least before the Day appointed for the last Examination or Adjournment thereof, under sect. 141, 24 *&* 25 *Vic. c.* 134. [*When ordered by the Court, a Goods Account and a Cash Account for such period as the Court shall think fit, and an Account accounting for any Deficiency, shall be added by the Bankrupt, within the time appointed, to his Statement of Accounts, and shall form part thereof.*]

In the Court of Bankruptcy, London [*or* for the District].
In the matter of of a bankrupt.
Filed the day of 18
Dated the day of 18

Dr. *Statement of Accounts.* *Cr.*

		£	s.	d.				£	s.	d.
Fol. 1	To creditors (unsecured) . .				Fol. 6 and 7	By debtors— Good . . .				
2	To creditors holding security					Doubtful . . Bad				
3	To liabilities on bills discounted									
4	To ditto, on accommodation bills									
5	To creditors to be paid in full				8 & 9	By property given up to my assignees . .				
					2	By property in the hands of creditors . .				
	Surplus (if any)					Deficiency . .				
	£					£				

MEMORANDUM.—The amount of my expenditure for the support of myself and family, &c. for the year next immediately preceding my bankruptcy was about ; ditto for the previous year.

SCHEDULE 16—(*continued*).

CREDITORS UNSECURED.

N.B.—When the Name and Residence (or either of them) of any Indorser or Holder of any Bill or Note, &c. are unknown, the fact must be stated. Where there are Cross Demands, the party must be entered as a Debtor or Creditor for the Balance only (as the case may be), and showing the amount of Set-off.

Reference to Ledger or Voucher.	Names of Creditors.	Residences and Occupations.	Amount.			When Contracted.	Nature and Consideration of the Debt, and whether any Judgment, Bond, Bill of Exchange, Promissory Note, &c.
			£	*s.*	*d.*		

CREDITORS HOLDING SECURITY.

Particulars of Securities held, with Dates of same and when given, to be stated under the Names of the several Creditors.

Reference to Ledger or Voucher.	Names of Creditors.	Residences and Description.	Value of Securities.			Amount of Debts.		
			£	*s.*	*d.*	£	*s.*	*d.*

LIABILITIES ON BILLS DISCOUNTED,

Which ought to be paid by the Acceptors.

The Dates of the Bills and when due, with the Names, Addresses, and Trade or Occupation of the Acceptors thereof, are to be set forth under the Names of the Holders.

	Names of Holders, as far as known.	Addresses.				Amount.		
			£	*s.*	*d.*	£	*s.*	*d.*

SCHEDULE 16—(*continued*).

ACCOMMODATION BILLS.

The Dates of the Bills, and when due, with the Names, Addresses, and Trade or Occupation of the Drawers and Acceptors thereof, are to be set forth under the Names of the Holders; if the Bankrupt be liable as Drawer, Acceptor, or Indorser thereof, it is to be stated accordingly.

	Names of Holders.	Addresses and Particulars of Bills.				Amount.		
			£	*s.*	*d.*	£	*s.*	*d.*

CREDITORS TO BE PAID IN FULL.

	Names of Creditors.	Residences and Occupations.	Amount.			When Contracted.	Nature and Consideration of the Debt.
			£	*s.*	*d.*		

DEBTORS UNDER £10.

Where there are Cross Demands, the Party must be entered as a Debtor or Creditor for the Balance only (as the case may be), and showing the Amount of Set-off.

Reference to Ledger or Voucher.	Names, Descriptions, and Residences of Persons from whom Debts are due, or claimed.	When Contracted.	Amount.						Nature and Consideration of the Debt, also Securities (if any) for the same, and the estimated Value of such Securities.
			Good.		Doubtful.		Bad.		

SCHEDULE 16—(*continued*).

DEBTORS EXCEEDING £10.

Where there are Cross Demands, the Party must be entered as a Debtor or Creditor for the Balance only (as the case may be), and showing the Amount of Set-off.

Reference to Ledger or Voucher.	Names, Descriptions, and Residences of Persons from whom Debts are due, or claimed.	When Contracted.	Amount.			Nature and Consideration of the Debt, also Securities (if any) for the same, and the estimated Value of such Securities.
			Good.	Doubtful.	Bad.	

PROPERTY IN POSSESSION.

Real and Personal Estate and Effects, which were at or since the Date of the Petition or Adjudication of Bankruptcy against me, or are now in my possession, enjoyment, or control, or which were or are held by any other person or persons in trust for my use, or to the possession or enjoyment of which I was entitled at the date of the said Petition or Adjudication, or am now entitled.

		£	*s.*	*d.*
1. Interest in Lands.	Freehold, Copyhold, and Leasehold Property, with local Description, Names of Tenants, and Annual Rent of the same, and statement of Incumbrances (if any) thereupon, with the Dates thereof			
2. Personal Property.	Cash, Bills of Exchange, Promissory Notes, or Securities of any description			
	Stock-in-Trade in my Business of at estimated value (if sold, state Amount realised.)			
	Machinery, Fixtures, & Utensils in my business, ditto, ditto			
	Household Goods and Furniture at			
	Jewels, Trinkets, and Ornaments of the Person . .			
	Plate, Linen, and China			
	Wines and other Liquors			
	Books, Prints, and Pictures			
	Horses, Cows, and other Animals			
	Carriages			
	Farming Stock and Implements of Husbandry . .			
	Ships and Shares of Ships, viz.:			
	Goods or Personal Property of any other description .			
	(*If any of the above are at any other place than the Premises of the Bankrupt, viz. any public or private Warehouse, Railway Station, Dock, Wharf, or any other place, state it accordingly.*)			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in Public or other Funds, Shares in Canal or other Companies; showing in whose names the same are standing, also when and by whom the last Dividend or other Payment was received in respect of the same			
4. Unpaid Legacies.	Legacies due, but unpaid, with all particulars concerning the same			
5. Policies of Insurance.	Policies of Insurance, either on my own Life or that of any other Person or Persons in which I have any interest . . .			
	Fire Policies			
BOOKS, DEEDS, PAPERS.	The following is a true List of all Books, Papers, Deeds, and Writings relating to my Trade, Dealings, Estate and Effects, or any part thereof, which at the date of the Petition or Adjudication of Bankruptcy against me were, or at any time since have been in my possession, or under my custody or control, or in the possession or custody of any person in trust for me or for my use, benefit, or advantage.			

PROPERTY in Reversion, Remainder, or Expectancy, Places, Pensions, Rights, and Powers.

N.B.—Contingent as well as vested Interests must be entered.

Real and Personal Estate and Effects in which I had or have any Interest in Reversion, Remainder, or Expectancy.

		Supposed Value of my Interest if now to be Sold.		
1. Interest in Land.	Freehold, Copyhold, and Leasehold Property, with Names and Descriptions of Persons now enjoying the same, and the Annual Value thereof; also the nature of my Interest therein, and from whom, and in what manner it is derived . .	£	*s.*	*d.*
2. Personal Property.	Personal Property, with Names and Descriptions of Persons now enjoying the same; also the nature of my Interest therein, and from whom, and in what manner it is derived .			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in Public or other Funds, Shares in Canal and other Companies; showing in whose Names the same are standing, with Names and Descriptions of Persons now enjoying the same; also the nature of my interest therein, and from whom, and in what manner it is derived . .			
4. Places and Pensions in Possession or Reversion.	Places of Benefit or Advantage held by me, with the Salaries, Fees, and Emoluments thereof; also all Pensions and Allowances in Possession or Reversion held by me, or by any other Person or Persons for me, or on my behalf, or of and from which I may derive any benefit or advantage			
5. Rights and Powers.	Rights and Powers which I or any other Person or Persons in Trust for me or for my Benefit have any power to dispose of, charge, or exercise			

SCHEDULE 17.

"The Bankruptcy Act, 1861."

Order of Discharge, when granted at the same Sitting of the Court at which the Bankrupt has passed his last Examination.—Sect. 140, 21 *&* 24 *Vict. c.* 134; *and see Sect.* 157, 170, 172.

In the matter of of adjudged bankrupt on the day of A.D.

Whereas at a public sitting of the Court held on the [1] day of at the Court of Bankruptcy, London [*or* at the Court of Bankruptcy for the District at] for the said Bankrupt to pass his last examination, and also to make application for his order of discharge under "The Bankruptcy Act, 1861" (whereof and of the purport whereof the notice required in that behalf was duly given), the said Bankrupt passed his last examination, and upon application then and there made by the said Bankrupt for such discharge, and upon hearing, &c. &c., it was adjudged by the Court that the said Bankrupt was entitled to such discharge, whereupon such order of discharge was and is hereby allowed and granted accordingly [*or, if the discharge were suspended, then, after the words "such Discharge," proceed as follows:* after suspension thereof for the period of the reasons for such suspension being, that it appeared to the Court that, &c. [*stating the reasons*]: And whereas the period of suspension has now elapsed, the Court allows the discharge, and such order of discharge is hereby allowed and granted accordingly.[2]]

Given under my hand and the seal of the Court at the Court of Bankruptcy, London [*or*, at the Court of Bankruptcy for the District, at in the county of] on the day of in the year of our Lord 186

——— Commissioner.

Seal of the Court.

——— Registrar.

SCHEDULE 18.

"The Bankruptcy Act, 1861."

Order of Discharge, when granted at a Sitting of the Court appointed after the Bankrupt has passed his last Examination.—Sect. 158, 24 *&* 25 *Vict.* c. 134.

In the matter of of adjudged bankrupt on the day of A.D.

[1] If adjourned, add "and by adjournment on the day of ."

[2] "If the order of discharge be wholly refused, or be granted subject to any condition, or any sentence of imprisonment has been awarded, alter and state the facts accordingly." *See* Sects. 157, 159.

Whereas at a public sitting of the Court appointed after the Bankrupt passed his last examination, and held on the [1] day of at the Court of Bankruptcy, London [*or* at the Court of Bankruptcy for the district, at], for the purpose of considering the question of granting to the Bankrupt his order of discharge under "The Bankruptcy Act, 1861," (whereof and of the purport whereof the notice required in that behalf was duly given), and upon hearing, &c. &c. [*proceed as in the form of order of discharge when granted at the same sitting at which the Bankrupt passed his last examination.*]

SCHEDULE 19.

"The Bankruptcy Act, 1861."

Form of Letter of Attorney.

In the matter of of a Bankrupt.

SIR,

I [*or* we] hereby authorise you to attend the meeting of creditors in this matter, advertised or directed to be holden at or or any adjournment thereof, and then and there for me [*or* us] and in my [*or* our] name to vote for or against [*here state the resolution or object of the meeting*], and in the choice of assignee or assignees of the estate of the Bankrupt.

Witness to the signature
of ——— A. B.
To ——— *or* A. B. for self and Partners.

WESTBURY, C.
JOHN S. M. FONBLANQUE, Commissioner.
EDWARD HOLROYD, Commissioner.
M. D. HILL, Commissioner.

[1] If adjourned, add "and by adjournment on the day of ."

SCHEDULES referred to in the 12 & 13 Vic. c. 106.

SCHEDULE (A).

Acts and Parts of Acts repealed.

Date of Act.	Title.	Extent of Repeal.
6 Geo. 4, c. 16.	An Act to amend the Laws relating to Bankrupts.	The whole.
1 & 2 Wm. 4, c. 56.	An Act to establish a Court of Bankruptcy.	The whole, except as hereinbefore in the Bankrupt Law Consolidation Act, 1849, is excepted, and except so far as relates to the appointment, tenure of office, and removal of commissioners, registrars, deputy-registrars, and official assignees of the Court of Bankruptcy, and except so far as the act prohibits such commissioners, registrars and deputy registrars from practising as a barrister, or being an attorney or solicitor, or renders such commissioners, registrars, deputy-registrars, official assignees, and the Lord Chancellor's Secretary of Bankrupts, incapable of being elected or sitting as a member of the House of Commons, and except so far as relates to the grant of compensations to officers and persons whose offices, places, fees or emoluments were discontinued and abolished.
3 & 4 Wm. 4, c. 47.	An Act to authorise his Majesty to give further Powers to the Judges of the Court of Bankruptcy, and to direct the Times of Sitting of the Judges and Commissioners of the said Court.	The whole.
1 & 2 Vic. c. 110.	An Act for abolishing Arrest on mesne Process in Civil Ac-	So far as relates to the manner of making bankrupt any trader within the mean-

SCHEDULE A.—(*continued*).

Date of Act.	Title.	Extent of Repeal.
	tions, except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England.	ing of the laws then in force respecting bankrupts, upon the filing of an affidavit or affidavits of debt or debts in the Court of Bankruptcy, and after notice in writing requiring immediate payment of such debt or debts.
2 Vic. c. 11.	An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy.	So far as relates to the protection of purchasers against secret acts of bankruptcy and fiats in bankruptcy.
2 & 3 Vic. c. 29.	An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Laws.	The whole.
5 & 6 Vic. c. 122.	An Act for the Amendment of the Law of Bankruptcy.	The whole, except as hereinbefore in the Bankrupt Law Consolidation Act, 1849, is excepted, so far as the act repeals any other act or acts, or any part of any other act or acts, and except so far as relates to the appointment, tenure of office and removal of additional commissioners, deputy registrars and official assignees to act in the country, except so far as relates to the salaries of commissioners, and except so far as relates to the transfer of the duties and business of the clerk of enrolments to the registrar of the court acting in Basinghall Street, and except so far as relates to retiring annuities and allowances, and except so far as relates to the allowance of travelling and other expenses to the commissioners and deputy registrars.
7 & 8 Vic. c. 96.	An Act to amend the Law of Insolvency, Bankruptcy, and Execution.	So far as relates to the powers of the Lord Chancellor to issue fiat against a trader upon petition of the trader himself, and to attach the commissioners acting in the country to any district.
8 & 9 Vic. c. 48.	An Act to substitute a Declaration for an Oath in Cases of Bankruptcy.	So far as relates to England.
10 & 11 Vic. c. 102.	An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Court of Bankruptcy and Court for the Relief of Insolvent Debtors.	So far as the act enacts that all laws, orders and authorities touching the practice and manner of proceeding in the Court of Review, and appealing to and from that court, shall continue in force, and be applicable to the jurisdiction of the Vice-Chancellor appointed to act in bankruptcy, and so far as the act enacts that all sums and fees shall continue to be payable and receivable by the like persons, and to be paid and applied to the like purposes, as the same had theretofore been paid and received in respect of any matter in the said Court of Review.
11 & 12 Vic. c. 86.	An Act to empower the Commissioners of the Court of Bankruptcy to order the Release of Bankrupts from Prison in certain Cases.	The whole.

SCHEDULE (B).

"The Bankrupt Law Consolidation Act, 1849."

Return by one of the Official Assignees of the Court of Bankruptcy for the District, showing the State of every Bankruptcy under his charge, and not finally wound up on the 31st day of December, 18

1. Name of Bankrupt.																		
2. Gross amount of debts and liabilities stated in the bankrupt's balance sheet.	3. Net amount of debts proved.	4. Gross amount of assets in balance sheet.	5. Total amount of assets collected.	6. Total amount paid in dividends.	7. Average rate per cent on the debts proved.	8. Total amount of charges (exclusive of the allowances to the official assignee).	9. Total amount of allowances paid to the official assignee.	10. Total amount of allowances to official assignee for petty expenses.	11. Average rate per cent on monies collected by official assignee.	12. Balance in Bank of England to the credit of the estate.	13. Balance in hands of official assignee.	14. Particulars of certificates granted, refused and suspended (distinguishing the result of each bankruptcy).	15. Cause of failure as shown by bankrupt's books and accounts.	16. Bankruptcies in which final dividends have been declared and the estates wound up, between 1st January and 31st December, 18 , inclusive.	17. Certificates allowed.	18. Class of certificate, 1, 2, or 3.		

SCHEDULE (C).

Documents.	Stamp Duty in lieu of Fees. £	s.	d.
Every petition for adjudication of bankruptcy or for arrangement between any debtor and his creditors, under the superintendence and control of the court, or for certificate of arrangement by deed	10	0	0
Every declaration of insolvency	0	2	6
Every summons of trader debtor	0	2	6
Every admission or deposition of trader debtor	0	2	6
Every bond with sureties	0	5	0
Every application for search for petition or other proceeding (except search for the appointment of any sitting or meeting)	0	1	0
Every allocatur by any officer of the court for any costs, charges, or disbursements, where such bill of costs shall not exceed 5*l.* . . .	0	1	6
Exceeding £5 and not exceeding £10	0	2	6
„ 10 „ 20	0	5	0
„ 20 „ 30	0	7	6
„ 30 „ 50	0	10	0
„ 50 „ 100	0	15	0
„ 100 „ 150	1	0	0
„ 150 „ 200	1	10	0
„ 200 „ 300	2	0	0
„ 300 „ 500	3	0	0
„ 500	5	0	0

SCHEDULE (D).

" The Bankrupt Law Consolidation Act, 1849."

Declaration of Insolvency by Trader.

I, the undersigned E. F., of do hereby declare that I am unable to meet my engagements with my creditors.

Dated at the hour of o'clock [in the forenoon, *or* at noon, *or* in the afternoon, *as the case may be*], this day of in the year of our Lord

(Signed) E. F.

Witness,
G. H., Attorney of the Court of

SCHEDULE (E).

" The Bankrupt Law Consolidation Act, 1849."

Writ of Summons to be served on a Member of Parliament in order to enforce the Provisions of " The Bankrupt Law Consolidation Act, 1849."

Victoria, &c.

To C. D., of, &c., Esquire, having privilege of Parliament, greeting:

We command you, that, within one calendar month next after personal service hereof on you, you do cause an appearance to be entered for you in our court of in an action [on promises, *or* debt, *or as the case may be*] at the suit of A. B.; and you are hereby informed that an affidavit of debt for the sum of hath been filed in the proper office, according to the provisions of " The Bankrupt Law Consolidation Act, 1849," and that unless you pay, secure or compound for the debt sought to be recovered in this action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for you, within one calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy from the time of the service hereof.

Witness at Westminster, the day of

This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards, and is to be endorsed with the name of the plaintiff or his attorney in manner following; that is to say,

This writ was issued by E. F., of attorney for the plaintiff [*or* plaintiffs] within named; *or*,

This writ was issued in person by the plaintiff within named, who resides at [*mention the city, town or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence, if any such there be*].

SCHEDULE (F).

" The Bankrupt Law Consolidation Act, 1849."

Affidavit for summoning a Trader Debtor.

A. B., of and C. D., of severally make oath and say, and first this deponent A. B. for himself saith, that E. F. is justly and truly indebted to this deponent in the sum of [*the amount of the debt*] for, &c. [*stating the nature of the debt with certainty and precision*]; and this deponent further saith, that the said E. F., as this deponent very believes, is a trader within the meaning of the law of bankruptcy, and resides at and that an account in writing of the par-

ticulars of the demand of the said A. B., amounting to the said sum of [*the amount of the debt*], with a notice thereunder written in the form prescribed by "The Bankrupt Law Consolidation Act, 1849," requiring immediate payment of the said debt, is hereunto annexed; and this deponent, C. D., for himself saith, that he did, on the day of instant [*or* last], personally [*or otherwise according to the fact*] serve the said E. F. with a true copy of the said account and notice.

Sworn, &c.

SCHEDULE (G).

"The Bankrupt Law Consolidation Act, 1849."

Particulars of Demand, and Notice requiring Payment.

To E. F., of

The following are the particulars of the demand of the undersigned A. B., of against you, the said E. F., amounting to the sum of [*the amount of the debt. Then copy the account*].

Take notice that I, the said A. B., hereby require immediate payment of the said sum of

Dated this day of in the year of our Lord (Signed) A. B.

SCHEDULE (H).

"The Bankrupt Law Consolidation Act, 1849."

Summons of Trader Debtor.

These are to will and require you to whom this warrant is directed personally to be and appear before the Court of Bankruptcy in Basinghall Street, in the city of London [*or* at in the county of], on the day of at o'clock; and you are hereby informed that the purpose for which you are thus summoned to appear before the said court is, to ascertain, in manner and form prescribed by "The Bankrupt Law Consolidation Act, 1849," whether or not you admit the demand of A. B., of (who claims of you the sum of [*state the amount*] for a debt), or any and what part thereof, or whether you verily believe that you have a good defence upon the merits to the said demand, or to any and what part thereof; and hereof you are not to fail, at your peril.

Given under my hand the day of in the year of our Lord (Signed) C. D. Commissioner.

SCHEDULE (I).

"The Bankrupt Law Consolidation Act, 1849."

Admission of Debt by Trader Debtor.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of] day of A.D.

Whereas I, the undersigned E. F., of am summoned to appear before this Honourable Court for the purpose of stating, in manner prescribed by "The Bankrupt Law Consolidation Act, 1849," whether or not I admit the demand of A. B., of (who claims of me the said E. F. the sum of [*the amount*] for a debt), or any and what part thereof; or whether I verily believe that I have a good defence upon the merits to the said demand, or to any and what part thereof; be it known that I, the said E. F., hereby confess that I am indebted to the said A. B. in the said sum of [*or* in part of the said sum of , that is to say, in the sum of].

(Signed) E. F.

SCHEDULE (J).

"The Bankrupt Law Consolidation Act, 1849."

Deposition by Trader Debtor that he has good Answer to Creditor's Demand or some Part thereof.

Court of Bankruptcy, Basinghall Street, London, [*or* at in the county of] day of A.D.

E. F. being sworn on the day and year and at the place aforesaid, upon his oath saith, that he verily believes he has a good defence upon the merits to the demand [*or* to part of the demand] hereinafter mentioned of A. B. of who claims of the said E. F. the sum of for a debt alleged to be due and owing from the said E. F. to the said A. B., as stated in the affidavit of the said A. B. filed in this Honourable Court, and bearing date the day of

(Signed) E. F.

Sworn before me, J. K., Commissioner.

SCHEDULE (K).

Form of Bond to pay admitted Demand.

Know all men by these presents, that we, A. B., C. D., and E. F., are jointly and severally held and firmly bound to E. F., in the sum of of lawful money of Great Britain, to be paid to him, his executors, administrators, and assigns, for which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators.

Dated this day of in the year of our Lord, 186 (L.S.) (L.S.) (L.S.)

Whereas the said A. B., after being duly summoned to appear in her Majesty's Court of Bankruptcy, for the purpose of stating whether or not he admits a certain demand of the said E. F., amounting to the sum of or any and what part thereof, or whether he verily believes that he hath a good defence upon the merits to the said demand, or to any and what part thereof, hath deposed upon oath, [*or* affirmation, *as the case may be*] that he verily believes that

he the said A. B. hath a good defence upon the merits to the said demand [*or* to part of the said demand]: *And whereas an action of debt [*or as the case may be*], wherein the said E. F. is plaintiff, and the said A. B. is defendant, is now depending in [*name of court in which the action is depending*], for the recovery of the said demand [*or* last-mentioned sum, *as the case may be*]: Now, therefore, the condition of this obligation is such, that if the said A. B. shall, on demand, well and truly pay to the said E. F., or his attorney or agent, such sum as shall be recovered by, together with such costs as shall be given to, the said E. F. in such action, this obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue. [*Or if an action has not been already brought, insert, instead of the paragraph following the*, these words*]: Now, therefore, the condition of this obligation is such, that if the said A. B. shall, on demand, well and truly pay or cause to be paid to the said E. F., his attorney or agent, such sum or sums as shall be recovered by, together with such costs as shall be given to, the said E. F. in any action which shall hereafter be brought for the recovery of the said demand [*or* last-mentioned sum, *as the case may require*], this obligation shall be void and of no effect, but otherwise shall be and remain of full force and virtue.

SCHEDULE (L).

"The Bankrupt Law Consolidation Act, 1849."

Admission of Debt by Trader Debtor signed out of Court.

I, the undersigned E. F., of do hereby confess, that I am indebted to A. C., of in the sum of

(Signed) E. F.

Dated this day of A.D.

Witness,

G. H., attorney for the said E. F., and subscribing witness to the execution hereof as such attorney.

SCHEDULE (M).

"The Bankrupt Law Consolidation Act, 1849."

Petition by a Creditor for Adjudication of Bankruptcy.

To the Court of Bankruptcy for the district.

The humble petition of

Showeth,

That being a trader, and having resided [*or* carried on business, *as the case may be*] for six calendar months next immediately preceding the date of this petition within the district of this honourable court, that is to say, at [*insert the name of the place*], is indebted unto your petitioner in the sum of fifty [*if two petitioners*, seventy, *and if three or more*, one hundred] pounds [*as the case may be*], and that your petitioner has been informed and believes that the said did lately commit an act of bankruptcy within the true intent and meaning of the law of bankruptcy.

Your petitioner therefore humbly prays, that on proof of the requisites in that behalf, adjudication of bankruptcy may be made against the said

And your petitioner shall ever pray, &c.

Signed by the petitioner on the day of 186 , in the presence of solicitor in the matter of this petition.

If the petition be by partners, alter the form accordingly, and let it be signed by one on behalf of himself and partners.

If the petition be by several, not being partners, then it must be signed by each, and in such case the names of the several petitioners should be stated in the attestation or attestations relating thereto respectively.

If the petitioner cannot speak to the place of residence or business of the trader, strike out the averment as to that, and annex to the petition a separate affidavit of some person who can depose to the fact.

If the petition be against partners, alter the form accordingly.

SCHEDULE (N).

"The Bankrupt Law Consolidation Act, 1849."

Affidavit of Truth of Allegations in Petition.

day of A.D.

of in the of the petitioner named in the petition hereunto annexed, maketh oath and saith, that the several allegations in the said petition are true.

Sworn at this day of one thousand eight hundred and before me,

If the petitioner affirm, alter the form accordingly.

SCHEDULE (O).

"The Bankrupt Law Consolidation Act, 1849."

Petition by a Trader for Adjudication of Bankruptcy against himself.

To the Court of Bankruptcy for the district.

The humble petition of

Showeth,

That your petitioner, being a trader within the meaning of the law of bankruptcy, and having resided [*or* carried on business, *as the case may be*,] for six calendar months next immediately preceding the date of this petition within the district of this honourable court; that is to say, at [*insert the name of the place*,] and being unable to meet his engagements with his creditors, has filed a declaration of insolvency in manner and form in that case made and provided, and

that your petitioner verily believes that he can make it appear to the satisfaction of the court that his available estate is sufficient to *produce the sum of one hundred and fifty pounds.*

Your petitioner therefore humbly prays, that on proof of the requisites in that behalf adjudication of bankruptcy may be made against him.

And your petitioner shall ever pray, &c.

Signed by the petitioner on the day of 18 in the presence of solicitor in the matter of this petition.

If the petition be by partners, alter the form accordingly, and state the names of the several petitioners in the attestation or attestations relating thereto respectively.

SCHEDULE (P).

"The Bankrupt Law Consolidation Act, 1849."

Order to prosecute a Petition for Adjudication of Bankruptcy in a particular District.

Court of Bankruptcy, Basinghall Street, London, the day of A.D.

In the matter of a petition for adjudication of bankruptcy against C. D., of, &c.

Upon application made to me this day by [of counsel *or* solicitor] for and upon reading the affidavit of I do hereby order that the petition for adjudication of bankruptcy against the above-named C. D. be prosecuted in the district.

A. B. Commissioner.

SCHEDULE (Q).

"The Bankrupt Law Consolidation Act, 1849."

Order to consolidate Proceedings, or to impound any Petition for Adjudication of Bankruptcy, and the Proceedings thereunder, or any part thereof.

Court of Bankruptcy, Basinghall Street, London, the day of A.D.

Ex-parte

In the matter of

Upon application made to me this day by [of counsel *or* solicitor] for and upon reading the affidavit of I do order that [*stating the order*].

A. B. Commissioner.

SCHEDULE (R).

"The Bankrupt Law Consolidation Act, 1849."

Order to Transfer a Petition for Adjudication of Bankruptcy, &c., from the Court in one District to the Court in another District.

Court of Bankruptcy, Basinghall Street London, the day of A.D.

Ex-parte

In the matter of

Upon application made to me this day by [of counsel *or* solicitor] for and upon reading the affidavit of I do order that [*stating the order*].

A. B. Commissioner.

SCHEDULE (S).

General Docket Book.

Name of Bankrupt.	Residence.	Trade.	Petitioning Creditor.	Solicitor.	Date of filing Petition.	Commissioner or Court.	Date of Adjudication.	When advertised.	When annulled.	Time allowed to Petitioning Creditor for proceeding extended.	Proceedings consolidated, impounded, or transferred (as the case may be).	Date of Certificate of Conformity.	Date of Certificate, 1, 2, or 3.

SCHEDULE (T).

"The Bankrupt Law Consolidation Act, 1849."

Order for Petition for Adjudication of Bankruptcy to be proceeded in on a Substituted Debt.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of], day of A.D.

In the matter of a bankrupt.

Upon application made to the court this day, by [of counsel *or* solicitor] for a creditor of the above-named bankrupt, and who has proved a debt of sufficient amount to support an adjudication, and the debt of the petitioning creditor having been found by the court to be insufficient to support the adjudication of bankruptcy against the above-named it is hereby ordered that the petition for adjudication of bankruptcy filed against the said on the day of be proceeded in, and that the costs of, &c. [*stating such order as to costs of any of the parties concerned as the court thinks fit.*]

A. B. Commissioner.

SCHEDULE (U).

"The Bankrupt Law Consolidation Act, 1849."

Order annulling Adjudication.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of] day of A.D.

In the matter of

Upon reading the proceedings in the above matter, and upon hearing [the evidence now adduced, *if the case be so*, and] what was alleged by and being satisfied that the petitioning creditor's debt, trading and act of bankruptcy [*or specify the particular matter deemed insufficient, as the case may require*] upon which the adjudication of bankruptcy made against the said on the day of was grounded, were and are [*or* was and is] insufficient to support such adjudication, and no other debt, trading or act of bankruptcy [*or specify the particular matter requisite in lieu of that deemed insufficient, as the case may require*] sufficient to support such adjudication being proved, I do order that the adjudication of bankruptcy made against the said on the said day of be annulled, and the same is hereby annulled accordingly.

A. B. Commissioner.

SCHEDULE (V).

"The Bankrupt Law Consolidation Act, 1849."

Search Warrant.

day of A.D.

Whereas by evidence duly taken upon oath it hath been made to appear to the satisfaction of me the undersigned commissioner of the Court of Bankruptcy, acting in the prosecution of a petition for adjudication of bankruptcy filed and now in prosecution against A. B. of in the county of bearing date the day of and under which the said A. B. has been adjudged bankrupt, that there is reason to suspect and believe that property of the said A. B. is concealed in the house [*or other place, describing it, as the case may be*] of one C. D. of in the county of such house not belonging to the said bankrupt: These are, therefore, by virtue of "The Bankrupt Law Consolidation Act, 1849," to authorise and require you, with necessary and proper assistants, to enter in the daytime into the house [*or other place, describing it, as the case may be*] of the said C. D. situate at aforesaid, and there diligently to search for the said property; and if any property of the said bankrupt shall be there found by you on such search, that you seize the same, to be disposed of and dealt with according to the provisions of the said act.

Given under my hand and the seal of the court, at the Court of Bankruptcy, London [*or* at the Court of Bankruptcy for the district, at in the county of], this day of in the year of our Lord one thousand eight hundred and

A. B. (L.S.)

To my messenger, and his assistants. Commissioner.

If there be reason to suspect that the bankrupt and his property are concealed, alter the warrant accordingly.

SCHEDULE (W).

"The Bankrupt Law Consolidation Act, 1849."

Form of Declaration to be made by the Bankrupt or the Bankrupt's Wife.

I, A. B., the person declared a bankrupt under a fiat in bankruptcy dated the day of [*or* under a petition for adjudication of bankruptcy filed on the day of in the year of our Lord *or* I, C. D., the wife of A. B., declared a bankrupt under a fiat in bankruptcy dated the day of *or* under a petition for adjudication of bankruptcy filed on the day of ,] do solemnly promise and declare, that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

(Signed) A. B.

[*or* C. D. the Wife of the said A. B.]

SCHEDULE (X).

"The Bankrupt Law Consolidation Act, 1849."

Admission of Debt by Creditor of Bankrupt.

I, the undersigned I. K., of do

hereby in open court confess that I am indebted to E. F. of a bankrupt, in the sum of upon the balance of accounts between myself and the said E. F.

(Signed) I. K.

Witness, G. H., attorney of one of the superior courts, and named by the said I. K. [*or* named by the court here] according to the Bankrupt Law Consolidation Act, 1849.

SCHEDULE (Y).

"The Bankrupt Law Consolidation Act, 1849."

Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of], day of A.D.

In the matter of a bankrupt.

Whereas of in his examination taken day of and signed and subscribed by the said has admitted that he is indebted to the above-named bankrupt in the sum of upon the balance of accounts between the said and the said bankrupt: It is hereby ordered that the said do pay to the official assignee of the estate and effects of the said bankrupt, in full discharge of the sum so admitted, the sum of forthwith [*or if otherwise, state the time and manner of payment*], and that the said do also pay to the said official assignee the sum of for the costs of and incident to the summons of the said in this behalf.

A. B. Commissioner.

C. D. Registrar.

If the court shall not adjudge the costs of and incident to the summons to be paid by the person summoned, or if the court shall adjudge the official assignee to pay to the person summoned his costs out of the estate and effects of the bankrupt, alter the form accordingly.

SCHEDULE (Z).

"The Bankrupt Law Consolidation Act, 1849."

Certificate of Conformity.

I, esquire, one of the Commissioners of her Majesty's Court of Bankruptcy, acting in the prosecution of a fiat in bankruptcy dated the day of [*or* a petition for adjudication of bankruptcy filed against and bearing date the day of], one thousand eight hundred and do certify that the said became bankrupt before the date and issuing of the said fiat [*or* date and filing of the said petition] within the true intent and meaning of the law of bankruptcy, and was thereupon adjudged bankrupt accordingly; and I further certify that due notice was given in the *London Gazette* of such fiat having been issued [*or* petition having been filed] and of the adjudication thereon, and that two public sittings for the said bankrupt to surrender and conform were duly appointed, the last of which said sittings was appointed to be on the day of last; and I further certify that such two several sittings were had pursuant to such notice, and that before three of the clock upon the said day of the said bankrupt did surrender himself, and did sign and subscribe such surrender, and submit to be examined from time to time upon oath; and I further certify that the said bankrupt did on the day of last finish his examination, and upon such examination made a full disclosure and discovery of his estate and effects, and in all things conformed, and, so far as the court can judge, there doth not appear any reason to question the truth or fulness of such discovery; and I further certify, that on the day of in the year of our Lord one thousand eight hundred and at the Court of Bankruptcy in Basinghall Street, London [*or* at in the county of], I held a public sitting for the allowance of this certificate to the said bankrupt (whereof, and of the purport whereof, the notice required in that behalf was duly given), and having regard to the conformity of the said bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, I did then and there find the said bankrupt entitled to such certificate, and did allow the same. And I further certify that his bankruptcy has arisen from unavoidable losses and misfortunes, and that he is entitled to, and I do award him this certificate as of the first class [*or* that his bankruptcy has not wholly arisen from unavoidable losses and misfortunes, and that he is entitled to, and I do award him this certificate as of the second class: *or* that his bankruptcy has not arisen from unavoidable losses or misfortunes, and that he is only entitled to, and I do only award him this certificate as of the third class].

[*If the certificate be allowed with conditions, the same to be inserted here.*]

Given under my hand and the seal of the court, at the Court of Bankruptcy, London [*or* at the Court of Bankruptcy for the district, at in the county of], this day of in the year of our Lord one thousand eight hundred and

A. B. (L.S.)

Signed and sealed in the presence of Commissioner.

In case of adjournment, or of the allowance of the certificate having been suspended, or of the allowance thereof by the Vice-Chancellor, or upon a rehearing, alter the form accordingly.

SCHEDULE (A a).

"The Bankrupt Law Consolidation Act, 1849."

Petition for Arrangement.

To the Court of Bankruptcy for the district.

The humble petition of
Showeth,
That your petitioner, being a trader unable meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of this honourable court, and of submitting himself to the jurisdiction thereof, petitions the court under the provisions of "The Bankrupt Law Consolidation Act, 1849."
That the inability of your petitioner to meet his engagements with his creditors arises from
Your petitioner therefore prays that his person and property may be protected from all process, and that such proposal as he may be able to make (or such modification thereof as by three fifths in number and value of his creditors may be determined) may be carried into effect under the superintendence and control of this honourable court.
And your petitioner shall ever pray, &c.
Signed by the petitioner in the presence of solicitor in the matter of this petition.

SCHEDULE (A b).

"The Bankrupt Law Consolidation Act, 1849."

Affidavit in support of Petition for Arrangement.

of in the of the petitioner named in the petition hereunto annexed, maketh oath and saith, that the several allegations in the said petition are true, and that he, this deponent, hath assets ready to be produced to this honourable court to the value of 200*l.* and upwards.
Sworn at this day of one thousand eight hundred and before me.

If the petitioner affirm, alter the form accordingly.

SCHEDULE (A c).

"The Bankrupt Law Consolidation Act, 1849."

Certificate to Petitioning Trader.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of] day of A.D.

Whereas of a trader unable to meet his engagements with his creditors, did on the day of present his petition to this honourable court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that a certain proposal, or such modification thereof as by three fifths in number and value of his creditors might be determined, should be carried into effect, under the superintendence and control of the said court: and whereas one of the commissioners of the said court, acting in the matter of the said petition, caused such sittings of the court to be held as are directed by the said act: and whereas a certain resolution or agreement was duly assented to at such sittings, which the said commissioner, thinking to be reasonable and proper to be executed under the direction of the said court, caused to be filed and entered of record therein: and whereas the said resolution or agreement has been fully carried into effect; I hereby certify the several matters aforesaid under my hand and the seal of court, this day of 18
A. B. (L.S.)
Commissioner.

SCHEDULE (A d).

"The Bankrupt Law Consolidation Act, 1849."

Certificate to Official Assignee.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of]
day of A.D.

Whereas of a trader unable to meet his engagements with his creditors, did on the day of present his petition to this honourable court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that a certain proposal should be carried into effect, under the superintendence and control of the said court: and whereas one of the commissioners of the said court, acting in the matter of the said petition, caused certain sittings of the court to be held pursuant to the said act: and whereas a certain resolution or agreement was duly assented to at such sittings, which the said commissioner, thinking the same to be reasonable and proper to be executed under the direction of the said court, caused to be filed and entered of record therein: and whereas the said resolution or agreement has been fully carried into effect, and I am satisfied that the official assignee appointed to carry the said resolution or agreement into effect, has fully performed his trust; I hereby certify the same under my hand and the seal of the court, this day of 186
A. B. (L.S.)
Commissioner.

SCHEDULE (B a).

"The Bankrupt Law Consolidation Act, 1849."

Certificate to Assignees or to a Creditor to entitle them to issue Writ of Execution.

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of]
day of A.D.

In the matter of a bankrupt.
I hereby certify, that A. B. of and C. D. of assignees of the estate and effects of the above-named bankrupt, are creditors of the said bankrupt as such assignees for the sum of in trust for the

creditors of the said bankrupt [*or* that E. F. of is a creditor of the said bankrupt for the sum of] and that the said bankrupt is not protected by this court from process against his person.

G. H. Commissioner.

I. J. Registrar.
Seal of the Court.

SCHEDULE (B b).

"The Bankrupt Law Consolidation Act, 1849."

Warrant against Person disobeying any Rule or Order of Court.

Whereas by a rule [*or* an order] of this court, bearing date the day of made for enforcing the purposes and provisions of "The Bankrupt Law Consolidation Act, 1849," [*or if of any other act hereafter in force relating to the subject-matters of this act, or made or entered into by consent for carrying into effect any of such purposes or provisions, alter the recital accordingly*], it was ordered, that, [*&c. &c. as in the rule or order*].

And whereas it is now proved that after the making of the said rule [*or* order], that is to say, on this day of a copy of the said rule [*or* order] was duly served on the said personally, and the original rule [*or* order] at the same time shown to him, but the said then refused [*or* neglected] to obey the same, and hath not as yet obeyed the said rule [*or* order]:

These are therefore to will, require and authorise you immediately upon receipt hereof to take into your custody the body of the said A. B., and him safely to convey to her Majesty's gaol [*or* prison] of [*or* called], and him there to deliver to the keeper of the said prison, together with this precept, and the keeper of the said prison is hereby required and authorised to receive the said A. B. into his custody, and him safely to keep and detain, without bail or mainprise, until this court, or the Vice-Chancellor appointed to sit in Bankruptcy, or the Lord Chancellor, shall make order to the contrary; and for so doing, this shall be your sufficient warrant.

Given under my hand and the seal of the Court, at the Court of Bankruptcy, London, [*or* at the Court of Bankruptcy for the district, at in the county of] this day of in the year of our Lord one thousand eight hundred and

A. B. (L.S.)
Commissioner.

To my messener, or his assistant,
and to the keeper of her Majesty's prison [*or* gaol] of [*or* called],
or his deputy there.

RULES AND ORDERS

MADE IN PURSUANCE OF

"THE BANKRUPT LAW CONSOLIDATION ACT, 1849."

(12 & 13 Vic. c. 106, s. 8.)

With respect to the several matters hereinafter mentioned—It is ordered as follows, that is to say,—

Definition of Terms.

Definition of Terms, &c.—1. That all words and expressions used in these rules or orders shall be construed in conformity with the interpretation clause (s. 276) of "The Bankrupt Law Consolidation Act, 1849."

Petition for Adjudication of Bankruptcy.

Petition for Adjudication of Bankruptcy to be on Parchment.—2. Every petition for adjudication of bankruptcy shall be fairly written or printed on parchment in the form given in the Schedule (M.) or (O.) of "The Bankrupt Law Consolidation Act, 1849" (as the case may be), and no alterations, interlineations, or erasures shall be permitted without leave of the court; except so far as the same may be necessary, in order to adapt the printed form to the circumstances of the particular case.

Petition and Affidavit in support thereof to be examined by Registrar before Filing.—3. All petitions for adjudication and the affidavits in support of the same shall be carefully examined by the chief registrar in London, or by one of the registrars in the country districts, before they are filed, and any petition or affidavit not being in conformity with the provisions of "The Bankrupt Law Consolidation Act, 1849," and these Orders, shall be rejected, subject, however, to an appeal to the commissioner of the day in London; or to the commissioner in attendance in the country.

Search to be made for previous Fiat or Petition.—4. The chief registrar shall carefully search whether any fiat in bankruptcy or petition for adjudication of bankruptcy has been issued or filed against or by the same person or persons, alone or jointly with any other person or persons, and shall endorse the result of such search on the petition previous to transmitting the same to the registrar of the day. Similar searches and endorsements shall be made by the registrar in attendance in the country.

Where two or more Petitions, receipt of One by Lot.—5. That in case two or more persons shall apply at the same time to present

petitions to the court in London or to a district court for adjudication of bankruptcy against the same person, and shall both be prepared to prosecute the same immediately, it shall be determined by lot which petition shall first be received and filed; but if one of such persons only is prepared to prosecute his petition immediately, such person shall be preferred: and in case one of such petitions shall be by the debtor or debtors, then the other petition (or one of the other petitions, to be ascertained as above), shall be preferred; and no subsequent petition for adjudication of bankruptcy against the same trader, either alone or jointly with any other person or persons, shall be proceeded with further than receiving and filing the same, until after the dismissal of the first, or other petition, or at the expiration of the time allowed for prosecuting the same.

Second Petition by Creditor neglecting to prosecute a former Petition.—6. That if any creditor shall petition for adjudication of bankruptcy, and shall neglect to prosecute his petition within the time limited for that purpose, no subsequent petition for adjudication of bankruptcy against the same trader or traders, or any of them, either alone or jointly with any other person or persons, shall be presented by the same creditor without the special leave of the court to which the previous petition was addressed.

Allotment of Petitions for Adjudications of Bankruptcy in London.—In District Court.—7. That every petition for adjudication of bankruptcy in London, whether presented by a creditor or by the trader himself, shall forthwith, after the filing thereof in the office of the chief registrar, be allotted by ballot by the registrar of the day, in the presence of the commissioner, and in the presence of the solicitor acting in the matter of such petition to one of the commissioners of the court, and such allotment shall be entered in a locked book to be kept for that purpose, to which book each registrar and commissioner shall have a key; and every such petition in any district court where there is more than one commissioner shall when filed be allotted in like manner by ballot, and entered in a locked book to be kept as aforesaid.

If Commissioner absent, Registrar may Ballot.—8. In case of the absence of any commissioner the registrar alone, and in case of the absence of any registrar, the commissioner alone may, but in either case in presence of the solicitor, proceed to ballot any petition, endorsing on such petition the reason for his so proceeding.

Second or subsequent Petition for Adjudication to be prosecuted before the same Commissioner.—9. That where a petition for adjudication of bankruptcy filed, either by a creditor or a trader, shall have been dismissed, or shall not have been prosecuted within the time limited, every second or subsequent petition presented to the same court for adjudication of bankruptcy against the same person or persons, or any of them, and either alone or jointly with any other person or persons, shall be allotted to and prosecuted before the commissioner who shall have acted in the matter of the first petition, or to whom the same shall have been allotted.

Question on Allotment of Petition, how determined.—10. Whenever any doubt shall arise as to the allotment of any petition in London, the same shall be determined by the senior commissioner, or in his absence by the commissioner of the day; and in the country by the commissioner in attendance.

Investigation of the Petitioning Creditor's Debt.—11. The petitioning creditor's debt shall be carefully investigated previous to the adjudication, and all securities held by him shall at the same time be exhibited to the commissioner, together with a debtor-and-creditor account between the petitioning creditor and the intended bankrupt, which shall be filed with the proceedings, unless otherwise directed by the court.

Personal Attendance of Petitioning Creditor, &c. how to be dispensed with.—12. The personal attendance of the petitioning creditor, and of the witness or witnesses to prove the trading and act of bankruptcy, upon the opening of the petition for adjudication, may be dispensed, on special cause proved to the satisfaction of the court.

Applications for Adjudication in London, when to be made.—13. Except in case of emergency, all applications for adjudication in London shall be made to the commissioner of the day in his private room previous to the public sitting of the court.

Disputing Adjudication of Bankruptcy. Sect. 104.

Notice to dispute Adjudication. 12 & 13 *Vic. c.* 106, *s.* 104.—14. That if any person adjudged bankrupt intend to show cause against the validity of such adjudication, he shall cause notice in writing of such his intention to be served upon the petitioning creditor, or his solicitor, and upon the registrar, two clear days at least before the day appointed by the court for showing cause against such adjudication, and in such notice shall state which of the following matters, namely, the petitioning creditor's debt or debts, the trading, or act or acts of bankruptcy, he intends to dispute.

Names of Witnesses to be given, &c.—15. That after serving such notice of his intention, he shall on application be forthwith furnished with the names of the witness or witnesses deposing to the matter in dispute, and shall, on payment for the same, have a copy of the deposition or depositions, or any of them, as the court in its discretion may think fit.

Showing Cause against Adjudication and grant of further Time.—16. That on the appearance to show cause against the validity of the adjudication, the petitioning creditor's debt, trading, act of bankruptcy, or such of those matters as the person adjudged bankrupt shall have given notice that he intends to dispute, shall again be proved *viva voce*, unless otherwise directed by the court, and if any new evidence of those matters or any

of them shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to show cause, the court shall, if it think the application reasonable, grant such further time as it may think fit.

Jurisdiction of the Court of Bankruptcy under sect. 12.—*Motions and Petitions, and Practice thereon.*

Mode of Application to the Court under 12 & 13 *Vic. c.* 106, *s.* 12.—17. That (unless the court shall in any particular case otherwise direct) all applications to the court in the exercise of its primary jurisdiction by virtue of "The Bankrupt Law Consolidation Act, 1849," shall be by way of motion, supported by affidavit, upon hearing which the court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made unless upon the consent of such person or persons, duly shown to the court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby, four clear days at least before the day named in such notice as the day when the motion is to be made: Provided, however, that the court may, if it shall think fit, in any case where the party or parties to be affected by the order, or any of them, shall not have been duly served with a notice of the motion for such order, make an order calling upon the party or parties to be affected thereby to show cause, at a day to be named by the court in such order, why such order should not be made.

Service of Order to show Cause.—18. That every order to show cause shall be served upon the parties to be affected thereby, four clear days at the least before the day appointed for showing cause.

Previous to issuing Warrant of Commitment, under s. 206, *for Disobeying any Rule or Order of Court, Notice of Motion or Order to show Cause to be personally served, &c.*—19. No warrant for the commitment of any person, pursuant to s. 266 of "The Bankrupt Law Consolidation Act, 1849," for disobeying any rule or order of the court, shall be issued, unless notice of the intended motion for such warrant shall have been served personally upon the person to be committed two clear days at the least before the day of hearing such motion; or unless an order to show cause why such warrant should not be issued shall have been personally served upon such person four clear days at the least before the day named in such order for showing cause: Provided, however, that in cases in which it shall be made to appear to the court that the person intended to be committed is keeping out of the way, and cannot be personally served with the notice of motion, or of the order to show cause, it shall be lawful for the court to make an order directing substituted service of the notice, or order to show cause, as may be best suited to the circumstance of the case; and service of such notice, or order to show cause, according to the directions of such order, shall be deemed to be as effectual as if such service had been made personally.

Service of Notice of Motion or Order to show Cause.—20. In cases in which personal service of any notice of motion, or of any rule or order of the court, is required, the same shall be effected, in the case of a notice of motion, by delivering to the party or parties to be served, and each of them, a duplicate of the notice of motion; and in the case of a rule or order, by delivering to the party or parties to be served, and each of them, a true copy of the order or rule, at the same time showing to him or them the original order or rule of the court.

Signature and Attestation of Petitions in general.—21. That, except where otherwise provided or required by the statute, or by these rules, every petition presented to the Court of Bankruptcy in London or in the country, shall be signed by the petitioner or petitioners: Provided always, that in the case of partnership or absence of any petitioner or petitioners from the United Kingdom, the signature of one of the partners, or of the party presenting the same on behalf of the person so absent, shall be sufficient, and the signature of each person signing the same shall be attested by the solicitor actually presenting the petition, or by some other solicitor, who shall state himself in his attestation to be the solicitor or agent of the solicitor of the party signing in the matter of the petition.

To be entered with the Registrar.—22. That every such petition presented to the court shall be entered with the registrar of the court to which the same is presented, and the order directing the attendance thereon shall be signed by the registrar, and under the seal of the court; and the original petition, when served, shall be returned to the registrar on or before the hearing, and filed of record. And it shall not be necessary to recite such petition at length, but only the prayer thereof, in any order pronounced by the court thereon.

Affidavits to be filed—No Affidavit in reply.—23. That every affidavit to be used in obtaining, supporting or opposing any petition or motion, or order for showing cause for or against any order or rule of court, shall be filed with the registrar of the court having the custody of the proceedings to which the same relates two clear days at the least before the day appointed for the hearing; and no affidavit in reply or in rejoinder is to be used except by leave of the court.

Affidavits to be Endorsed by the Registrar, with the Day when left for filing.—24. That the registrar, upon any affidavit being left with him to be filed, do endorse the same with the day of the month and year when the same was so left, and do forthwith file the same, with the proceedings to which the same relates.

Affidavits to be Intituled.—25. That no affidavit be filed unless the same is properly intituled in the court and matter in which

the same is to be used, and that after any affidavit is left with a registrar to be filed, the same is on no account to be delivered to any person whatever, except by order of the court.

Hearing Motions and Petitions.—26. Except in cases of emergency, all motions shall be made, and all petitions heard, before the commissioner acting in the particular bankruptcy to which the matter relates, or the commissioner acting for him in his absence, and in London, on the day on which he sits as commissioner of the day, and at the sitting of the court, and in the order set down in the registrar's diary, unless the commissioner shall otherwise direct.

Motions, order of making.—27. Motions made by the bar shall be heard according to the right of precedence, and motions made by attorneys in the order in which they have been set down in the registrar's diary previous to the public sitting of the court.

Note of Motion to be delivered to the Registrar.—28. A short note of every motion shall be delivered to the registrar previous to the public sitting of the court, specifying the bankruptcy or other matter to which the same relates, the name of the party on whose behalf the same is made, the name and residence of the attorney of such party (and of the counsel, if the same be made by counsel), the name of any party, and the name and residence of his attorney, on whom any notice of such motion has been served.

Deposit of Costs on Appeal. Sect. 12.

Deposit on Appeal, 12 & 13 *Vic. c.* 106, *s.* 12.—29. That at or before the time of entering an appeal against a decision or order of the Court of Bankruptcy, the party intending to appeal shall (in any case not otherwise specially provided for) deposit with the chief registrar such sum, not being less than 10*l.* and not exceeding 40*l.*, as the commissioner, whose order or decision is appealed from, or some other commissioner of the same court, shall direct, to satisfy, so far as the same may extend, any costs that the appellant may be ordered to pay, and in the absence of any directions of a commissioner as to the amount of deposit, the sum of 20*l.* shall be so deposited. If it shall appear that there are several respondents in separate interests, the commissioner, if he shall think fit, may order a separate deposit as to every such respondent.

Allowance of Amendments.

Amendments may be allowed by leave of the Court.—30. That in any proceeding before the court, the court, if it think fit so to do, may allow amendment in any particular or particulars in the judgment of the court not material to the merits of the case to be forthwith made on such terms as to re-swearing (in case of affidavits when necessary) and as to payment of costs, or both payment of costs and postponement, or otherwise, as the court shall think reasonable.

Removal of Commissions and Fiats issued on or before the 11*th November*, 1842. *Sect.* 22.

Transfer of Commissions and Fiats into Court. 12 & 13 *Vict. c.* 106, *s.* 22.—31. That every commission and fiat directed to any commissioners in the country, and opened or purporting by the proceedings to have been opened at any place situated within any one of the several districts appointed for holding courts of bankruptcy in the country, and not heretofore brought into court, shall be, and the same is hereby transferred and removed into the district court of bankruptcy within the district in which such place shall be situate, and every commission and fiat directed to any commissioners in the country, and opened or purporting by the proceedings to have been opened in the country elsewhere than at any place situated within any one of the said several districts, and not heretofore brought into court, shall be and the same is hereby transferred and removed into the Court of Bankruptcy in London, and all further proceedings in every commission and fiat so transferred and removed as aforesaid shall be thenceforth prosecuted and carried on in the court to which the same is hereby ordered to be transferred.

Division of certain Transferred Commissions and Fiats against Commissioners in London.—32. That all commissions and fiats directed to any commissioners in the country, and opened or purporting by the proceedings to have been opened in any of the counties or divisions or parts of the counties named in the schedule hereunder written, and transferred into the Court of Bankruptcy in London by the preceding order, be further prosecuted in such court before the commissioner of the said court named in such schedule, in conjunction with such county or counties, or divisions, or parts respectively.

SCHEDULE.

Mr. Commissioner Evans	Norfolk.
Mr. Commissioner Fonblanque	Oxford.
	That part of the county of Dorset not being within the Exeter district.
	South Wilts.
	North Hants.
	Surrey.
Mr. Commissioner Fane	South Hants.
	West Sussex.
Mr. Commissioner Holroyd	East Sussex.
	Kent.
Mr. Commissioner Goulburn	Suffolk.
	Essex.
	Herts.
	Berks.
Before the above-named Commissioners, according to such scale of distribution as from time to time shall be directed by any three Commissioners	Rutland.
	Huntingdon.
	Cambridge.
	Northampton.
	Bedford.
	Bucks.

With respect to the Chief and other Registrars.

Chief Registrar's Office.—33. That the chief registrar's office shall be at the Court of Bankruptcy in London, and shall be kept open daily, throughout the year, from ten till four o'clock (Sunday, Christmas-day, Good Friday, Monday and Tuesday in Easter Week, and any day appointed for a public fast or thanksgiving excepted).

Affidavits to be filed.—34. That all petitions, affidavits, and other documents directed to be filed, except the affidavits mentioned in Rule 23, shall be filed in the office of the chief registrar at the Court of Bankruptcy in London, if relating to any bankruptcy or other matter under this act, prosecuted in London, or with the registrar or registrars of the district court in which any bankruptcy or other matter under this act is prosecuted in the country.

Roll of Attorneys.—35. That a roll or book shall be kept by the chief registrar, in which shall be enrolled the names of all attorneys and solicitors entitled to practise in the Court of Bankruptcy.

Book, with Chief Registrar in London, for Names and Places of Abode or Business of enrolled Attorneys and Solicitors, where they may be served with Notices, &c.—36. That the chief registrar shall keep a book in alphabetical order, for the purposes after mentioned, and the same shall be publicly kept in the Court of Bankruptcy in London, to be there inspected by any enrolled attorney or solicitor. And that every attorney or solicitor enrolled in the Court of Bankruptcy shall at the time of his signing the book or roll, mentioned in Rule 35, enter in such alphabetical book his name and place of abode or business, where he may be served with notices, summonses, orders and rules, in matters depending in the court, and as often as any attorney or solicitor shall change his place of abode or business, he shall make the like entry thereof in the said book; and all notices, summonses, orders and rules, which do require personal service, shall be deemed sufficiently served on such attorney or solicitor if a copy thereof shall be left at the place last entered in such book, with any person resident at or belonging to such place; and if any attorney or solicitor shall neglect to make such entry, then the fixing up of any notice, or the copy of a summons, order or rule, for such attorney or solicitor, in the office of the chief registrar, shall be deemed as effectual and sufficient as if the same had been served at such place of residence or business as aforesaid.

Like Book in District Courts in the Country.—37. That a like alphabetical book of names and residences shall be kept by the senior registrar of every district court in the country having two registrars, and by the registrar of every district court in the country where there is only one registrar, in which book every attorney and solicitor resident in, and usually practising in such district respectively, shall in the like manner, and subject to the same regulations, enter his name and place of abode and business.

Substituted Place for serving Notice, &c. on Attorneys and Solicitors, when their Place of Abode or Business is above a certain Distance, &c.—38. That in case the place of abode or business of any attorney or solicitor be not within a circuit of five miles from the General Post Office in London, or within five miles of the place appointed for the sittings of any district court of bankruptcy in the country districts, such attorney or solicitor shall appoint, and enter in the said alphabetical book, some convenient place within a three-miles' circuit of the General Post Office, if he be an attorney or solicitor usually practising in the Court of Bankruptcy in London, or within three miles of the place of sitting of the district court, if usually practising in any country district, where such notices, summonses, orders and rules as aforesaid may be served on him, subject to the regulations aforesaid.

Existing Commissions and Fiats, when transferred to be entered in Books, &c.—39. All existing commissions and fiats, when transferred to the Court of Bankruptcy in London, shall be duly entered in the chief registrar's office, in books to be kept for that purpose, and in the country in a book to be kept by the senior registrar of every district court having two registrars, and by the registrar, where there is only one.

Transmission of Minutes of Proceedings from the Country Districts.—40. That in addition to the minutes required to be transmitted to the chief registrar by section 95 of the "Bankrupt Law Consolidation Act," the registrars in the country districts (or when there are two registrars, one of them) shall transmit to the chief registrar, between the 1st and 5th day of each month, a return of the proceedings of such court for the last preceding month, in the form set forth in Schedule 26 to these orders annexed; and the chief registrar shall cause the same to be minuted in a book to be intituled the "Supplemental Docket-Book."

Of the Proceedings.

Proceedings to be on Parchment or Paper, of uniform size, &c.—41. All proceedings in the court shall be written or printed on parchment or paper of one uniform size, that is to say, on sheets of sixteen inches in length and ten inches in breadth, without unnecessary alterations or interlineations; and no erasures shall be permitted, except by leave of the court, on special cause shown; in which case any proceedings, though on paper or parchment not of the said size, may be received and filed.

Proceedings to remain of Record in the Court, and shall not be removed without special Direction.—42. All proceedings shall remain of record in the court, and shall not be removed, for any purpose whatever, except by special direction thereof, or of the Lord Chancellor.

A Registrar to attend in each Court, and to take Minutes, &c.—43. A registrar shall at-

tend in each court, at such times as the commissioner shall direct, to take and draw up minutes of all proceedings, and such registrar shall have the charge of all such proceedings, under the superintendence of the chief registrar.

Registrar not to sit for Commissioner without his Request in Writing.—44. Except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any commissioner, under section 27, without the express request, in writing, of such or some other commissioner.

Memorandum of Advertisement in Gazette, *&c. when in lieu of copy of* Gazette.—45. In lieu of attaching a copy of the *Gazette* to the proceedings in each bankruptcy or other matter, the registrar shall make a memorandum of the advertisement in the *Gazette*, and of the date thereof, with proper reference to the file to facilitate search, and one copy of every *Gazette* shall be kept in the office of the chief registrar.

Office Copies of Proceedings under Sections 53 *and* 232.

Charge for Office Copies under s. 232.—46. That all office copies of fiats, petitions, or other proceedings, books, papers and writings, or any parts thereof, provided for any bankrupt or arranging debtor, or for any creditor of a bankrupt or arranging debtor, or attorney of any such bankrupt, debtor or creditor, shall be charged and paid for at the rate directed by the 53d section of "The Bankrupt Law Consolidation Act, 1849," with respect to the office copies therein mentioned.

Office Copies.—47. That all office copies shall be made by the chief registrar or registrar, or by the messenger or usher of the court, as the court shall appoint, and shall, except as to figures, be fairly written at length, and shall be sealed with the seal of the court, and delivered out by the person appointed, without any unnecessary delay, and in the order in which they shall have been bespoken.

Duties of the Master.

Bills to be Taxed by the Master.—48. That the bills to be taxed by the master shall be all bills of costs, charges, fees and disbursements in matter of bankruptcy before the Lord Chancellor, the Lords Justices acting in bankruptcy (as are now taxed by the said master), and the Court of Bankruptcy in London, and all other taxable bills in other matters in which the Court of Bankruptcy in London may exercise jurisdiction, and such taxable bills as may be specially referred to him for taxation by any district court of bankruptcy, subject to the revision of the court.

Office of the Master.—49. That the office of the master shall be at the Court of Bankruptcy in Basinghall Street, and shall be open for the transaction of business daily from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except on such days and during such periods as the office of the accountant in bankruptcy shall be closed by any order of the Lord Chancellor, or by any general rule or order of the court.

Business of the Master to be transacted by him in person.—50. That the business of the master shall be transacted by him in person.

Copies of Bills.—51. That all copies of bills of costs lodged in the master's office shall be made, examined and delivered out by the clerk who has heretofore made, examined and delivered out the same.

Taxation of Bills, &c. in the Country Districts.—52. That in the country districts all bills of costs, charges, fees and disbursements (except such as may be specially referred to the master) shall be taxed by one of the registrars.

Proof of Debts.

Debts may be proved at Sitting for Dividend.—53. That every sitting held for making a dividend of a bankrupt's estate shall be a sitting for proof of debts, and the notice of such sitting in the *London Gazette* shall express that debts may be proved at such sitting.

Separate Debts may be proved under joint Petition, and distinct Accounts to be kept of joint and separate Estate; Application thereof in case of Surplus.—54. That any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons. And under every such adjudication distinct accounts shall be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate shall be applied in the first place in satisfaction of the debts of the separate creditors. And in case there shall be an overplus of the separate estate, such overplus shall be carried to the account of the joint estate. And in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the separate estates of each bankrupt, in proportion to the right and interest of each bankrupt in the joint estate. And that the cost of taking such accounts be paid out of the joint and separate estates respectively as the court shall direct.

Taking Accounts of Property mortgaged or pledged, and of the Sale thereof.

Directions for taking Accounts and Sale.—55. That upon application (which shall be in manner prescribed by Rule 17) by any person claiming to be a mortgagee of or to have security over any part of the bankrupt's estate or effects, real or personal, and whether such mortgage or security shall be by deed or otherwise, and whether the same shall be of a legal or equitable nature, the court will proceed to inquire whether such person is such mortgagee, or is entitled to such security, and for what consideration and under what circumstances, and if it shall be found that such person is such mortgagee, or is entitled to such security,

and no sufficient objection shall appear to the title of such person to the sum claimed by him, under such mortgage or security, the court will then proceed to take an account of the principal, interest and costs due upon such mortgage or security, and of the rents and profits, or dividends, interest or other proceeds received by such person, or by any other person by his order or for his use, in case he shall have been in possession of the property over which the mortgage or security shall extend, or any part thereof, and the court will then cause notice to be given in the *London Gazette*, and in such other of the public papers as it shall think fit, when and where and by whom, and in what way the said premises or property, or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly, and that the assignees (unless it be otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application.

Conveyance, where necessary.—56. That all proper parties shall join in the conveyance to the purchaser (where necessary) as the court shall direct.

Application of Proceeds.—Proof by Creditor for Deficiency.—57. That the monies to arise from such sale be applied in the first place in payment of the costs, charges, and expenses of the assignees, of and occasioned by the application to the court, and of and attending such sale, and then in payment and satisfaction of what shall be found due to such mortgagee, or person so having security, for principal, interest and costs, and that the surplus of the said monies (if any) be paid to the assignees. But in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee, or person so having security, then he shall be admitted a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend or dividends then already made.

All Parties to be examined.—58. That for the better making such inquiry and taking such account, and making a title to the purchaser, all parties be examined by the court upon interrogatories or otherwise as it shall think fit, and produce before the court upon oath all deeds, papers and writings in their respective custody, or power, relating to the estate or effects of the bankrupt, as the court shall direct.

Bankrupt's Balance-Sheet.

Bankrupt's Balance-Sheet must be filed in duplicate Ten Days before the day appointed for last Examination; last Examination will not otherwise be passed: Office Copies of Balance-Sheet, or any part, to be provided by proper Officer.—59. The bankrupt's balance-sheet must be filed in duplicate with the registrar of the court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment-day thereof for that purpose (one copy for the official assignee and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the court unless his balance-sheet shall have been duly filed as aforesaid; office copies of the balance-sheet, or such part thereof as shall be required, shall be provided by the proper officer.

Advertisement of Certificate and Transmission to Chief Registrar, and Appeal against Allowance thereof.

Advertisement of Certificate.—60. That the notice of the allowance of a certificate of conformity shall be advertised by the messenger of the court in the *London Gazette* ten days or more before the expiration of the time allowed by the statute for entering an appeal against the allowance, and such notice shall specify the class of the certificate and the time of suspension (if any), and the conditions (if any) annexed to the allowance; and no certificate of conformity shall be delivered to the bankrupt, except on production of the *Gazette* containing such advertisement.

Certificate to be transmitted to Chief Registrar.—61. That after the expiration of the time allowed for entering an appeal against the allowance of a certificate, and being satisfied that no appeal has been entered, the registrar of the court shall deliver such certificate to the bankrupt, and shall certify the allowance to the chief registrar.

Deposit of Costs before Application for Recall of Certificate.—62. That before any application for a recall of a certificate, and before or at the time of entering an appeal against the judgment of the Court of Bankruptcy for the allowance of a certificate, or for the refusal, the withholding, or the class of a certificate, or otherwise with respect to a certificate, the creditor, or assignee or bankrupt intending to appeal, shall deposit with the chief registrar such sum, not being less than 10*l.* and not exceeding 40*l.*, as the commissioner whose judgment is appealed from, or some other commissioner of the same court acting for him, shall direct, in order to satisfy (so far as the same may extend) any costs that the appellant may be ordered to pay, and in the absence of any direction of a commissioner as to the amount of deposit, the sum of 20*l.* shall be so deposited.

Notice to the Court of an Appeal.—63. That at the time of entering an appeal against the judgment of the court for the allowance of a certificate, or for the refusal, the withholding, or the class of a certificate, notice thereof shall be given to the court by leaving the same in writing with the chief registrar, who shall forthwith enter in the certificate-book the time and nature of every such appeal, and shall afterwards enter in the said book the date and substance of any order made in the said appeal that may be produced before him.

Affidavits in support to be filed with Petition of Appeal.—64. That all affidavits to be

made in support of petitions of appeal against the allowance, refusal or withholding of any bankrupt's certificate, or the class thereof, shall be filed at the time of the filing of such petition of appeal.

Audits.

Bills of Solicitors and Messengers to be delivered to Registrar for Taxation five days before the Audit; if Audit adjourned by default of Solicitor or Messenger in that behalf, the Solicitor or Messenger to pay the Costs of the Adjournment: no Sum to be paid to any Solicitor or Messenger on account of his Bill until it has been Taxed.—65. Every bill of fees and disbursements, and charges of any solicitor or attorney, or messenger, under any commission, fiat or petition for adjudication of bankruptcy, incurred prior to any sitting for an audit, shall be delivered to the registrar for taxation five days at least before the day appointed for such sitting; and in default thereof, if such sitting shall be adjourned by reason of such default, such solicitor or attorney, or messenger, shall pay the costs occasioned by the adjournment, and the amount thereof shall be deducted from the amount of such bill; and no money shall be paid to any solicitor, or attorney, or messenger, on account of any fees or disbursements or charges of any bill, until such bill shall have been taxed.

Audit Accounts of Official Assignee or Creditors' Assignee to be made out in a particular Form, to be uniform in all the Courts.—66. The audit account of the official assignee, or of any creditors' assignee or assignees, shall be made out in the ordinary form of a debtor-and-creditor account, each item thereof being entered according to its date, and a name, date, and proper explanation given to such item; and a duplicate of such account shall be sent by the official assignee to the solicitor two days at least prior to the day appointed for the auditing of such account, subject to the power of the commissioner to require an account, digested under proper heads, to be annexed to the audit account, if he shall think proper.

At every Audit the Debtor and Property-Book of the Official Assignee to be examined, and compared with Audit Paper; cause of Monies remaining uncollected to be ascertained, and a Minute thereof made, and filed with Proceedings: the Debtors to be Summoned and Examined on Oath, and Examination filed: Court to give Directions as to further Proceedings against such Debtors.—67. At every audit the debtor and property-book exhibited to the court by the official assignee shall be carefully examined and compared with the debts and property collected, as stated in the audit paper, and the cause of any monies remaining uncollected shall be ascertained, and a minute thereof made, and filed with the proceedings; and all persons appearing to be indebted to the bankrupt's estate shall be forthwith summoned and examined in that behalf upon oath, and the examination so taken shall be filed with the proceedings; and such directions shall be given by the court as to any further proceedings thereupon as to the court shall seem fit.

Summoning of Trader. Sections 78 to 86.

Summoning of Trader-Debtors.—Particulars of Demand and Notice, how to be signed.—N.B. The Particular of Demand and Notice must be a Copy of the Particulars of Demand and Notice required to be annexed to the Affidavit of Debt.—68. That the particulars of demand and notice under "The Bankrupt Law Consolidation Act, 1849," and specified in Schedule (G.) to the said act annexed, shall, where the debt is claimed to be due to a person or persons not in partnership, be signed by or in the Christian name and surname of every such person, adding after his signature his description, residence or place of business, and shall, where the debt is claimed to be due to a partnership firm, be signed by or in the name of one of the partners on behalf of himself and partner or partners, adding after such signature the style or firm of partnership and place of business as follows; (that is to say), John Thompson for self and partner, trading under the style or firm of at in the county of

How such Particulars of Demand and Notice should be directed.—69. Such particulars of demand and notice shall be directed to the party or parties intended to be summoned by the Christian and surname of each of them (or where the Christian name is not known, by the surname only, or when the Christian name is indicated only by any initial or contraction, then by such initial letter or letters, or contraction of the supposed Christian name and by the surname), and also by the place of residence or business, and shall also contain in the body thereof a statement of the name or names with such initial or initials or contractions as above-mentioned, if the name is not known, of all the persons from whom the debt is claimed to be due, whether the whole of them shall be summoned or not, or (in case of partners) the style or firm of partnership and place of business, in the same form as above-mentioned.

The Account to be expressed with reasonable certainty as to Dates, &c.; and where Credit is given in the Account, Payment of the Balance only to be required in the Notice.—70. The account in such particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters, and where credit is given in such account to the debtor, the notice shall require payment of the difference or balance only which appears to be due in such account.

If Affidavit for summoning Debtor not filed within a certain time, fresh Particulars of Demand and Notice required.—71. If the affidavit of debt under the said act shall not be filed within one calendar month after service of the particulars of demand and notice, the plaintiff (or creditor) shall not

afterwards be at liberty to proceed without serving new particulars of demand and notice.

Affidavit of Debt, what certainty required in.—72. Every affidavit for summoning a debtor under the said act shall state the nature of the debt with the same degree of certainty and precision as is now or shall hereafter be required in an affidavit to hold to bail by order of a judge in the superior courts at Westminster.

The Parties, how to be Described in Summons.—73. Every summons of a debtor under the said act shall describe the parties in the same manner as they were described in the particulars of demand and notice.

Notice to be Endorsed on Summons in the Form given, to make known to the Party summoned the Provisions of the Act relating thereto.—74. Every such summons shall be endorsed with a notice as follows:—

"NOTICE TO THE PARTY SUMMONED."

This summons is served upon you pursuant to the provisions of "The Bankrupt Law Consolidation Act, 1849," and is founded on an affidavit of debt which was filed in the Court of Bankruptcy in London, or the Court of Bankruptcy for the district, at on the day of 18

If you shall fail to appear to this summons at the time and place within specified, having no lawful impediment made known to and proved to the satisfaction of the said court and allowed, and if you also fail within seven days after personal service of this summons, or within such enlarged time as the said court may grant, to pay, secure or compound for the demand within mentioned to the satisfaction of the summoning creditor, or enter into a bond, in such sum, and with two sufficient sureties as the court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the eighth day after the service of this summons, provided a petition for adjudication of bankruptcy shall be filed against you within two calendar months from the filing of the above-mentioned affidavit.

If you shall appear, and on appearance, or at any enlargement or adjournment of the summons, shall refuse to sign an admission of the said demand in the form required by the said act, and shall not make a deposition on your oath, in the form required by the said act, that you believe you have a good defence upon the merits to such demand or some part thereof, and shall not (if required by the court so to do) enter into a bond according to the form contained in Schedule (K.) to the said act annexed, in such sum and with such two sufficient sureties as the court shall approve of, to pay such sum or sums as shall be recovered, together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand or of any part thereof in respect of which such deposition shall be made, and shall also fail within seven days after personal service of this summons, or within such enlarged time as aforesaid, to pay, secure or compound as above-mentioned, or to enter into such bond as first above-mentioned, the same consequence will follow as in the case first supposed, subject to the same proviso as regards the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall sign and file an admission of the said demand, and shall not within seven days next after the filing of such admission pay or tender and offer to pay to the said creditor the amount of such demand, or secure or compound for the same to the satisfaction of such creditor, you will be deemed to have committed an act of bankruptcy on the eighth day after the filing of such admission, subject to the same proviso as beforementioned with regard to the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall sign an admission for part of the said demand, and shall not make a deposition upon oath in the form required by the said act, that you believe you have a good defence upon the merits to the residue, and shall not (if required by the court so to do) enter into such bond as aforesaid, to pay such sum or sums as shall be recovered in any action which shall have been brought, or shall thereafter be brought for the recovery of such residue, together with such costs as shall be given in such action, then if, as to the sum so admitted, you shall not, within seven days next after the filing of such admission, pay, or tender and offer to pay to the said creditor the sum so admitted, or secure or compound for the same to the satisfaction of such creditor, and as to the residue of such demand shall not within seven days from the service of the summons, or such enlarged time as may be granted by the said court in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with such two sufficient sureties as the court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the eighth day after the service of this summons, subject to the same proviso as before mentioned with regard to the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall, as to the whole of the said demand or part of it, make a deposition on your oath (in the form required by the said act) that you believe you have a good defence upon the merits to the same, and (if required by the court so to do) enter into such bond according to the form contained in Schedule (K.), in such sum and with such sureties as aforesaid, you will be entitled to a discharge from the summons.

You are moreover to observe, that an admission made by you after the service of this summons, though signed elsewhere than before the court, may afterwards be filed in court, and will be as effectual as if you had appeared and signed it in court, provided such admission be made in the form contained in Schedule (I.) to the said act annexed, and there be present at the time of the signature an attorney of one of her Majesty's superior courts of law on your behalf, expressly named by you, and attending at your request, to inform you of the effect of such admission before it is signed by you, and provided also that such attorney do subscribe his name to the admission as a witness to the due execution thereof, and in such attestation declare himself to be attorney for you, and state therein that he subscribes as such attorney.

Summons to be Endorsed with the Name of the Attorney suing out the same, or with a Memorandum expressing that it was sued out by the Creditor in person.—75. Every summons of a debtor under the said act shall be endorsed with the name and place of business of the attorney actually suing out the same, but *in case no attorney* shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the summoning creditor "in person."

Summons to be served Four Days before time for Appearance.—76. Every such summons shall be served four days at least before the time for appearance therein mentioned.

Summons to be served between Nine o'Clock, a.m. and Nine o'Clock, p.m.—77. Every such summons shall be served between the hours of nine o'clock in the forenoon and nine o'clock in the afternoon.

If Plaintiff makes Default in Appearance, the Defendant entitled to Discharge from Summons, &c.—78. If the plaintiff (or summoning creditor) shall make default in appearance by himself or his attorney at the time appointed in that behalf, the defendant (debtor) shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be endorsed on the summons.

If Defendant appear, when in such case entitled to Discharge from Summons.—79. If the defendant or party summoned shall appear at the time appointed in that behalf, or at any enlargement or adjournment thereof, and shall refuse to admit such demand, but shall, as to the whole of the said demand, or part of it, make a deposition as required by the said act, that he believes he has a good defence on the merits to the same or some part thereof, and if ordered by the court so to do, but not otherwise, enter into such bond according to the form contained in Schedule (K.) in such sum and with such two sufficient sureties, and within such time as the court shall approve of and direct, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be endorsed on the summons.

Want of Compliance with these Rules, consequence of.—80. Any want of compliance on the part of the plaintiff with these rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant, or allowed to be rectified by the court, when it shall not in the opinion of the court be matter of substance, or shall have arisen from a mere slip; but unless waived by the defendant, or rectified with the consent of the court, if the same shall be made known to and proved to the satisfaction of the court, at the time required by the summons for the appearance of the defendant, it shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff or any part thereof; and in such case the defendant shall be entitled to his discharge from the summons with costs, and a memorandum of such discharge shall be endorsed on the summons.

Application to Enlarge Time.—81. Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand or any part thereof, or for entering into a bond with sureties, shall be supported by affidavit.

Notice to be given of Defendant's Intention to enter into Bond.—82. Before any defendant shall be allowed to enter into a bond with sureties, according to the provisions of the said act, he shall give to the plaintiff or his attorney two clear days' notice in writing, signed by the defendant or his attorney, of the defendant's intention so to proceed.

Notice of Sureties to be accompanied with Copy of Affidavit of Sufficiency. Form of Affidavit of Sufficiency.—83. Such notice of sureties shall be accompanied with a true copy of their affidavit of sufficiency, which affidavit shall be in the following form, viz.—

In the Court of Bankruptcy, London, [*or* in the Court of Bankruptcy for the district].

Between and

A. B. of in the &c. and C. D. of &c. [*adding their place of residence and description respectively*] severally make oath and say, and first the said A. B. for himself saith that he is one of the proposed sureties for the above-named defendant, and that he the said A. B. resides at aforesaid, and that he is worth property to the amount of £ over and above what will pay and satisfy all his just debts and incumbrances, *that he is not surety in any manner for the above-named defendant or any other person, except on the present occasion*, [*or* if he is surety on any other occasion substitute for the words in italics the following, "*and every other sum for which he is now surety*];" that his the said A. B.'s property to the amount aforesaid consists of [*here specify the nature and value of the property, according to the circumstances of the case, as follows*]: stock-in-trade in his business of a carried on by him at of the value of of good book debts owing to him to the amount of furniture in his

house at of the value of of a freehold or leasehold farm of the value of situate at occupied by [*or of other property, particularising each description of property, with the value thereof*]. And the said A. B. further saith that for the last six months he has resided at aforesaid [*or if he has resided at several places, then say at the following places, particularising them*]. And the above-named deponent, C. D., for himself saith that [*here pursue the same form as with respect to the former surety*].

Sureties to justify; in what Amount.—84. The amount of property so sworn to shall be at least equal to the sum demanded, or the portion thereof for which the bond is ordered to be given (fractional parts of a pound excepted) and one-fourth more.

Liberty to except to Sureties.—85. The plaintiff shall be at liberty, within four days after service of notice of sureties, to except to the proposed sureties or either of them, by delivering a written notice to the defendant or his attorney, to the effect generally that he excepts to such surety or sureties (as the case may be), and a copy of such notice shall be served on the registrar of the court in which such exception is to be heard, two days at least before the day of hearing.

Attendance in Court to justify, and Opposition thereto.—86. Two days after service of such notice of exception, the defendant or his attorney shall attend before the commissioner of the day in London at three o'clock in the afternoon, or if in the country, at such time as the court shall appoint, with the bond duly stamped, and with an affidavit by the subscribing witness of the execution of such bond, and the plaintiff or his attorney shall be at liberty to oppose the sureties or either of them, upon affidavit or on the ground of any defect appearing on the face of the proceedings.

Penalty of the Bond, and Form of.—87. The bond shall in all cases be taken in a penal sum to the amount of double the sum demanded, or the part thereof in respect of which the bond is to be given, up to the sum of 1000*l.*; and beyond 1000*l.* in the sum of 1000*l.* beyond the sum demanded.

The condition of the bond is to be according to the form contained in Schedule (K.) to the said act.

Where no Notice of Exception, Course of Proceeding.—88. Where no notice of exception is served, the defendant or his attorney shall attend before the commissioner of the day on the sixth day after service of notice of sureties, at eleven o'clock in the forenoon in London, or if in the country, at the hour appointed by the court, with the bond and affidavit of execution aforesaid, and also with an affidavit of service of notice of sureties, and an office copy of the affidavit of sufficiency.

Arrangements between Debtors and their Creditors, under the Superintendence and Control of the Court.

Presentation and Allotment of Petitions.—89. That every petition shall be delivered fairly written or printed on parchment, properly stamped, between the hours of eleven and two, to the registrar of the day in London, or to the registrar or one of the registrars in the country (as the case may be in town or in country), who shall file and number such petition, and allot the same by ballot, in the presence of a commissioner, to one of the commissioners of the Court of Bankruptcy in London (or to a commissioner in the country where there are two commissioners), and forthwith certify to such commissioner the filing of the petition and the allotment to him, and the petition shall be prosecuted before such commissioner (or before the sole commissioner where there is only one). Provided always, that any one commissioner of the same court may, in the absence of any other commissioner, act for him: Provided also, that where a petition shall have been previously filed by the same petitioner, whether the same shall have been dismissed or not, or when the petitioner has previously been bankrupt in London, or within the same district in the country, the new petition shall be allotted to the same commissioner to whom the former petition, commission, fiat or petition for adjudication was allotted.

Two Copies to be delivered to Registrar.—90. That two fair copies on paper of the petition shall be delivered to the registrar, together with the original petition: one for the use of the commissioner, the other for the use of the official assignee and for the inspection of creditors.

Deposit with Official Assignee.—91. That the sum of 10*l.* or such other sum not exceeding 30*l.* as the commissioner shall direct, shall, before the appointment of any sitting of the court under such petition, be deposited with such official assignee of the commissioner to whom the petition shall be allotted, as he shall direct, for the costs of the sitting or sittings, for the payment of such remuneration to the official assignee as the commissioner shall award for the examination of the accounts, and for other necessary expenses, and the residue, if any, shall be repaid to the petitioner.

Certificate of Causes of Detention to be annexed to Petition.—92. That in all cases where a petitioner shall be in custody, there shall be filed with his petition a certificate from the gaoler or officer of the cause or causes of the detention of the petitioner.

Sending and serving of Notices.—93. That all notices required by or given in pursuance of the provisions of the act with respect to the said arrangements, except where otherwise directed by the act, or by the court, shall be sent or served (as the case may require) by a messenger of the court.

Petitioner's Account to be attested and furnished to Official Assignee.—94. That the account to be filed by the petitioning trader shall be signed in the presence of and attested by a solicitor of the Court of Bankruptcy, and that the copy to be furnished to

the official assignee shall be so furnished ten days or more before the day appointed for the private sitting of the court.

Right to attend Sittings and inspect Proceedings.—95. That no person not being or not claiming to be a creditor, or the solicitor or duly authorised attorney of a creditor, except the official assignee and one clerk, and the petitioner accompanied by two persons, shall be present at any sitting, or be permitted to inspect the petition or other proceedings, unless authorised in writing by the commissioner.

Minutes of Sittings.—96. That the minutes or notes of the proceedings at every sitting shall be kept by the registrar.

Title of Affidavits.—97. That every affidavit in the matter of an arrangement under the superintendence and control of the court, made after the allotment of a petition, shall be intituled "The Court of Bankruptcy in London," or "The Court of Bankruptcy for the District" (as the case may be), "In the matter of a Petition for Arrangement between A. B. and his Creditors."

Forms.—98. That the several forms in the following schedule marked (A) shall be used, with the necessary variations :—

SCHEDULE (A.)

FORM OF ORDER *for Protection to Petitioning, Trader, under Section* 211.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of], the day of in the year of our Lord one thousand eight hundred and .

Whereas of a trader, unable to meet his engagements with his creditors, did on the day of present his petition to this honourable court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that his person and property might be protected from all process, and that such proposal as he might be able to make, or such modification thereof, as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence and control of this honourable court; and there was filed with the said petition such affidavit in support thereof as is required by the said act. Now I, one of the commissioners of the said court, acting in the matter of the said petition, do hereby, in pursuance of the said statute, order that the person and property of the said shall be protected from all process from the date hereof until the day of next at noon, or until further order.

Given under my hand and the seal of the court this day of 18

Commissioner.

FORM OF RENEWAL *of Protection, to be endorsed on the original Order for Protection.*

Court of Bankruptcy, Basinghall Street, London, [*or* at in the county of] the day of in the year of our Lord one thousand eight hundred and

I, one of the commissioners of the Court of Bankruptcy in London [*or* for the district], authorised to act in the matter of the within petition, do hereby renew the protection within granted, and order that the person and property of the said shall be protected from all process from the date hereof until the day of next at noon, or until further order.

Given under my hand and the seal of the court the day of 18

Commissioner.

ORDER OF RELEASE *of Petitioning Trader from Custody, under Section* 211.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of] the day of in the year of our Lord one thousand eight hundred and

Whereas of a trader, unable to meet his engagements with his creditors, did on the day of present his petition to this honourable court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that his person and property might be protected from all process, and that such proposal as he might be able to make (or such modification thereof as by three fifths in number and value of his creditors might be determined) might be carried into effect under the superintendence and control of this honourable court acting in the matter of the said petition; and whereas I have made an order, bearing date this day [*or* the day of] that the person and property of the said shall be protected from all process from the date thereof until the day of next at noon, or until further order; and whereas it appears that the said is in prison for debt, namely, in the prison of under an execution upon a judgment obtained on the day of in the court of against the said at the suit of for the sum of £ and interest thereon [*the statement of the cause of the petitioner's imprisonment or custody to be varied according to the facts*], and it does not appear by any judgment, order, commitment, or sentence, under which the said petitioner is in prison or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any of-

fence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Now I do hereby order the sheriff of [*the person having the petitioner in prison or custody*] and every person who shall have the said in custody by virtue of the said execution, to release the said from custody as to such execution, pursuant to the said statute.

Given under my hand and the seal of the court this day of in the year of our Lord 18

Commissioner.

CERTIFICATE OF APPROVAL *of Resolution accepting Petitioning Trader's Proposal. Section* 216.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of], the day of in the year of our Lord one thousand eight hundred and

Whereas of a trader, unable to meet his engagements with his creditors, did on the day of present his petition to this honourable court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that such proposal as he might be able to make (or such modification thereof as by three fifths in number and value of his creditors might be determined) might be carried into effect, under the superintendence and control of the said court; and whereas one of the commissioners of the said court acting in the matter of the said petition, caused such sittings of the court to be held as are directed by the said act; and whereas a certain resolution or agreement now exhibited and marked with the letter was duly assented to at such sittings, which I, a commissioner acting in the matter of the said petition, and after hearing do think reasonable and proper to be executed under the direction of this court, and have approved and confirmed the same, and caused it to be filed and entered of record in the said court; I do hereby certify the several matters aforesaid under my hand and the seal of the court this day of in the year of our Lord 18

Commissioner.

PROTECTION FROM ARREST, *to be endorsed on the foregoing Certificate.*

The within-named is hereby protected from arrest at the suit of any person being a creditor at the date of his petition, and having had such notice or notices as by the within-mentioned act is required, until the day of 18 at noon, or until further order, provided that this protection shall not be valid in favour of the said if he shall be proved to have been about to abscond beyond the jurisdiction of this court, or if he has concealed or is concealing any part of his estate or effects, nor against any creditor whose debt is not truly specified in the account filed by the said nor against any creditor whose debt has been contracted by the said by any manner of fraud or breach of trust.

Dated this day of 18

Commissioner.

FORM OF ACCOUNT *to be filed by Petitioning Trader, under* 12 *&* 13 *Vic. c.* 106, *s.* 214.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of], the day of in the year of our Lord one thousand eight hundred and

I, of being a petitioning trader under the provisions of "The Bankrupt Law Consolidation Act, 1849," do declare that the following schedules do contain a full and true account of my debts and the consideration thereof, and the names, residences and occupations of my creditors, and also a full and true account of my estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by me, and of all property of what kind soever held in trust for me, and that I have therein set forth such proposal as I am able to make under the provisions of the said act.

Witness my hand the day of one thousand eight hundred and

Signed by the said in the presence of

Solicitor.

CREDITORS.

No.	Names, Residences, and Occupations of Creditors.	Amount. £	s.	d.	When Contracted.	Name and consideration of the Debt and Securities, if any, and estimated value of such Securities.

Note.—When the name and residence (or either of them) of any indorser or holder of any negotiable security are unknown, that fact must be stated.

DEBTORS.

N.B. Where there are Cross Demands, the party must be entered both as Creditor and Debtor, and "Set Off" must be written under the amount.

No.	Names, Descriptions and Places of Abode of Persons from whom Debts and Rights are due to the Petitioner, or claimed by him.	Amount. £	s.	d.	When contracted.	Good, Bad, or Doubtful.	Nature and Consideration of the Debt, also Securities, if any, for the same, & the estimated value of such securities	Witnesses, with their Residences, and other Evidence by which the Debt may be proved.

PROPERTY IN POSSESSION.

Real and Personal Estates and Effects, which were at or since the time of filing my Petition or are now in my possession, enjoyment or control, or which were or are held by any other person or persons in trust for my use, or to the possession or enjoyment of which I was entitled at the time of subscribing my Petition, or am now entitled.

		£	s.	d.
1. Interest in Lands.	Freehold, Copyhold, and Leasehold Property, with local Description, Names of Tenants, and Annual Rent of the same, and statement of Incumbrances (if any) thereupon, with the Dates thereof			
2. Personal Property.	Household Goods and Furniture, at			
	Wearing Apparel			
	Jewels, Trinkets, and Ornaments of the Person			
	Plate, Linen, and China			
	Wines, and other Liquors			
	Books, Prints, and Pictures			
	Horses, Cows, and other Animals			
	Carriages			
	Farming Stock and Implements of Husbandry			
	Stock in Trade in my Business of			
	Machinery and Utensils in my Business of			
3. Property in the Funds, Annuities. Shares, &c.	Ships, and Shares of Ships, viz.: Annuities, Money in the Public or other Funds, Shares in Canal or other Companies; showing in whose names the same are standing, also when and by whom the last Dividend or other Payment was received in respect of the same			
4. Unpaid Legacies.	Legacies due, but unpaid, with all particulars concerning the same			
BOOKS, DEEDS, PAPERS.	The following is a true List of all Books, Papers, Deeds, and Writings relating to my Estate and Effects, or any part thereof, which at the time of presenting my Petition were, or at any time since have been in my Possession, or under my custody or control, or in the possession or custody, of any person in trust for me, or for my use, benefit or advantage.			

PROPERTY in Reversion, Remainder, or Expectancy, Places, Pensions, Rights, and Powers.

N.B.—Contingent as well as vested Interests must be entered.

Real and Personal Estates and Effects in which I had or have any Interest in Reversion, Remainder, or Expectancy.

		Supposed Value of my Interest if now to be Sold.		
1. Interest in Land.	Freehold, Copyhold, and Leasehold Property, with Names and Descriptions of Persons now enjoying the same, and the Annual Value thereof; also the nature of my interest therein, and from whom, and in what manner it is derived	£	*s.*	*d.*
2. Personal Property.	Personal Property, with Names and Descriptions of Persons now enjoying the same; also the nature of my interest therein, and from whom, and in what manner it is derived			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in Public or other Funds, Shares in Canal and other Companies; showing in whose Names the same are standing, with Names and Descriptions of Persons now enjoying the same; also the nature of my interest therein, and from whom, and in what manner it is derived			
4. Places and Pensions in Possession or Reversion.	Places of Benefit or Advantage held by me, with the Salaries, Fees, and Emoluments thereof; also all Pensions and Allowances in Possession or Reversion held by me, or by any other Person or Persons for me, or on my behalf, or of and from which I derive or may derive any benefit or advantage			
5. Rights and Powers.	Rights and Powers which I or any other Person or Persons in trust for me, or for my use, benefit or advantage or am or were, or are in any manner seised or possessed of, or interested in or entitled to, or which I or any other Person or Persons in trust for me, or for my benefit, had or have any power to dispose of, charge, or exercise for my benefit or advantage			

Witness my hand, the day of one thousand eight hundred and

Signed by the said in the presence of *Solicitor.*

Arrangement by Deed. Ss. 224 *to* 229.

Forms of Certificate, Account, and Affidavit under 12 *&* 13 *Vic. c.* 106, *ss.* 225, 226, 227. —99. That a certificate of the trustee or inspector, or of two creditors, of the execution of the deed or memorandum of arrangement by the requisite number of creditors, and the account to be appended thereto, and affidavit verifying the same, and the certificate to be granted by the court, shall be in the following forms, with the necessary variation:—

FORM OF CERTIFICATE *by Trustee or Inspector.*

"The Bankrupt Law Consolidation Act, 1849."

To the Court of Bankruptcy in London [*or* to the Court of Bankruptcy for the district].

I, the undersigned being the trustee [*or* inspector] [*or* we the undersigned and being the trustees] [*or* inspectors] under a deed [*or* memorandum] of arrangement now produced, and bearing date the day of and made between [*state the parties to the deed or memorandum*] being a deed [*or* memorandum] of arrangement between the said and his creditors, within the meaning of the provisions of "The Bankrupt Law Consolidation Act, 1849," with respect to arrangements by deed, do hereby certify to the Court of Bankruptcy in London [*or* to the Court of Bankruptcy for the district], that the said deed [*or* memorandum] has been signed by or on behalf of six sevenths in number and value of the creditors of the said whose debts amount to 10*l.* and upwards, accounting every creditor a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens from the said appeared to be the balance due to such creditor; and that a full account of the debts of the said together with the names, residences, and occupations of his creditors, is appended hereto.

Dated this day of 18 A. B.

FORM OF CERTIFICATE *by Two Creditors of the Trader.*

"The Bankrupt Law Consolidation Act, 1849."

To the Court of Bankruptcy in London

[*or* to the Court of Bankruptcy for the district].

We, the undersigned A. B. of and C. D. of being two of the creditors of the trader hereinafter mentioned, and there being no trustees or inspectors under the deed [*or* memorandum] of arrangement hereinafter mentioned, do hereby certify to the Court of Bankruptcy in London [*or* to the Court of Bankruptcy for the district] that a deed [*or* memorandum] bearing date the day of and made between [*state the parties to the deed or memorandum*] being a deed [*or* memorandum] of arrangement between the said and his creditors, within the meaning of the provisions of "The Bankrupt Law Consolidation Act, 1849," has been signed by or on behalf of six sevenths in number and value of the creditors of the said whose debts amount to 10*l.* and upwards, accounting every creditor a creditor in value in respect of such amount only as, upon an account fairly stated after allowing the value of mortgaged property, and other such available securities, or liens from the said appeared to be the balance due to such creditor; and that a full account of the debts of the said together with the names, residences, and occupations of his creditors, is appended hereto.

Dated this day of 18 E. F.
G. H.

FORM OF THE ACCOUNT *to be appended to the Certificate of Trustee, or Inspector, or Two Creditors.*

N.B.—This is to be an account of all the debts of the trader, including those under 10*l.*, and including debts secured, and showing the estimated value of any security.

"The Bankrupt Law Consolidation Act, 1849."

A full Account of the Debts of together with Names, Residences, and Occupations of his Creditors.

Amount of Debts.	CREDITORS.			Debts wholly or partially secured by mortgage or other such available securities or liens, showing the amount secured, and the value or estimated value of the Security.
	Names.	Residences.	Occupations.	
£500 . .	John Smith.	10 Fore Street, London.	Merchant	£250, part of the debt secured by mortgage of freehold premises in Street, London, dated the 1st day of January, 1840. The estimated value of the premises is 300*l.*
£4: 10: 6	William Roberts	50 Cheapside, London.	Tailor	

FORM OF AFFIDAVIT *of the Trader to accompany the Certificate.*

"The Bankrupt Law Consolidation Act, 1849."

In the Court of Bankruptcy in London [*or* Court of Bankruptcy for the district].
In the matter of an arrangement by deed between I. K. and his creditors.

The above-named I. K. maketh oath and saith, that he hath perused the accompanying certificate purporting to be signed by bearing date the day of and the account appended thereto, and purporting to be a full account of the debts of this deponent, together with the names, residences, and occupations of this deponent's creditors. And this deponent saith that the said account and the matters therein stated are true, and that the said account is a full and true account of the debts of this deponent, together with the names, residences, and occupations of this deponent's creditors. And this deponent saith that he is acquainted with the handwriting of the said and the signature to the said certificate is in the handwriting of the said and that the contents of the said certificate are true.

FORM OF CERTIFICATE *by the Court of Execution by requisite Proportion of Creditors.*

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London [*or* at in the county of the day of in the year of our Lord 185].
In the matter of an arrangement by deed between I. K. and his creditors.

Upon reading the petition of the above-named I. K. to this court, and the affidavit [*or* affidavits] in support thereof, and of the due service of the notices required by this act, and upon hearing and being satisfied that the said I. K., being a trader liable to become a bankrupt, has suspended payment, and that he did for six months next immediately preceding his suspension

of payment reside [*or* carry on business] within the district of this court, and that a deed [*or* memorandum] now exhibited, and marked with the letter and bearing date the day of and made between [*state the parties to the deed or memorandum*], being a deed [*or* memorandum] of arrangement between the said and his creditors, within the meaning of the provisions of "The Bankrupt Law Consolidation Act, 1849," with respect to arrangements by deed, has been signed by or on behalf of six sevenths in number and value of the creditors of the said I. K., whose debts amounted to 10*l.* and upwards, accounting every creditor a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the said I. K. appeared to be the balance due to such creditor; I hereby certify the same under my hand and the seal of the Court.

Dated this day of 185

A. B. Commissioner.

Orders for Payment of Money and Costs, and Execution thereon. Ss. 123, 132, 151, *and* 249.

Order for Payment of Money for Costs.—100. That every order for payment of money and costs, or either of them, shall be signed by the commissioner making such order, and be sealed with the seal of the court, and be countersigned by the registrar, or one of the registrars, and shall be forthwith filed with the proceedings.

Order for Costs to contain leave to issue Execution.—101. That every order for payment of costs shall contain a direction that the party in whose favour the order is made may enforce the same by issuing execution.

Taxation of Costs.—102. That the costs directed by any such order to be paid shall be taxed on production of an office copy of such order, and the allocatur being duly stamped, shall be signed and dated by the master or registrar taxing the costs.

Chief Registrar to issue Execution.—103. That in all cases where writs of execution may be issued out of the Court of Bankruptcy to enforce an order for payment of money and costs, or either of them, the same shall be sealed with the seal of the court, and be issued by the chief registrar on production of an office copy of the order for payment, and (where the order comprises costs) on production of the allocatur.

Præcipes to be filed.—104. That at the time of issuing any writ of execution the solicitor causing the same to be issued shall file a præcipe thereof with the chief registrar in the form given in the schedule to these orders.

Præcipe-Book to be kept.—105. That the chief registrar shall file and keep every such præcipe, and shall keep a book in which he shall enter the same, with an index referring alphabetically to the names of the persons against whom writs are issued.

Forms of Writs of Execution, and of the Execution thereof.—106. That writs of execution shall be in the forms given in the following schedule, or as near thereto as the circumstances of the case may require, and such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he doth or ought to execute such-like writs, and for the execution of such writs such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law.

Teste and Return.—107. That writs of execution shall be tested in the name of the senior commissioner, and of the day when actually issued, and be made returnable immediately after the execution thereof, before the Court of Bankruptcy in London.

Indorsement of Amount.—108. That the amount actually intended to be levied or extended, or for which the person is to be taken, and the name, occupation, and address of the person against whom the writ is issued, and the name and residence, or place of business of the solicitor issuing the same, shall be endorsed on every writ of execution.

Venditioni Exponas.—109. That on the filing of a return to a former writ that goods have been seized but not sold, a writ of *venditioni exponas* may be issued.

Returns to be filed with the Chief Registrar and entered in Præcipe-Book.—110. That on execution of the writ, or before execution, if so ordered by the Court of Bankruptcy in London, every writ shall be forthwith returned to the said Court of Bankruptcy, by filing the same (with the proper return endorsed) with the chief registrar, by whom such writ and return shall be filed of record, and the fact and date, and substance of the return, shall be forthwith entered in the præcipe-book.

Entry of Satisfaction.—111. That on satisfaction by levy or otherwise, in whole or in part, the party on whom the order is made may, on delivery of a search stamp, cause such satisfaction to be entered on the order for payment.

Order for Entry of Satisfaction.—112. That unless such satisfaction shall appear by the return of the writ, or shall be admitted by the party in whose favour the order shall be made, or his solicitor, application must be made to the Court of Bankruptcy wherein the proceedings and order shall be filed to order such entry of satisfaction.

Amendment of Writs, &c.—113. That the Court of Bankruptcy shall, on proper application, exercise such and the same powers of amendment of writs of execution, and the indorsement thereon, and the præcipes thereof, in cases where such powers may be reasonably exercised, and on the same terms as to payment of costs or otherwise as the superior courts of Westminster are in the habit of exercising.

FORM OF PRÆCIPE *on issuing Execution.*

SURREY. *Fi. Fa., Ca. Sa., Elegit,* or *Venditioni exponas* [*as the case may be*] against C. D. for payment of £ and £ costs [*as the case may be*] to A. B., official assignee of [*omit this if not applicable*] on order of the Court of Bankruptcy in London [*or* for the district] dated the day of in the year of our Lord 18

E. F. [*Solicitor issuing the writ.*]
Address
Date

FORMS OF WRITS.

(To be varied where necessary.)

No. 1.

Writ of *Fieri Facias* on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas by an order of the Court of Bankruptcy in London [*or* for the district] dated the day of in the year of our Lord 18 and made in the matter of [*insert the title of the order*], reciting that C. D. of in his examination taken the day of and signed and subscribed by him, had admitted that he was indebted to the said bankrupt in the sum of £ upon the balance of accounts between the said C. D. and the said bankrupt, it was ordered that the said C. D. should pay to A. B. the official assignee of the estate and effects of the said bankrupt in full discharge of the sum so admitted the sum of £ forthwith [*make this conformable to the order*]: And whereas we are given to understand that the said sum of £ [*or* that the sum of £ part of the said sum of £] is still unpaid: Now we command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the said sum of £ [*insert the sum to be levied*] and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £ at the rate of 4*l.* per centum per annum from the said date of the said order. And that you have that money and interest before our Court of Bankruptcy at Basinghall Street, in the city of London, immediately after the execution hereof, to be paid to the said A. B., official assignee as aforesaid, in pursuance of the said order. And that you do all such things as by the statute passed in the year of our Lord 1838 you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to our said Court of Bankruptcy at Basinghall Street aforesaid immediately after the execution thereof, and have there then this writ.

Witness [*name of senior commissioner*] at Basinghall Street, in the city of London, the day of in the year of our Lord 185

No. 2.

Writ of *Fieri Facias* on an Order for Payment by Instalments of Debt admitted in Court to be due to the Estate of a Bankrupt.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas by an order made in the Court of Bankruptcy in London [*or* for the district] bearing date the day of in the year of our Lord 18 entitled, "In the matter of " [*insert the title of the order*] and reciting that C. D. of in his examination taken the day of and signed and subscribed by the said C. D., had admitted that he was indebted to the said bankrupt in the sum of £ upon the balance of accounts between the said C. D. and the said bankrupt: It was ordered that the said C. D. should pay to A. B., the official assignee of the estate and effects of the said bankrupt, in full discharge of the said sum of £ the sum of £ in manner following, that is to say, by instalments of £ each, the first whereof was to be made on the day of And it was ordered that in default of payment of any of the said instalments the whole sum then remaining unpaid should immediately become payable and be paid: And whereas we are given to understand that default was made in payment of one of the said instalments, and thereupon the said sum of £ which then remained unpaid [*or* the sum of £ being the portion of the sum so ordered to be paid, which then remained unpaid, *according to the facts*] immediately became payable, but the same has not been paid: Therefore we command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the said sum of £ [*insert here the sum to be levied*] and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest [*proceeding as in the former form*].

No. 3.

Writ of *Fieri Facias* on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt, and of Costs assessed by the Court.

VICTORIA, by the grace of God [*as in the forms given above, reciting the order, including the portion of it relating to costs*]: And whereas we are given to understand that the said sums of £ and £ are still unpaid [*make this agree with the facts*].

Now we command you, that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the sums of £ and £ [*proceed as in the above form, with the necessary variations*].

No. 4.

Writ of *Fieri Facias* on an Order for Payment of Costs to be Taxed.

VICTORIA, by the grace of God of the

United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

We command you, that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ for certain costs which lately before our Court of Bankruptcy in London [*or* for the district] by an order made in a certain matter there, entitled, "In the matter of " [*insert the title of the order*] bearing date the day of were ordered to be paid by the said C. D. to A. B., official assignee of the estate and effects of [*omit this if not applicable, and alter the form to suit the facts of the case*] which costs have been since taxed at the said sum of £ as appears by an allocatur dated the day of and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest at the rate of 4*l.* per centum per annum on the said sum from the said date of the said allocatur. And that you have that money and interest before our Court of Bankruptcy at Basinghall Street, in the city of London, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said order. And that you do all such things as by the statute passed in the year of our Lord 1838 you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to our said court in London immediately after the execution thereof.

Witness [*name of the senior commissioner*] at Basinghall Street, in the city of London, on the day of in the year of our Lord 185

No. 5.

Writ of *Capias ad Satisfaciendum* on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting [*recite the order for payment, and that the money continues unpaid, as in the form of* Fieri facias *above given, and proceed*]:

Now we command you, that you take the said C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body immediately after the execution hereof before our Court of Bankruptcy in London, to satisfy the said A. B., official assignee as aforesaid, the said sum of £ and further to satisfy the said A. B., official assignee as aforesaid, interest upon the said sum of £ at the rate of 4*l.* per centum per annum from the said date of the said order, and have there then this writ.

Witness [*name of senior commissioner*] at Basinghall Street, in the city of London, the day of in the year of our Lord 18

No. 6.

Writ of *Venditioni Exponas.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the mandatory part of the* Fieri facias *to the end*] and on the day of you returned to our said Court of Bankruptcy in London that by virtue of the said writ to you directed you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers [*to be varied according to the actual return*]: Therefore we, being desirous that the said A. B. should be satisfied the money and interest aforesaid, command you that you expose to sale and sell or cause to be sold the goods and chattels of the said C. D. by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before our said Court of Bankruptcy at Basinghall Street, in the city of London, immediately after the execution hereof, to be paid to the said A. B., and have there then this writ.

Witness at Basinghall Street, in the city of London, the day of in the year of our Lord 18

No. 7.

Writ of *Elegit* on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

Victoria, &c. To the sheriff of greeting.

Whereas [*recite the order for payment, and that the money continues unpaid, as in the form of* Fieri facias *above given, and proceed*]: And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him, her, or them [*as the case may be*] all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the day of in the year of our Lord [1] or at any time afterwards, or over which the said C. D. on the said day of [4] or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rec-

[1] The day on which the order was made.

tories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ shall have been levied: Therefore we command you, that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold and customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of[1] or at any time afterwards, or over which the said C. D. on the said day of[1] or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said sum of £ shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

No. 8.

Writ of *Elegit* on an Order of the Court of Bankruptcy for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt, and of Costs assessed by the Court.

Victoria, &c. To the sheriff of greeting.

Whereas [*recite the order for payment, including the portion of it relating to costs, and that the moneys are unpaid, as before, and proceed*]: And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said C. D., or any one in trust for him, was seised or possessed of on the day of in the year of our Lord[1] or at any time afterwards, or over which the said C. D., on the said day of[1] or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of £ and £ together with interest upon the said sum of £ at the rate of 4*l.* per centum per annum from the day of [1] and on the said sum of £ at the rate aforesaid, from the day of[2] shall have been levied: Therefore we command you, that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of[1] or at any time afterwards, or over which the said C. D. on the said day of[1] or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

No. 9.

Writ of Elegit *on an Order for Payment of Costs to be taxed.*

Victoria, &c. To the Sheriff of greeting.

Whereas lately in our Court of Bankruptcy in a certain matter there depending, intituled "In the matter of E. F.," by an order of our said court made in the said matter, and bearing date the day of it was ordered that C. D. should pay unto A. B. certain costs as in the said order mentioned, and which costs have been taxed and allowed by G. H., Esq., the master of our said court, at the sum of £ as appears by the certificate of the said master, dated the day of and afterwards the said A. B. came into our said Court of

[1] The day on which the order was made.
[2] The date of the allocatur.

Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said C. D., or any one in trust for him, was seised or possessed of, on the day of in the year of our Lord[1] or at any time afterwards, or over which the said C. D., on the day of[2] or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ together with interest thereon at the rate of 4*l.* per centum per annum from the said day of[1] shall have been levied: Therefore we command you, that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of[1] or at any time afterwards, or over which the said C. D., on the said day of[1] or at any time afterwards had any disposing power, which he might, without the assent of any other person or persons, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

Course of Priory of Payment out of the Estate of the Bankrupt, of the Costs of the Petitioning Creditor (*Section* 114), *and of Payment of Costs out of joint or separate Estates.*

Course of Priority for Payment of the Costs of the Petitioning Creditor.—114. That after payment or retainer out of the estate of the bankrupt of all monies duly paid by the official assignee, the per-centage on the gross produce of the estate, from time to time payable to the credit of "The Chief Registrar's Account," and afterwards the per-centage payable to the official assignee in respect of realising the property, the costs of the petitioner of filing and prosecuting his petition, until the choice of assignees by the creditors, shall be paid as follows:—first, the costs and charges of the messenger and broker acting under the petition to the time of the choice of assignees, and then the costs and charges of the solicitor acting in the matter of the petition until the said time.

In case Joint Estate insufficient, Court may order Costs to be paid out of Separate Estate, and vice versâ.—115. That in case any joint estate of any bankrupts shall be insufficient to pay any costs or charges necessarily incurred in respect of the same, the court may order such costs to be paid out of the separate estates of such bankrupts, or one or any of them; and, *vice versâ*, may order costs necessarily incurred for any separate estate, if the same were incurred with reasonable probability of benefit to the joint estate, to be paid out of such joint estate.

Composition after Adjudication of Bankruptcy, under Sections 230, 231.

Minutes of First Meeting.—116. That at the first of the meetings of creditors directed by the statute to be held, a minute shall be taken by the solicitor to the assignees of the names of the several creditors present, and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition.

Second Meeting to be before Commissioner.—117. That the second of the said meetings shall be held before the commissioner, and that at such meeting the said commissioner shall, by deposition of witnesses and documentary evidence, as to him shall appear to be proper, inquire and ascertain whether the several particulars directed by the statute to be performed previous to the holding of such second meeting have been duly performed, and certify the same, together with the proceedings which shall have taken place at such second meeting.

Certificate of Commissioner.—118. That for the better information of all parties interested, the certificate of the commissioner shall state what proportion in number and value the creditors assenting to the composition bear to the creditors who shall have proved debts to the amount of 20*l.* and upwards under the fiat or petition, and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.

[1] The date of the allocatur.

[2] The date of the master's certificate of taxation.

With respect to Official Assignees, and their Duties.

Appointment by Commissioners of Official Assignees to act.—119. That each commissioner shall appoint his official assignees, where more than one is attached to his court, to act in rotation under the several bankruptcies prosecuted before him, unless in any case the commissioner shall see cause to the contrary.

Same as to existing Commissions and Fiats.—120. That the same rule for the appointment of official assignees shall be followed as to existing commissions and fiats issued before the 11th of October, 1849, under which no official assignee has been appointed.

Appointment of Assignees, and the Certificate thereof.—121. That the appointment of any official assignee to any bankrupt's estate shall be under the hand of the commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the court, shall be delivered to such assignee by the registrar upon application for the same.

Official Assignee not to Trade, &c.—122. No official assignee shall, either directly or indirectly, carry on any trade or business, or hold or be engaged in any office or employment other than his office of official assignee.

Official Assignee to find Sureties.—123. Each official assignee shall find sureties to the extent of 6000*l.*, and shall, together with such sureties (except where otherwise especially directed by any three commissioners, of whom the senior commissioner shall be one), execute a joint and several bond to the chief registrar for the time being in the penal sum of 6000*l.*

Liability of Official Assignee and Sureties.—124. Each official assignee to be made liable to the whole amount, and the sureties to be liable together to the like amount, in such proportions as shall be approved of by such three commissioners, provided that no one surety shall be liable for more than 3000*l.*, nor less than 1000*l.*

The Official Assignee annually to make Declaration that his Sureties, to the best of his belief, are alive and solvent, and also state any Change of Residence.—125. That each official assignee shall, on the 1st day of January in every year, or within one week then next following, make a declaration in writing, to be filed with the chief registrar, that to the best of his knowledge and belief his sureties are alive and solvent, and in such declaration state, to the best of his knowledge and belief, any change of residence of any or either of such sureties.

Official Assignee to give Notice of Death, Bankruptcy, or Insolvency of his Sureties.—126. Each official assignee shall, on pain of dismissal, give immediate notice in writing to the chief registrar of the death, bankruptcy or insolvency of any or either of his sureties, and shall, if required, cause a new bond to be executed to the like amount by another surety or sureties, to be approved of as above.

Official Assignee to follow the Instructions of the Commissioner.—127. Each official assignee shall follow the instructions of the commissioner under whom he acts.

No Official Assignee to have under his control more than 100*l. under any one Estate, or in the aggregate more than* 1000*l.*—128. That no official assignee shall keep under his control upon any one estate more than 100*l.*; or, in the aggregate of monies of bankrupts' and petitioning debtors' estates, more than 1000*l.*; and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

Form to be adopted on Payment of Money into the Bank by an Official Assignee.—129. That the official assignees, at the time of paying monies into the Bank of England, shall state in writing, delivered therewith to the cashier of the Bank, in the form specified in the schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the Accountant in Bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the Bank, and on the same day carry or transmit it to the office of the Accountant in Bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt or bankrupts, in the books kept in the office of the Accountant in Bankruptcy, such voucher to be produced when called for by the court.

Allowance of Official Assignees.—130. That the allowance to be made to the official assignee shall be upon the following scale, subject to variation in any particular case, and for special cause to be assigned by the commissioner in writing, and filed with the proceedings.

Scale.

That there be paid to each official assignee for the examination of the bankrupt's accounts, such sum as the commissioner shall think fit, not exceeding 20*l.* for the accounts of one bankrupt, nor exceeding 20*l.* for the joint estate of two or more bankrupts, and not exceeding 10*l.* for each separate estate administered under the same adjudication.

For every debt collected, 5 per cent on the first amount of 100*l.* or any less sum; 2½ per cent on the next amount of 400*l.* or any less sum; 1 per cent on the next amount of 500*l.* or any less sum; and ½ per cent on all further sums.

For property realised, 2½ per cent on the first amount of 500*l.* or any less sum; 1 per cent on the next amount of 500*l.* or any less sum; and ½ per cent on all further sums.

On dividend, 2 per cent on the first amount of 1000*l.* or any less sum, actually divided; and 1 per cent on all further sums.

The per-centage on mortgage property to be calculated only on the residue payable to the bankrupt's estate.

For drawing every dividend warrant or renewed dividend warrant, sixpence.

Note.—At the expiration of twelve months after these orders come into operation, this scale will be revised by the commissioners (subject to the approval of the Lord Chancellor), regard being had to the amount of remuneration received by the official assignees in the preceding twelve months.

Official Assignee to keep a Register of the Bankruptcies to which he has been appointed.—131. That the official assignee shall enter in a book, to be called "The Register Estate-Book," the names of the bankrupts in the commissions, fiats and petitions to which he shall have been or shall be appointed.

Particular sets of Books to be kept by the Official Assignee.—132. That the official assignee shall keep the following set of books, in size and form heretofore used; that is to say, register estate-book (No. 1); register-book of bankrupts' books delivered to official assignee under each estate (No. 2); debtor-and-property book; rough cash-book; fair cash-book; rough journal, fair journal (for bills of exchange, securities, &c.) ledger; letter-book; petty cash and postage-book; audit-book.

Official Assignee to sort and number Books, &c. of the Bankrupt.—133. That the official assignee, forthwith after his appointment under any bankrupt's estate, shall sort and number the books, papers, and writings of the bankrupt, with the number of the estate, in the register estate-book, and the number of each book, thus:—

[54. (The number of the estate in the register estate-book.)
75. (The number of the book, paper or writing received by the official assignee.)]

And the official assignee shall file a list thereof, with the proceedings, and shall also forthwith after his appointment deliver to the bankrupt a written notice or letter in the form specified in the schedule hereunto annexed (No. 1).

Official Assignee to direct the Payment of Monies due to a Bankrupt's Estate from Persons in England, and exceeding a certain Sum in amount to be made direct into the Bank of England.—134. That the official assignee shall direct, in the form specified in the schedule hereunto annexed (No. 2), the payment of all monies due to any bankrupt's estate from any one person, or from two or more persons being partners, and carrying on business or residing in England, and exceeding in amount the sum of 500*l.*, and of all monies being in the hands or under the control of any assignee or assignees chosen by the creditors of any bankrupt's estate to which such official assignee shall have been appointed, into the Bank of England, to the credit of the Accountant in Bankruptcy, and for the particular estate to which such money shall belong.

Party making such Payment to take a Receipt for the same.—135. That when any money shall be paid into the Bank of England pursuant to the directions aforesaid, the person so paying such money shall receive a certificate in the form specified in the schedule hereunto annexed (No. 3), from one of the cashiers of such bank, of his paying the same, and of its being placed to the account of the Accountant in Bankruptcy for the proper estate, and a voucher for such payment shall be sent by the bank on the same day to the said accountant.

Accountant in Bankruptcy to Notify such Payment to the proper Official Assignee.—136. That as soon as conveniently may be after every such payment, the Accountant in Bankruptcy shall certify in writing to the proper official assignee that such payment has been made, and the name of the bankrupt or bankrupts to the credit of whose estate the money has been placed in the books kept in the office of the Accountant in Bankruptcy.

All Monies under the control of the Official Assignee to be kept at a Banker's, to his account as Official Assignee, and not mixed with his own Monies.—137. That all monies without exception received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the Accountant in Bankruptcy, shall be paid by the official assignee, as soon as they shall amount to 100*l.*, into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled as official assignee, and in which account no monies shall be entered except such as are received by the official assignee in his official capacity.

Order for Payment of Money out of the Bank of England under any Bankrupt's Estate to be made by a Commissioner in writing under his hand, and testified by a Registrar; the application of the Money to be specified in the Order.—138. That all monies paid into the Bank of England to the credit of the Accountant in Bankruptcy, for the estate of any person adjudged bankrupt, or in matters of bankruptcy, shall be subject to the order of a commissioner of the Court of Bankruptcy, in writing under his hand, and testified by a registrar, as to the application thereof: Provided that every such order shall specify the amount of any payment to be made by such order, the purpose to which it is to be applied, and the name of the official assignee or other person to whom the same is to be made for such purpose; and in cases where the sum to be paid exceeds 500*l.*, the name of the person beneficially entitled (to whom only in such case the payment shall be made), and the Accountant in Bankruptcy shall and may, pursuant to such order, pay the sum of money specified therein, out of such bankrupt's estate, by a draft subscribed to, and on the same paper with the said order; such order and draft to be in the form specified in the schedule hereunto annexed (No. 5).

Orders for Payment of Money, &c. to be signed in Triplicate.—139. That all orders by the commissioner for payment of money, or for the transfer and sale (as hereinafter provided) of any stock or securities, being part of a bankrupt's estate, be signed in

triplicate, and that one copy of such order be filed with the proceedings in bankruptcy, and that one copy be left with the Bank of England, and that one copy be left with the Accountant in Bankruptcy.

Official Assignee to enter in a Book the Names of all Debtors to the Bankrupt's Estate, and state therein the Reasons why Debts are not paid, and to produce the Book at the Audit. —140. That the official assignee shall, before any audit, enter in a book the names of all the debtors to the bankrupt's estate, as returned in his balance-sheet, and shall state the reasons why debts are not paid on the opposite page; such book shall be produced to the court at every audit.

Bills of Exchange, Notes, &c. to be deposited in the Bank by Official Assignee, &c.— 141. That each official assignee shall deposit in the Bank of England, to the credit of the Accountant in Bankruptcy, all bills, notes and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange as soon as the same shall have have been accepted or refused acceptance; and shall at the time of such deposit leave a statement in writing with the cashier of the Bank of England specifying the date and contents of the instruments so deposited; the name of the official assignee making such deposit; the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belong, and that such instruments respectively are to be deposited to the credit of the said Accountant in Bankruptcy; and shall also take a receipt for the same from the cashier of the Bank, and carry or transmit it to the office of the said Accountant in Bankruptcy, who shall give a proper voucher, to be produced when called for by the court.

Bills, &c. when due, how to be dealt with.— 142. That when and as soon as any bill, note or other negotiable instrument, deposited as aforesaid in the Bank of England in the name of the said accountant shall become due, the Governor and Company of the Bank of England shall, without any direction from the said accountant, deliver such bill, note or other negotiable instrument to one of the cashiers of the Bank, who is to present the same for payment, and receive the sum of money due thereon, and forthwith to pay the sum so received, if any, into the Bank of England, to be there placed to the credit of the said accountant.

In case of Non Payment, &c.—143. That in case any such bill, note or other negotiable instrument shall not be paid, the said Governor and Company of the Bank of England shall cause such bill, note or other negotiable instrument as is by law required to be noted and protested to be delivered to a notary for that purpose, and to be noted and protested accordingly, and shall, after the same shall have been so noted and protested, as the case may be, again deposit the same in the Bank of England, to the credit of the said accountant.

Bank of England to certify to Accountant the Receipt of Money on Bill or Dishonour, &c. —144. And that the said Governor and Company of the Bank of England forthwith after every such receipt of money or deposit of any note, bill or other negotiable instrument, shall certify to the said accountant the sum of money received, if any, on each such bill, note or negotiable instrument, and placed to the credit of the said accountant, or that such bill, note or negotiable instrument. has been dishonoured, and such dishonoured bill, note or other negotiable instrument, shall be forthwith delivered by the Bank to the proper official assignee.

Official Assignee to give Notice of Dishonour, &c.— 145. And that as often as any bill, note or other negotiable instrument, that shall have come to the hands of any official assignee shall have been or shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note or other negotiable instrument respectively.

Commissioner to order delivery out of Bills, Notes, &c. to Official Assignee. — 146. That any one of the commissioners of the Court of Bankruptcy acting in the prosecution of any bankruptcy may from time to time make order relative to the delivery out to an official assignee of any bill of exchange or promissory note which may stand in the Bank of England to the credit of the Accountant in Bankruptcy for the estate under such bankruptcy; provided that the purpose of such delivery be stated in the order, and such order be attested by a registrar.

Commissioner may order Money to be invested in Exchequer Bills, or Sale of Exchequer Bills, &c. — 147. That any one of the commissioners of the Court of Bankruptcy acting in the prosecution of any commission, fiat or petition for adjudication of bankruptcy, may, as often as it shall appear to him expedient, by order under his hand in the forms specified in the schedule hereunto annexed (Nos. 6, 7 and 8), direct any money, which may have been paid into the Bank of England on account of the estate of the bankrupt named in such commission, fiat or petition, to be invested in the purchase of exchequer bills, to be lodged in the Bank of England, and may in like manner direct the sale or exchange of such exchequer bills, and also the exchange, sale or transfer of any stock in the public funds, or in any public company, or of any exchequer bills, India bonds, or other public securities which shall have been transferred, delivered, or paid into the Bank of England on account of such bankrupt's estate, and may direct the proceeds thereof to be laid out in the purchase of exchequer bills, and that such exchequer bills, when so purchased, be deposited in the Bank of England, to the credit of the said accountant for such particular estate; and the said accountant shall and may, pursuant to such order, make such sale, purchase or transfer without any further order or direction; and the expenses thereof may be charged to the account of

the estate for the benefit of which the same shall have been respectively made.

Provided always, that the signature of the commissioner be attested by a registrar, and that the order of the accountant in bankruptcy be subscribed to the order of the commissioner, and on the same paper with the said order.

Provided further, that no stock or public fund be transferred upon any sale, and that no exchequer bill, India bond or public security be delivered for the purpose of sale, except to a cashier of the Bank of England, until the price or value thereof be paid into the Bank of England to the credit of the Accountant in Bankruptcy for the particular estate to which it belongs, and that no sum be paid for the purchase of any exchequer bill, India bond or other public security, until such exchequer bill, India bond, or public security be deposited in the Bank of England to the credit of the said Accountant in Bankruptcy, and for such particular estate.

The Official Assignee to give Notice in Gazette, *and to send through the Post-Office a printed Circular Letter to each Creditor, giving him Notice of the Time and Place of the delivery of the Dividend Warrant.*—148. That the official assignee shall forthwith after the declaration of a dividend give notice by advertisement in the *London Gazette*, and to each creditor by a printed circular letter in the form specified in the schedule hereunto annexed (No. 9), to be sent through the post-office at the cost of the bankrupt's estate, to be settled by the commissioner, of the time and place of the delivery of the dividend warrants as hereinafter provided; and that at such time the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt until such security shall be produced, without the special directions of a commissioner in that behalf.

Payment of Dividend.— The Duty of Solicitors.— Duty of Official Assignee.— Accountant's Duty.—149. That when a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors in alphabetical order, and shall state, in separate columns, after the name of each creditor, the amount of his debt and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof, and shall to each name prefix a number in regular series, together with the date of the order of dividend, according to the form in the schedule hereunto annexed (Nos. 10 and 11), and shall sign such several lists, and deliver the same within four days after the declaration of such dividend to the official assignee, who shall cause one of the lists which specifies such securities to be filed with the proceedings, and shall examine and sign the several lists, if correct, and shall prepare books at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the schedule hereunto annexed (No. 12), for London, and (No. 13) for the country, and shall number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him, and shall keep one of the lists specifying the securities in his custody, and shall take or send the books containing such warrants, together with the list not specifying the securities, to the Accountant in Bankruptcy, who shall ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the warrants with the lists, and if correct shall certify the same, by affixing the seal of his office, to be provided for that purpose, in the margin of the warrants; and he shall keep in his custody the list of creditors, and return the warrants to the official assignee, for delivery to the creditors as hereinafter mentioned.

Official Assignee's Duty.— Commissioner to order Payment of Dividend in Cases where Securities cannot be produced.—150. That when a creditor, or any person duly authorised under his hand to receive his dividend warrant shall apply for the same, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof, and if satisfied that the amount of the said dividend still remains due, shall fill up the date in the warrant and receipt, and upon the creditor or such other person authorised as aforesaid signing the receipt, the official assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the warrant for the same; provided that no dividend warrant shall be delivered to any creditor holding any security for his debt until such security shall be produced; provided that upon the statement of a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability, and his examination shall be filed with the proceedings, and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security; and if the commissioner is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by the commissioner, and upon such indemnity being given the official assignee shall deliver the dividend warrant to the creditor.

Dividend Warrant, how paid.—151. That the payment of the dividend warrant may be obtained by the creditor, or any person duly authorised by him under his hand to receive his dividend, or by the executor or administrator of any such creditor, upon production of the dividend warrant at the office of the Accountant in Bankruptcy, or in a

country bankruptcy, at any branch of the Bank of England, or such other bank as shall be named by the Bank of England in that behalf.

When Order of Commissioner for Payment of Dividend Warrant. — 152. That if any other person than the creditor or person duly authorised by him, or the executor or administrator of any such creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof indorsed upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: provided always, that in no case shall any dividend warrant be paid to an official assignee unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

Transfer of Money from General Account to Dividend Account.—Commissioners authorised to carry back Dividend not called for to the original Account of Estate.—153. That when a dividend has been or may be declared under any commission, fiat or petition for adjudication, the commissioner acting in the prosecution of such bankruptcy may, by order under his hand, attested by a registrar, in the form specified in the schedule hereunto annexed (No. 14), direct the sum ordered to be divided, or such part thereof as may be required, to be carried from the general account of such estate to an account to be kept in the books of the Accountant in Bankruptcy, entitled "The Dividend Account," and to the particular estate; provided that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the commissioner may, by order under his hand, testified as aforesaid, and in the forms specified in the schedule hereunto annexed (Nos. 15, 16, 17, 18, and 19, as the case may be), direct such sum to be carried back to the original account of the estate to which it belonged.

Unpaid Dividend Warrants of above Twelve Months' Date to be returned to the Accountant in Bankruptcy by the Official Assignee, and cancelled. — 154. That all dividend warrants under any bankrupt's estate, which shall have been delivered to any official assignee by the Accountant in Bankruptcy for more than twelve calendar months, the same having been previously stamped by such accountant, but which shall not have been delivered to any creditor of such estate, shall forthwith, after the expiration of such twelve months, be brought or sent by such official assignee, together with two lists thereof, under each bankrupt's estate, to the said accountant, who shall thereupon compare the warrants with such lists, and cancel such warrants; and one of such lists shall be certified by the said accountant, and returned to the official assignee, who shall file such list with the proceedings of the respective bankruptcies; and the other of such lists to be retained by the said accountant.

Official Assignee to deliver Quarterly Accounts of Balances, together with his Cash-Book and Pass-Book. — 155. That the official assignee shall once in every quarter of a year deliver to the court to which he shall be attached an account made up to the last day of the preceding month, together with his cash-book and banker's pass-book duly balanced, and any other books that the commissioner may require; and such account shall show the balances placed to the credit of the Accountant in Bankruptcy, and of every estate under the charge of such official assignee in the books kept in the office of the Accountant in Bankruptcy, such balances to be certified by the said accountant; and such account shall also show the balances of every bankrupt's estate then in the hands or under the power or control of the official assignee.

The Quarterly Accounts to be kept by Registrar of the Court, and open to the Inspection of Creditors at convenient Times. — 156. That such quarterly account shall be kept by the registrar of the court to which such official assignee shall be attached, and shall be open to the inspection of creditors; and that notice shall be given in each court of such account having been delivered, and that any creditor applying to the court may inspect the same without fee at such convenient time as may be appointed by the court.

Monies or Bills, &c. may be paid or delivered to the Bank of England through any of the Branch Banks thereof. — 157. That all monies, bills of exchange, notes and other negotiable instruments hereinbefore directed to be paid or delivered to or by the Bank of England, may be paid or delivered to or by the Bank of England by or through any of the branch banks thereof, or any other bank that may be named by the Governor and Company of the Bank of England for that purpose; and all business arising in the country with the Bank of England may, where necessary or convenient, be transacted with the Bank of England by or through any of such branch banks, or other bank so named.

Other Forms in the Schedule to be followed where applicable. — 158. That the several forms specified in the schedule hereunto annexed for the several purposes therein stated, and not hereinbefore referred to, be followed in all cases where the same be applicable.

Official Assignee keeping under his Control more than 100*l. under any one Estate, or more than* 1000*l. in the aggregate, to be charged with* 20*l. per cent on the Excess, and unless the Money has been kept from proper Causes, to be dismissed from his Office, on the Report of the Commissioner, or upon Petition to the Lord Chancellor by a Creditor, and be liable to Costs and Expenses, and have no Claim to Remuneration.*—159. That if the official assignee shall, without good and sufficient cause, to be allowed by the court, keep under his control more than 100*l.* of money belonging to any one estate, or more than

1000*l.* in the aggregate of monies belonging to bankrupts' estates, for more than one week, he shall be charged in his accounts by the Commissioner with such sum as shall be equal to interest at the rate of 20*l.* per cent per annum on the excess of the said sum of 100*l.* or 1000*l.*, as the case may be, for such time as such money shall be under his control beyond the said week; and unless the money has been kept for good and sufficient cause, allowed by the court, the official assignee shall be dismissed from his office, upon the report of the commissioner, or upon petition to the Lord Chancellor by the creditors' assignee or assignees, or by any creditor, and be liable to the costs and expenses, and have no claim to remuneration.

Forms relating to Payment, &c. of Money under Bankruptcies in the Country to be printed in Red Ink.—160. That all forms relating to the payment or delivery into or out of the Bank of England of any money, bills, notes, or other securities under bankruptcies, prosecuted in the country, be printed in red ink.

Orders as to Official Assignees under Bankruptcies to be applicable to Official Assignees under Petitions for Arrangements, &c.—161. That the orders hereby made as to official assignees of the estate of bankrupts, and their duties and conduct, shall, so far as the same are applicable, apply to, and be observed by official assignees, appointed under petitions presented by debtors desirous of effecting arrangements with their creditors, under the superintendence and control of the court.

Printed Copies of Rules to be supplied by Chief Registrar, &c.—162. That printed copies of these rules and orders shall be supplied by the chief registrar to the several courts of bankruptcy in London, and in the country districts; and also to the Accountant in Bankruptcy, the Governor and Company of the Bank of England, the Master in Bankruptcy, and each official assignee; and that one such copy be posted up in some conspicuous place in every such court; and in the respective offices of the Chief Registrar, the Accountant in Bankruptcy, the Master in Bankruptcy, and official assignees.

Rules and Orders, when to take Effect.—163. That these rules and orders shall take effect from and after the 11th day of January, 1853, from which time all rules and orders made previous to the passing of "The Bankrupt Law Consolidation Act, 1849," and the order made on the 12th of October, 1849, shall be and are hereby rescinded.

Joshua Evans, *Senior Commissioner.*

John S. M. Fonblanque,
Edward Holroyd,
Edward Goulburn,
Wm. Thos. Jemmett,
M. B. Bere,
Richd. Stevenson,
William Scrope Ayrton,
H. I. Perry,
} *Commissioners.*

Approved,
St. Leonards, C.
19*th October*, 1852.

SCHEDULE OF FORMS.

No. 1.

Form of Letter to Bankrupt forthwith after Appointment of Official Assignee.

(Residence and date.)

Sir,—Having been appointed official assignee to your estate, I have to inform you that the Court requires you to make out and deliver to me immediately:—

1st.—A list of all your creditors (alphabetically arranged), and of liabilities on bills of exchange, as acceptor, drawer, or indorser, and any other engagement provable under your estate.

If any creditor has received your acceptance, or note of hand, or any other bill, with your name as drawer or indorser, or any other security, goods or property on account of his debt, state the particulars against his name.

This list is required within a week from this day.

2dly.—A list of all the debtors to your estate.

State the name and present residence of the debtor, and the sum due, distinguishing those you consider to be bad or doubtful, or that are disputed.

If the debtor has been bankrupt, state if the debt has been proved, and if any and what dividends have been received by you.

If you hold or have received any security from the debtor, state its nature.

3dly.—A statement of rent, taxes, and rates due by you up to the quarter-day preceding your bankruptcy, with an account of all sums due for salaries and wages, and the rate per year, month, or week.

4thly.—A statement of the probable value of your stock-in-trade, leasehold property in houses, lands, or buildings, or any other property in your possession or control, or in the possession of others, on which you have received any advances, or have an interest.

State if the stock and premises are insured from fire, in what office, and to what extent, and when the insurance expires, and who holds the policy.

5thly.—A list of all books, papers, or documents belonging to your estate, such list to be verified on oath, specifying whether the same are already taken by the messenger, or are in your custody (in which case you are hereby required to deliver the same to me), or are in the custody of any other and what person, and under what right or circumstance. And the court requires that you attend from day to day at my office to make up and balance your books, and prepare a balance-sheet for the purpose of passing your last examination, and which must be filed at least ten days before the day appointed for the last examination, being the day of

I remain, Sir, your obedient servant,

To Mr. Official Assignee.

No. 2.

Direction from Official Assignee for payment of Sums exceeding 500*l.* in amount due to a Bankrupt's Estate into the Bank.

"Bankrupt Law Consolidation Act, 1849."

By virtue of the General Orders made under this act, and bearing date the day of I hereby direct you to pay the sum of £ due [*or* by the books and statements of the bankrupt hereinafter named, appearing to be due] from you to the estate of C. D., of a bankrupt, into the Bank of England, to the credit of the accountant in bankruptcy for the said estate.

At the time of payment you will have a receipt from the Bank, which will be a sufficient discharge to you for the same. I am, &c.

To Official Assignee.

N.B.—*It is of great importance that you should produce this letter to the Bank, or fill up the annexed form, when you make the payment.*

No. 2*a.*

Bankrupts' Estates.

London [*or* day of 18 .]

Estate of of

Official Assignee.

A. B., of is desirous to pay into the Bank of England the sum of £ to the credit of Esq., accountant in bankruptcy for the above estate.

£

Bank clerk.

Ent^d^.

To be sent or transmitted by the Bank forthwith to the accountant in bankruptcy upon payment being made into Bank.

No. 3.

Certificate of Payment into Bank by other than Official Assignees.

Bankrupts' Estates.

day of 18

Estate of

I hereby certify that A. B., of has this day paid into the Bank of England the sum of to be placed to the credit of Esq., as the accountant in bankruptcy for the above estate.

For the Governor and Company of the Bank of England.

£

Cashier.

Ent^d^.

N.B.—*This certificate to be retained by party making payment in.*

No. 3 *a.*

Certificate of Payment into Bank by other than Official Assignees.

Bankrupts' Estates.

District day of 18

Estate of

I hereby certify that A. B., of has this day paid into the Bank of England the sum of £ to be placed to the credit of Esq., as the accountant in bankruptcy for the above estate.

For the Governor and Company of the Bank of England.

£

Cashier.

Ent^d^.

N.B.—*This certificate to be retained by party making payment in.*

No. 4.

Certificate of Payment into Bank by Official Assignee.

C Bankrupts' Estates.

day of 18

I hereby certify that Mr. E. F., official assignee of the estate of bankrupt has this day paid into the Bank of England the sum of £ to be placed to the credit of Esq., as the accountant in bankruptcy.

For the Governor and Company of the Bank of England.

£

Cashier.

Entd.

N.B.— *This certificate to be sent forthwith to the accountant in bankruptcy by the official assignee, upon payment being made into the Bank.*

No. 4 *a.*

Certificate of Payment into Bank by Official Assignee.

C District day of 18

I hereby certify that Mr. E. F., official assignee of the estate of bankrupt has this day paid into the Bank of England the sum of £ to be placed to the credit of Esq., as the accountant in bankruptcy.

For the Governor and Company of the Bank of England.

£

Cashier.

Entd.

N.B.— *This certificate to be sent or transmitted forthwith to accountant in bankruptcy by the official assignee, upon payment being made into Bank.*

No. 5.

Order for Payment of Money.

Bank.

In the Court of Bankruptcy.

Basinghall Street, London, day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the sum of £ stands to the credit of the above estate in the books of the accountant in bankruptcy.

Official assignee.

Reg.

It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, and that the sum of £ is required for the I therefore order the said sum to be paid in out of the monies standing to the credit of the accountant in bankruptcy in the books of the Bank of England.

Commissioner.

Estate of

Pursuant to the above Order, pay to the said the said sum of £ to be charged to the debit of my account as accountant in bankruptcy.

£

Accountant.

To the Cashiers of the Bank of England.

No. 5 *a.*

Order for Payment of Money.

District.

In the District Court of Bankruptcy.

in the county of day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the sum of £ stands to the credit of the above estate in the books of the accountant in bankruptcy.

Official Assignee.

Reg.

It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, and that the sum of £ is required for the I therefore order the said sum to be paid to out of the monies standing to the credit of the accountant in bankruptcy in the books of the Bank of England.

Commissioner.

Estate of

Pursuant to the above order, pay to the said the said sum of £ to be charged to the debit of my account as accountant in bankruptcy.

£

Accountant.

To the Cashiers of the Bank of England.

No. 6.

Order for Purchase of Exchequer Bills.

In the Court of Bankruptcy.

Basinghall Street, London, day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the sum of £ stands to the credit of the estate in the books of the accountant in bankruptcy.
Official Assignee.

It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, I order the sum of £ to be laid out in the purchase of exchequer bills, and that the exchequer bills when purchased be deposited in the Bank of England, to the credit of the accountant in bankruptcy: provided that no sum be paid for such purchase until the exchequer bills be deposited in the Bank of England.

Reg. Commissioner.

Estate of

Pursuant to the above order, pay to the sum of £ on his causing £ exchequer bills so purchased to be deposited in the Bank to the credit of my account as accountant in bankruptcy.

£ Accountant.

To the Cashiers of the Bank of England.

No. 6 *a*.

Order for Purchase of Exchequer Bills.

In the District Court of Bankruptcy.

in the county of day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the sum of £ stands to the credit of the estate in the books of the accountant in bankruptcy.
Official Assignee.

It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, I order the sum of £ to be laid out in the purchase of exchequer bills, and that the exchequer bills when purchased be deposited in the Bank of England, to the credit of the accountant in bankruptcy: provided that no sum be paid for such purchase until the Exchequer Bills be deposited in the Bank of England.

Reg. Commissioner.

Estate of

Pursuant to the above order, pay to the sum of £ on his causing £ exchequer bills so purchased to be deposited in the bank to the credit of my account as accountant in bankruptcy.

£ Accountant.

To the Cashiers of the Bank of England.

No. 7.

Order for Sale of Exchequer Bills.

In the Court of Bankruptcy.

Basinghall Street, London, day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the within-mentioned Exchequer Bills stand to the credit of the above estate in the books of the accountant in bankruptcy.
Official Assignee.

It appearing to me, by the annexed certificate, that the following exchequer bills stand to the credit of the above estate, viz.
I order that of such exchequer bills be forthwith sold, and for that purpose that such exchequer bills be delivered out to one of the cashiers of the Bank, who is to receive the money arising by such sale, and pay the same into the Bank of England, to the credit of the accountant in bankruptcy: provided that such exchequer bills be not delivered by the cashier of the Bank until the proceeds of the sale be paid into the Bank as aforesaid.

Reg. Commissioner.

Estate of

Pursuant to the above order, deliver out of the Bank of England to one of the cashiers of the Bank the following exchequer bills, viz. for the purpose of being sold: provided that such exchequer bills be not delivered by the cashier of the Bank until the proceeds of the sale be paid into the Bank as aforesaid.

£ Accountant.

To the Cashiers of the Bank of England.

No 7 *a.*

Order for Sale of Exchequer Bills.

In the District Court of Bankruptcy.
in the county of day of 18
Before Mr. Commissioner
In the matter of

I certify that by my books the within-mentioned Exchequer Bills stand to the credit of the above estate in the books of the accountant in bankruptcy.
Official Assignee.

It appearing to me, by the annexed certificate, that the following exchequer bills stand to the credit of the above estate, viz.
I order that of such exchequer bills be forthwith sold, and for that purpose that such exchequer bills be delivered out to one of the cashiers of the Bank, who is to receive the money arising by such sale, and pay the same into the Bank of England, to the credit of the accountant in bankruptcy: provided that such exchequer bills be not delivered by the cashier of the Bank until the proceeds of the sale be paid into the Bank as aforesaid.

Reg. Commissioner.

Estate of

Pursuant to the above order, deliver out of the Bank of England to one of the cashiers of the Bank the following exchequer bills, viz. for the purpose of being sold: provided that such exchequer bills be not delivered by the cashier of the Bank until the proceeds of the sale be paid into the Bank as aforesaid.

£ Accountant.

To the Cashiers of the Bank of England.

No. 8.

Order for Sale of Stock.

In the Court of Bankruptcy.
Basinghall Street, London, day of 18
Before Mr. Commissioner
In the matter of

I certify that by my books the sum of £ stock stands to the credit of the above estate in the books of the accountant in bankruptcy.
Official Assignee.

It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, I therefore order the said sum of £ to be forthwith sold: provided that such stock be not transferred by the accountant in bankruptcy until the proceeds of the sale be paid into the Bank of England, to the credit of the said accountant.

Reg. Commissioner.

To the Cashiers of the Bank of England.

No. 8 *a.*

Order for Sale of Stock.

In the District Court of Bankruptcy.
At in the county of day of 18
Before Mr. Commissioner
In the matter of

I certify that by my books the sum of £ stock stands to the credit of the above estate in the books of the accountant in bankruptcy.
Official Assignee.

It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, I therefore order the said sum of £ to be forthwith sold: provided that such stock be not transferred by the accountant in bankruptcy until the proceeds of the sale be paid into the Bank of England to the credit of the said accountant.

Reg. Commissioner.

To the Cashiers of the Bank of England.

No. 9.

Notice by Official Assignee to Creditor when Dividend payable.

District day of 18

Estate of

Sir,—I have to inform you that you may, upon application at my office on any or after the day of between the hours of receive a warrant for the dividend due to you in the above estate.

If you cannot personally attend, the warrant will be delivered to your order upon your filling up and signing the subjoined letter.

The bills and securities [if any] exhibited at the time of the proof of your debt, must be produced to me before the warrant for the dividend can be received.

I am, Sir, your obedient servant,
(Official Assignee.
Residence.

To

day of 18

Estate of

Sir,—Please deliver to the dividend warrant payable to me under the above estate.

Creditor.

To Official Assignee.

No. 10.

List of Proofs of Debt and Claims for Dividend.—No. 2.

Form of List.

In the Court of Bankruptcy.

Basinghall Street, London, 18

In the matter of bankrupt.

A List of Debts proved and claimed under the with the Dividend at the Rate of in the Pound, this day declared thereon by Mr. Commissioner

No.	Creditors. *To be placed Alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.*	Sum Proved. *The Claims to be set forth in the same Manner at the End of the whole of the Proofs.*			Dividend.			

No. 10 *a.*

List of Proofs of Debt and Claims for Dividend.—No. 2.

Form of List.

In the District Court of Bankruptcy, at in 18

In the matter of bankrupt.

A List of Debts proved and claimed under the with the Dividend at the Rate of in the Pound, this day declared thereon by Mr. Commissioner

No.	Creditors. *To be placed Alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.*	Sum Proved. *The Claims to be set forth in the same Manner at the End of the whole of the Proofs.*			Dividend.			

No. 11.

List of Proofs of Debt and Claims for Dividend.—No. 1.

In the Court of Bankruptcy at Basinghall Street.

In the matter of bankrupt.

18

A List of Debts proved and claimed under this Bankruptcy, with the Dividend at the rate of in the pound, this day declared thereon by Mr. Commissioner

Note.—The Dividends will be paid from this List; it is therefore required to be carefully extracted from the proceedings; signed by the Solicitor to the Fiat, and delivered to the Official Assignee the same day, or, at the furthest, the following day.

No.	Creditors. *To be placed Alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.*	Residence and Description.	Sums proved or claimed. *Claims to be set forth in the same manner after the whole of the Proofs.*	Dividend.	Bills and Securities exhibited.				
					Date of Bill or Note.	Drawer.	Acceptor.	Indorser.	Sum

No. 11 *a*.

List of Proofs of Debt and Claims for Dividend.—No. 1.

In the District Court of Bankruptcy, at in

In the matter of Bankrupt.

18

A List of Debts proved and claimed under this bankruptcy, with the Dividend at the rate of in the pound, this day declared thereon by Mr. Commissioner

Note.—The Dividends will be paid from this List; it is therefore required to be carefully extracted from the proceedings; signed by the Solicitor to the Fiat, and delivered to the Official Assignee the same day, or, at the furthest, the following day.

No.	Creditors. *To be placed Alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.*	Residence and Description.	Sums proved or claimed. *Claims to be set forth in the same manner after the whole of the Proofs.*	Dividend.	Bills and Securities exhibited.				
					Date of Bill or Note.	Drawer.	Acceptor.	Indorser.	Sum

Margin of Book.

Number of Warrant.
Estate
Dividend of in the £
Creditor A. B.
Recd. Warrant.
day of
Creditor.

No. 12.

London Dividend Warrant. No.

£

London day of 18

Estate of bankrupt.

(Under fiat or commission, or petition for adjudication of bankruptcy, dated).

(Accountant's Stamp.)

Dividend of in the £ declared day of 18

A. B. is entitled to be paid the sum of £

Official Assignee.

To the Accountant in Bankruptcy.

Order for payment. { Let this be paid to A. B. or bearer from my account as Accountant in Bankruptcy.

£ Accountant.

To the Cashiers of the Bank of England.

N.B.—*This, upon being indorsed by the payee, will be paid any day between the hours of eleven and three, at the office of the Accountant in Bankruptcy at the Court of Bankruptcy, Basinghall Street.*

☞ *Observe rules at the back as to endorsement.*

Rules as to Endorsement of Warrant.

That the endorsement by an executor or administrator of any creditor be sufficient.

That if any other person than the creditor, or person duly authorised by the creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: Provided always, that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

Margin of Book.

Number of Warrant.
Estate of
Dividend of in the £
Creditor A. B.
Recd. Warrant.
day of
Creditor.
day of

No. 13.

Country Dividend Warrant. No.

£

District day of 18

Estate of bankrupt.

(Under fiat or commission, or petition for adjudication of bankruptcy, dated).

(Accountant's Stamp.)

Dividend of in the £ declared day of 18

A. B. is entitled to be paid the sum of £

Official Assignee.

To the Accountant in Bankruptcy.

Order for payment. { Let this be paid to A. B. or bearer from my account as Accountant in Bankruptcy.

£ Accountant.

To the Cashiers of the Bank of England.

N.B.—*If the sum to be paid on the above warrant be under the sum of ten pounds, the same may be received at any branch of the Bank of England without the signature of the accountant, if presented within one calendar month of the date of the warrant.*

This, upon being indorsed by the payee, will be paid any day between the hours of eleven and three, at the office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall Street, London, or at any branch of the Bank of England.

☞ *Observe rules at the back as to endorsement.*

Rules as to Endorsement of Warrant.

That the endorsement by an executor or administrator of any creditor be sufficient.

That if any other person than the creditor, or person duly authorised by the creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: Provided always, that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the administrator or executor of the payee, or the assignee of any bankrupt payee.

Margin of Book.

Number of Warrant.
Estate of
Dividend of in the £
Creditor
Recd. Warrant day of
Creditor.
day of

No. 13*a*.

Country Dividend Warrant. No.

£ District day of 18

Estate of bankrupt.
(Under fiat or commission, or petition of adjudication of bankruptcy, dated).

(Accountant's Stamp.) Dividend of in the £ declared day of 18
A. B. is entitled to be paid the sum of £

Official Assignee.

To the Accountant in Bankruptcy.

Order for payment. { Let this be paid to A. B. or bearer from my account as Accountant in Bankruptcy.

£ Accountant.

To the Cashiers of the Bank of England.

N.B.—*If the sum to be paid on the above warrant be under the sum of ten pounds, the same may be received at any branch of the Bank of England without the signature of the accountant, if presented within one calendar month of the date of the warrant.*

This, upon being endorsed by the payee, will be paid any day between the hours of eleven and three, at the office of the Accountant in Bankruptcy, Basinghall Street, London, or at any branch of the Bank of England, or in the Exeter District, at

☞ *Observe rules at the back as to endorsement.*

Rules as to Endorsement of Warrant.

That the endorsement by an executor or administrator of any creditor be sufficient.

That if any other person than the creditor, or person duly authorised by the creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: Provided always, that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the administrator or executor of the payee, or the assignee of any bankrupt payee.

No. 14.

Order of Transfer to Dividend.

In the Court of Bankruptcy.

Basinghall Street, London, day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the sum of £ stands to the credit of the above estate in the books of the accountant in bankruptcy.

Official Assignee.

By the annexed certificate it appears that the sum of £ stands to the credit of the above estate; and by an order made in this bankruptcy on the day of a dividend amounting to £ was ordered to be paid to the creditors: I therefore order the sum of £ to be carried to the "Dividend Account" of the above estate.

Commissioner.

Reg.

£

Carried over day of

Fut^{d}.

No. 14 *a.*

Order of Transfer to Dividend.

In the District Court of Bankruptcy.
in the county of day of 18
Before Mr. Commissioner
In the matter of

I certify that by my books the sum of £ stands to the credit of the above estate in the books of the accountant in bankruptcy.
Official Assignee.

By the annexed certificate it appears that the sum of £ stands to the credit of the above estate; and by an order made in this bankruptcy on the day of a dividend amounting to £ was ordered to be paid to the creditors: I therefore order the sum of £ to be carried to the "Dividend Account" of the above estate.

Commissioner.

Reg.

£ Carried over day of

Ent^d.

No. 15.

Proof Reduced.

In the Court of Bankruptcy.
day of 18
Before Mr. Commissioner
In the matter of

I have altered the proof of from £ to £ and hereby direct a warrant to be drawn for the dividend of in the pound, corresponding with such alteration, and amounting to the sum of £ and I further direct a new warrant to be made out for the balance of £ to be carried back to the original account of the above estate in the books of the accountant in bankruptcy.

£ To be signed.
£ To be carried to the "Original Account."
£ Dividend on original proof.

Commissioner.

£ Carried back day of

Ent^d.

N.B.—*Old warrant to be produced to accountant in bankruptcy, and cancelled by him before new warrant be stamped and signed by him.*

No. 15 *a.*

Proof Reduced.

In the District Court of Bankruptcy.
in the county of day of 18
Before Mr. Commissioner
In the matter of

I have altered the proof of from £ to £ and hereby direct a warrant to be drawn for the dividend of in the pound, corresponding with such alteration, and amounting to the sum of £ and I further direct a new warrant to be made out for the balance of £ to be carried back to the original account of the above estate in the books of the accountant in bankruptcy.

£ To be signed.
£ To be carried to the "Original Account."
£ Dividend on original proof.

Commissioner.

£ Carried back day of

Ent^d.

N.B.—*Old warrant to be produced to accountant in bankruptcy, and cancelled by him before new warrant be stamped and signed by him.*

No. 16.

Proof Expunged.

In the Court of Bankruptcy.

day of 18

Before Mr. Commissioner

In the matter of

I have expunged the proof of and I order that a new warrant be made out for the dividend thereon, amounting to £ to be carried back to the original account of the above estate, in the books of the accountant in bankruptcy.

Commissioner.

£ Carried back day of

Ent^d^.

N.B.—*Old warrant to be produced to accountant in bankruptcy to be cancelled by him.*

No. 16 *a.*

Proof Expunged.

In the District Court of Bankruptcy.

in the county of day of 18

Before Mr. Commissioner

In the matter of

I have expunged the proof of and I order that a new warrant be made out for the dividend thereon, amounting to £ to be carried back to the original account of the above estate in the books of the accountant in bankruptcy.

Commissioner.

£ Carried back day of

Ent^d^.

N.B.—*Old warrant to be produced to accountant in bankruptcy to be cancelled by him*

No. 17.

Claim Established.

In the Court of Bankruptcy.

day of 18

Before Mr. Commissioner

In the matter of

having established his claim of I hereby direct a warrant to be drawn for the dividend of £ in the pound thereon amounting to the sum of £

Commissioner.

£ Signed day of

Ent^d^.

No. 17 *a.*

Claim Established.

In the District Court of Bankruptcy.

in the county of day of

Before Mr. Commissioner

In the matter of

having established his claim of £ I hereby direct a warrant to be drawn for the dividend of in the pound thereon, amounting to the sum of £

Commissioner.

£ Signed day of

Ent^d^.

No. 18.

Claim in part Established.

In the Court of Bankruptcy.

day of 18

Before Mr. Commissioner

having in part established his claim of £ to the extent of £

I hereby direct a warrant to be drawn for £ being the dividend on the sum of £

And I further direct a warrant for the residue of the dividend reserved on the said claim of £ amounting to £ to be drawn, and the sum carried to the original account of the above estate in the books of the accountant in bankruptcy.

£	To be signed.
£	To be carried to "Original Account."
£	Originally reserved, being the dividend at the rate of in the pound on £
£	Commissioner.
£	Carried back day of

Ent^{d}.

No. 18 *a.*

Claim in part Established.

In the District of Bankruptcy.
in the county of
day of 18
Before Mr. Commissioner
having in part established his claim of £ to the extent of
I hereby direct a warrant to be drawn for £ being the dividend on the sum of £

And I further direct a warrant for the residue of the dividend reserved on the said claim of £ amounting to £ to be drawn, and the sum carried to the original account of the above estate in the books of the accountant in bankruptcy.

£	To be signed.
£	To be carried to "Original Account."
£	Originally reserved, being the dividend at the rate of in the pound on £
£	Commissioner.
£	Carried back day of

Ent^{d}.

No. 19.

Claim Expunged.

In the Court of Bankruptcy.
day of 18-
Before Mr. Commissioner
In the matter of
I have expunged the claim of for £ and hereby direct a warrant to be drawn for the dividend of in the pound thereon, amounting to the sum of £ to be carried back to the original account of the above estate in the books of the accountant in bankruptcy.

Commissioner.

£	Carried back day of

Ent^{d}.

No. 19 *a.*

Claim Expunged.

In the District Court of Bankruptcy.
in the county of
day of 18
Before Mr. Commissioner
In the matter of
I have expunged the claim of for £ and hereby direct a warrant to be drawn for the dividend of in the pound thereon, amounting to the sum of £ to be carried back to the original account of the above estate in the books of the accountant in bankruptcy.

Commissioner.

£	Carried back day of

Ent^{d}.

No. 20.

Form of Payment into Bank by Official Assignee to the Chief Registrar's Account.

Per-centage Fee under Bankrupt's Estate, 12 & 13 Vic. c. 106.

day of 18

I do hereby certify, that Mr. official assignee of the estate of bankrupt, has this day paid into the Bank of England the sum of £ to be placed to the credit of Esq., as the accountant in bankruptcy, and to the credit of "The Chief Registrar's Account."

For the Governor and Company of the Bank of England.

£

Ent^{d}.

N.B.—*This certificate to be sent or transmitted forthwith to the accountant in bankruptcy upon payment being made into Bank.*

No. 21.

First Letter to Debtors for Sums under 500*l.*

No.

Estate of (Residence and date).

Sir,—By the books and statements of the above bankrupt you appear to be indebted to this estate in the sum of £ which, if admitted, I request may be paid *at my office* on or before the

If you dispute this demand, or any part of it, an early answer, stating the fact, and the grounds of your objection, may save further trouble.

I remain, sir,

Your obedient servant,

Official Assignee.

Office hours—Nine till Four.

Bring or send this letter on calling, and in any written communications please name the estate and the number.

No. 22.

Another Form for Debtors, for Sums under 500*l.* intended for those residing out of London.

No.

Estate of (Residence and date).

Sir,—By the books and statements of the above bankrupt, you appear to be indebted to this estate in the sum of £ which I request may be paid to me *at my office*, on or before the

If the claim is incorrect, or any objection intended to the payment, I request the favour of being immediately informed of the grounds thereof.

I remain, Sir,

Your obedient servant,

Official Assignee.

NOTE.—*If this debt be not paid by the above day, interest thereon at the rate of five per cent per annum will be demanded, pursuant to the 3d and 4th Wm. 4, c. 42.*

It may be desirable for parties in the country to be informed, that the postmasters in post towns will receive sums not exceeding 5*l.*, and give orders for them on the Post Office in London, which orders can be remitted to me in payment of debts.

Office hours from nine till four.

Bring or send this letter if you call or send.

No. 23.

Second Form of Letter to Debtors, where first Application has not been effectual.

"Bankrupt Law Consolidation Act, 1849."

Estate of (Residence and date).

Sir,—The applications I have made for payment of £ appearing by the bankrupt's books and statements to be due by you to this estate, having failed to produce a settlement,

I have now to inform you that if this sum be not paid on or before the it will be my duty to apply for a summons to bring you before the court to be examined on oath, and that you will be liable to the costs of the proceeding. I am, Sir,

Your obedient servant,
Official Assignee.

No. 24.

Letters to Creditors for Particulars of Demand, &c.

Estate of Bankrupt.

(Residence and date).

Sir,—I request you will immediately favour me with a statement of your account with the above bankrupt, and the particulars of any bills, notes, deeds, goods or other securities in your possession. I remain, Sir,

Your obedient servant,
Official Assignee.

No. 25.

Form of Affidavit by Creditor of Loss of Bill of Exchange.

In the matter of
maketh oath, and saith, that ha made a careful search for the bill of exchange, the particulars whereof are under written, and which ha been proved under this estate by but that th deponent ha not been able to find the same, and verily believe that the same ha been lost or mislaid; and th deponents further saith that ha not nor ha the said or any person or persons to use, to this deponent's knowledge or belief, negotiated the said bill or either of them, nor in any manner parted with or assigned legal or beneficial interest in the said bill of exchange or any part thereof; and that deponent the person now legally and beneficially interested in the same, and entitled to receive for own use all dividends in respect thereof, and that all dividends which have been paid or declared, or monies received on account of or in respect of the said bill or either of them, or from any other security, do not amount to twenty shillings in the pound, and that the dividends now payable under the above estate and not yet received will not make up twenty shillings in the pound.

Bill above referred to.

Date.	Drawer.	Acceptor.	Sum.		
			£	s.	d.

Sworn before me at this day of 18

Upon the above-named signing the annexed letter of indemnity, and giving security to the satisfaction of the official assignee, I direct the dividend to be paid to

Commissioner.

Estate of Bankrupt.

Sir,

The under-mentioned bill proved by under this estate, having been lost or mislaid, and the following dividend having been declared hereon, but not yet paid, viz. and which dividend with all others already received, or which have been declared or become payable on or in respect of the said bill do not amount to twenty shillings in the pound thereon; in consideration therefore of your paying to or to order the dividend above mentioned hereby undertake to indemnify you from all claim of any other person to the said dividend, or any part thereof, and from all loss, damage, and expense which you, or your executors or administrators, may sustain by reason of your making such payment to me; and if it should hereafter appear that the said sum of £ or any part thereof, with the dividends already received or declared up to this day, exceed the amount of the bill hereby engage to repay the same to you, or to the assignee or assignees of the above estate with interest at the rate of five per cent per annum from this day. Dated at this

Bill above referred to.

To Mr.

Official assignee to the above estate.

Appendix.

GENERAL ORDERS

FOR REGULATING

THE PRACTICE AND PROCEDURE OF THE COUNTY COURTS IN BANKRUPTCY AND INSOLVENCY.

Orders of Bankruptcy Court to be Orders for the County Courts.—1. The General Orders of the Court of Bankruptcy made in pursuance of "The Bankrupt Law Consolidation Act, 1849," "The Bankruptcy Act, 1854," and of "The Bankruptcy Act, 1861," except the orders Nos. 119 to 158, both inclusive, of the orders of the 19th October 1852, the order of the 3d February, 1855, the orders of the 19th May, 1855, the order of the 19th June, 1856, and the orders Nos. 10, 11, 15, and 18 of the orders of 12th October, 1861, shall be the rules and orders for regulating the practice and procedure of the County Courts in matters of bankruptcy in such courts, so far as the same are applicable and not inconsistent with any of the following orders.

Place of sitting of County Courts.—2. The place of sitting of each County Court in matters of bankruptcy shall be the place at which the court now holds, or may hereafter hold its sittings for the general business of the court, under the provisions of the act 9 & 10 Vic. c. 95, or of any act amending or extending the provisions of the same.

Times of Sitting of County Courts.—3. The times of the sitting of each County Court in matters of bankruptcy shall be those appointed for the transaction of the general business of the court, unless the judge of any such court shall otherwise order, and shall appoint a special day or days for a sitting of the court in matters of bankruptcy.

Form of Proceedings.—4. In matters of bankruptcy in the County Courts the proceedings shall be in the several forms set forth in the schedule attached to these orders, and where forms for any proceeding in such matters are not provided in the schedule the forms in use in the Court of Bankruptcy shall be used so far as the same are applicable.

Form of Petition under Sect. 94 of B.A., 1861.—5. Every petition for adjudication of bankruptcy presented under the 94th section of "The Bankruptcy Act, 1861," shall be printed on parchment or paper, and shall be in the form set forth in the schedule, and except so far as may be necessary to adapt the printed form to the circumstances of the particular case no alterations, interlineations, or erasures shall be permitted without the leave of the court or a registrar thereof.

6. Forthwith after the filing in court of the statement of a person presenting a petition for adjudication of bankruptcy against himself in pursuance of s. 93 of "The Bankruptcy Act, 1861," the high bailiff shall transmit by post a notice in the form set forth in the schedule to each creditor named in such statement, informing him of the fact of such petition having been presented.

7. The affidavit to be made by a person petitioning for adjudication of bankruptcy against himself *in formâ pauperis* shall be in the form set forth in the schedule, and shall be annexed to the petition.

8. The notice of an order for a registrar to attend at a gaol for the examination of prisoners in pursuance of section 101 of "The Bankruptcy Act, 1861," required to be given to the gaoler and to the execution and detaining creditors of such prisoners, shall be sent by post by the messenger of the court, and such notice shall be in the form set forth in the schedule.

9. The registrar of a county court shall, as official assignee, assist a bankrupt in preparing the statement of his accounts by giving him access to his books and papers, and by furnishing him with all information necessary to enable him to comply, in such statement, with the requirements of the court.

10. Notice of any sale to be made by auction under the provisions of s. 137 of "The Bankruptcy Act, 1861," shall be given in two local newspapers at least fourteen clear days before the sale shall be held.

11. It shall be the duty of the high bailiff to attend all meetings of the court in matters of bankruptcy, and to serve all summonses, notices, &c., to execute all warrants and processes, to prepare and cause to be inserted in the *Gazette* and newspapers all notices of meetings to be holden in pursuance of this act, and to do and perform all other things which are required to be done or performed by a messenger of the Court of Bankruptcy.

12. The costs of printing and postages in any matters of bankruptcy in the County Courts shall be defrayed out of the proceeds of the bankrupt's estate, and when such estate is insufficient to pay such costs the same shall be paid out of the chief registrar's account.

13. The cost of all necessary advertising in the *Gazette* and newspapers in proceedings on a petition of a pauper prisoner shall be paid out of the chief registrar's account.

14. In matters of bankruptcy in the County Courts for which forms are not provided in the schedule, the forms used in the Court of Bankruptcy shall be followed, *mutatis mutandis*.

SCHEDULE.

No. 1.

Record of the taking the Oath prescribed by Section 7 of "The Bankruptcy Act, 1861," to be entered in the Minute Book of each Court over which the Judge presides.

"The Bankruptcy Act, 1861."

Be it remembered that C. D., Judge of this Court, did at the General Quarter Sessions of the Peace holden at in and for the county of take the oath prescribed by "The Bankruptcy Act, 1861."

No. 2.

Petition for Adjudication of Bankruptcy against himself by a Debtor, whose Debts do not exceed 300*l.*

"The Bankruptcy Act, 1861."

To the County Court of holden at

The humble petition of [*here insert at full length the name, address, and description of the petitioner, and also the description of the trade or business or trades or businesses which he carries on or has carried on during six or the longest period of six months' residence within the district of the Court next before the filing of his petition.*]

Showeth,

That your petitioner having resided for the longest period during the last six calendar months next before the date of this petition within the district of this court, to wit, the period of , at , and owing debts not exceeding 300*l.*, and being unable to meet his engagements with his creditors, doth pray that he may be adjudged a bankrupt.

And your petitioner shall ever pray, &c.

A. B.

No. 3.

Notice by Prisoner of his intention to petition a County Court for Adjudication of Bankruptcy against himself.

"The Bankruptcy Act, 1861."

Take notice that I intend to present a petition to the County Court of holden at for adjudication of bankruptcy against myself. Dated this day of

A. B.,
a prisoner in the gaol [*or* prison] at in the county of

To the Gaoler [*or* Keeper] of the gaol [*or* prison] at in the county of

No. 4.

Petition for Adjudication of Bankruptcy against himself by a Debtor in custody, whose Debts do not exceed 300*l.*

"The Bankruptcy Act, 1861."

To the County Court of holden at

The humble petition of [*here insert at full length the name, address, and description of the petitioner, and also the description of the trade or business or trades or businesses which he carries on or has carried on during six or the longest period of six months at in the county of next before his committal to prison*].

Showeth,

That your petitioner, being a prisoner in gaol [*or* prison] at in the county of and owing debts not exceeding 300*l.*,[1] and being unable to meet his engagements with his creditors, doth pray that he may be adjudged a bankrupt.

And your petitioner states that he has given notice in writing to the keeper of the above-named gaol [*or* prison] of his intention to file this petition.

[*Add, when the petitioner petitions in formâ pauperis*, and your petitioner not having the means of paying the fees and expenses usually payable in respect of a petition by a debtor for an adjudication of bankruptcy, hath made an affidavit to that effect, as required by the statute.]

And your petitioner will ever pray, &c.

No. 5.

Affidavit of Truth of Allegation in Petition.

"The Bankruptcy Act, 1861."

In the County Court of holden at

I, the petitioner named in the petition hereunto annexed, make oath [*if the petitioner affirm, alter the form accordingly*] and say, that the several allegations in the said petition are true,[2] and that I verily believe the debts justly due and provable in bankruptcy against my estate amount in the whole to a sum not exceeding 300*l.*

Sworn at, &c.
Before me,
C. D., Registrar of the above Court [*or* a Commissioner, &c.]

No. 6.

Statement to be filed in Court, by Debtor petitioning for Adjudication against himself, of Debts, &c.

"The Bankruptcy Act, 1861."

In the County Court of holden at

I, A. B., of in the county of make oath and say that the following statement, signed by me, is a full, true, and accurate statement of my debts and liabilities of every kind, and of the names and residences of my creditors, and of the causes of my inability to meet my engagements.

Sworn at, &c. A. B.
Before me, &c.

[1] Omit the words "and owing debts not exceeding 300*l.*," when prisoner petitions *in formâ pauperis*.

[2] If prisoner petitions in *formâ pauperis*, end here.

No. 6.—(*continued.*)

STATEMENT.

Creditors.		Amount due to each unsecured Creditor, including Interest and Costs where due.	Nature of Consideration.	Amount due to each secured Creditor after deducting the Value of the Security.	Nature and Value of Security.	If contracted previous to any former Bankruptcy or Insolvency, so state in each Case, or barred by any Statute of Limitations.
Names.	Residences.					
Totals						
		Total unsecured debts				
		Total of all debts . .				

The causes of my inability to meet my engagements are [*here state them, and if bankrupt or insolvent previously, state the day and year, and the court in which he was so*]. A. B.

No. 7.

"The Bankruptcy Act, 1861."

In the County Court of holden at

Statement of Accounts required by sect. 141 of the above statute, made by me, A. B., of a bankrupt in this Court.

Specifications of all property, real and personal, in which I have had an interest at any time since the day of 18 to the present time, showing when, how, to whom, for whom, and for what consideration any portion of any such property has been parted with.

Date.		£ s. d.

Account, showing what part of such property is now available for the benefit of my creditors, and the particular application of the proceeds of such property as has been parted with.

Date.		£ s. d.

CREDITORS.

N.B.—Where there are cross demands, the party must be entered both as creditor and debtor, and "set-off" must be written under the amount.

No.	Names and Descriptions of Creditors and Claimants, and their present or last Residences.	Amount.	When Contracted.	Admitted or Disputed.	Nature and Consideration of the Debt and Securities, if any; also, if the Debt is disputed, the Reason thereof.
		£ s. d.			

No. 7.—(*continued.*)

DEBTORS.

N.B.—Where there are cross demands, the party must be entered both as creditor and debtor, and "set-off" must be written under the amount.

No.	Names, Descriptions, and Places of Abode of Debtors.	Amount £	s.	d.	When Contracted.	Good, Bad, or Doubtful.	Nature and Consideration of the Debt; also, Securities, if any, for the same.	Witnesses, with their Residences, and other Evidence by which the Debt may be proved.

PROPERTY IN POSSESSION.

Real and Personal Estates and Effects, which were in my possession, enjoyment, or control, or which were held by any other person or persons in trust for my use, or to the possession or enjoyment of which I was entitled at the time of subscribing my petition.

		Supposed Value. £	s.	d.
1. Interest in Land.	Freehold, Copyhold, and Leasehold Property with local Description, Names of Tenants, and Annual Rent of the same; and statement of Incumbrances (if any) thereupon, with the Dates thereof			
2. Personal Property.	Household Goods and Furniture, at			
	Wearing Apparel			
	Jewels, Trinkets, and Ornaments of the Person			
	Plate, Linen, and China			
	Wines, and other Liquors			
	Books, Prints, and Pictures			
	Horses, Cows, and other Animals			
	Carriages			
	Farming Stock and Implements of Husbandry			
	Stock in Trade in my business of			
	Machinery and Utensils in my business of			
	Ships and Shares of Ships: viz.			
	Cash, Bill, Promissory Notes, Bonds, and other Personal Property not before specified			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in the Public or other Funds, Shares in Canal and other Companies; showing in whose Name the same are standing, also when and by whom the last Dividend or other payment was received in respect of the same			
4. Unpaid Legacies.	Legacies due but unpaid; with all particulars concerning the same.			
BOOKS, DEEDS, PAPERS.	The following is a true list of all Books, Papers, Deeds, and Writings relating to my Estate and Effects, or any part thereof, which at the time of presenting my petition were, or at any time since have been in my possession, or under my custody or control, or in the possession or custody of any person in trust for me, or for my use, benefit, or advantage.			

No. 7.—(*continued*).

PROPERTY IN REVERSION, &c., PLACES, PENSIONS, RIGHTS, AND POWERS.

N.B.—Contingent as well as vested Interest must be entered.

Real and Personal Estates and Effects, in which I have any Interest in Reversion, Remainder, or Expectancy.

		Supposed Value of my Interest if now to be sold. £	s.	d.
1. Interest in Land.	Freehold, Copyhold, and Leasehold Property, with Names and Description of Persons now enjoying the same, and the Annual Value thereof; also the nature of my Interest therein, and from whom, and in what manner it is derived			
2. Personal Property.	Personal Property, with Names and Descriptions of Persons now enjoying the same; also the nature of my Interest therein, and from whom, and in what manner it is derived . . .			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in the Public or other Funds, Shares in Canal and other Companies; showing in whose Names the same are standing, with Names and Descriptions of Persons now enjoying the same; also the nature of my Interest therein, and from whom, and in what manner it is derived			
Places and Pensions in Possession or Reversion.	Places of Benefit or Advantage held by me, with the Salaries, Fees, and Emoluments thereof; also all Pensions and Allowances in Possession or Reversion held by me or by any other Person or Persons for me or on my behalf, or of and from which I derive or may derive any benefit or advantage . .			
Rights and Powers.	Right and Powers, which I or any other Person or Persons in trust for me, or for my Use, Benefit, or Advantage, am or are in any manner seised or possessed of, or interested in, or entitled unto, or which I or any other Person or Persons in trust for me, or for my benefit, have any power to dispose of, charge, or exercise, for my benefit or advantage			

I do hereby swear that the contents of this statement, and of all and every part thereof respectively, are true; and that I possess no other property whatsoever than that therein mentioned.

Sworn at, &c.

Before me

N.B.—The above statement must begin at or before the day on which the earliest debt, still unpaid, was contracted by the bankrupt.

If before that period, but since the commencement of the bankrupt's present embarrassments, any property has gone away from him by sale, assignment, mortgage, distress, execution, or any means other than the ordinary course of trade, the account must commence so as to include all such transactions.

The blanks in the description of the debtor side of the account must be filled with a date early enough for compliance with the above directions.

The specific appropriation of each sum received must be separately shown, where the case admits of it.

The date of each item in the account must be given by stating the day as well as the year where the same can be ascertained.

The money and other property, which was in possession of the petitioner or his family, or of any other person for his or their benefit, at the time when he filled his petition, must, in all cases, be made a specific item or items in the account.

The word "none" to be entered opposite the description of any property of which the bankrupt has not been possessed.

No. 8.

Declaration of Proof of Debt by Creditor under Sect. 144 *of "The Bankruptcy Act*, 1861."

"The Bankruptcy Act, 1861."

In the County Court of holden at

In the matter of A. B. of bankrupt.

I, C. D., of do declare that the statement of the debts [and of the account (*if any*)] between me and the bankrupt hereunto annexed is a full, true, and complete statement of account between me and the bankrupt, and that the debt thereby appearing to be due from the estate of the bankrupt to me was on or about the day of 18 [*the date of the bankruptcy*], and still is justly due to me.

C. D., creditor above named.

No. 9.

Declaration of Proof of Debt by Agent to a Body Politic or Public Company under Sect. 144 *of "The Bankruptcy Act*, 1861."

"The Bankruptcy Act, 1861."

In the County Court of holden at

In the matter of A. B. of bankrupt.

I, C. D., agent to [*here state name of body politic or company*], incorporated [*or* authorised to sue or bring actions] do declare that I am such agent and authorised to make this proof, and that the statement of the debt [and of the account (*if any*)] between the said body politic [*or* company], and the bankrupt hereunto annexed, is a full, true, and complete statement of account between the said body politic [*or* company] and the bankrupt, and that the debt thereby appearing to be due from the estate of the bankrupt to the said body politic [*or* company] was on or about the day of 18 [*the date of the bankruptcy*], and still is, justly due to the said body politic [*or* company].

C. D., agent to the [*here state name of body politic or company*].

No. 10.

Affidavit in Proof of Debt by Creditor or Agent under Section 146 *of "The Bankruptcy Act,* 1861."

"The Bankruptcy Act, 1861."

In the County Court of holden at

In the matter of A. B. of bankrupt.

I, C. D., of do hereby make oath and say [*or* I, E. F., of agent of C. D. of do hereby make oath and say], that the statement of the debt [and of the account (*if any*)] between me [*or* the said C. D.] and the bankrupt, hereunto annexed, is a full, true, and complete statement of account between me [*or* the said C. D.] and the bankrupt, and that the debt thereby appearing to be due from the estate of the bankrupt to me [*or* the said C. D.] was on or about the day of 18 [*the date of the bankruptcy*], and still is justly due to me [*or* the said C. D.] [*add, when affidavit is made by an agent,* and I do hereby make oath and say, that I am the agent of C. D., and that I am duly authorised by him to make this affidavit, and that it is within my own knowledge that this debt was incurred, and for the consideration mentioned in the statement hereunto annexed, and that to the best of my knowledge and belief the debt still remains unpaid and unsatisfied.]

C. D., creditor.

[*or* E. F., agent to C. D.]

Sworn at, &c. before me

No. 11.

Form of Adjudication.

"The Bankruptcy Act, 1861."

In the County Court of holden at

In the matter of A. B. of [*following the description given by the petitioner in his petition*].

Upon reading the petition of the above-named A. B., and also his affidavit, stating that the several allegations in the said petition are true, and that he verily believes that the debts justly due and provable in bankruptcy against his estate amount in the whole to a sum not exceeding 300*l.*, I do adjudge the said A. B. a bankrupt.

[*If petitioner is a prisoner, and the proceedings are to be transferred to another County Court, then add,* And I do order that the proceedings on this adjudication be transferred to the County Court of holden at]

Given under my hand, and the seal of this court, this day of 186

Judge.

No. 12.

Form of Petition by Person appointed to represent a Lunatic.

"The Bankruptcy Act, 1861."

In the matter of A. B., a lunatic prisoner for debt in the gaol of at in the county of

[To the County Court of holden at]

The humble petition of C. D. of

Showeth,

That your petitioner hath been appointed by the Court of Bankruptcy for the district to represent A. B. a lunatic prisoner for debt in the above gaol [*or* prison].

That the said A. B. is unable to meet his [*or* her] engagements with his [*or* her] creditors.

And that your petitioner verily believes the debts justly due and provable in bankruptcy against the said lunatic prisoner's estate amount in the whole to a sum not exceeding 300*l.*

Your petitioner therefore prays that the said A. B. may be adjudged a bankrupt.

C. D.

Signed by the petitioner on the day of 18

No. 13.

Conviction of Bankrupt of Misdemeanor by a Judge.

"The Bankruptcy Act, 1861."

In the matter of A. B. of a bankrupt.

At a sitting of the County Court of holden at this day of 18

Whereas the said A. B. having been adjudged bankrupt, did on the day of pass his last examination, and did on the same day apply for an order for his discharge, and thereupon the court did appoint a sitting of the court to be held on the day of for the purpose of considering the question of granting to the said bankrupt such order of discharge: And whereas the court being then of opinion that there was ground for charging the said bankrupt with acts or conduct amounting to a misdemeanor under the Bankruptcy Act, 1861; that is to say [*set out the offence*], did, the bankrupt consenting thereto, direct a clear statement in writing of the charge to be delivered to the said bankrupt, and the same charge was delivered accordingly: And whereas the court did appoint this day for trying the said bankrupt upon such charge, and the court did direct C. D., the creditor's assignee [*or* official assignee, *or* a creditor of the said bankrupt] to act as prosecutor on such trial.

Now I, the Judge of the said court, do adjudge that the said A. B. did, contrary to the form of the statute in that case made and provided [*here set out the offence*]. And I do adjudge that the said A. B. for his [*or* her] said offence shall be imprisoned in gaol, [and there kept to hard labour] for the space of Judge.

No. 14.

Conviction of Bankrupt of Misdemeanor by Verdict.

"The Bankruptcy Act, 1861."

In the matter of A. B. of a bankrupt.
At a sitting of the County Court of holden at this day of 18

Whereas the said A. B. having been adjudged bankrupt, did on the day of pass his last examination, and did, on the same day, apply for an order for his discharge, whereupon the court did appoint a sitting of the court to be holden on the day of for the purpose of considering the question of granting to the said bankrupt such order of discharge: And whereas the court being then of opinion that there was ground for charging the said bankrupt with acts or conduct amounting to a misdemeanor under the Bankruptcy Act, 1861; that is to say [*set out the offence*], did, the bankrupt consenting thereto, direct a clear statement in writing of the charge to be delivered to the said bankrupt, and the same statement was delivered accordingly: And whereas the court did appoint this day for trying the said bankrupt upon such charge, and the said bankrupt requiring it, the court did summon a jury for such purpose, and the court did direct C. D., the creditors' assignee [*or* official assignee, *or* a creditor of the said bankrupt] to act as prosecutor on such trial.

And whereas the said jury did by their verdict find that the said A. B. did, contrary to the form of the statute in that case made and provided [*here set out the offence*].

Now I, the Judge of the said court, whose name is hereunder written, do thereupon adjudge that the said A. B. for his [*or* her] offence be imprisoned in [and there kept to hard labour] for the space of Judge.

No. 15.

Warrant of Committal for Misdemeanor.

"The Bankruptcy Act, 1861."

In the County Court of holden at

Whereas A. B. of was this day duly convicted by [*or* before] me, the Judge of the said court acting in prosecution of an adjudication of bankruptcy against the said A. B., for that the said A. B. did contrary to the form of the statute in that case made and provided [*here set out the offence*], and I did adjudge that the said A. B. for his [*or* her] offence should be imprisoned in of in the county of [and there kept to hard labour] for the space of

These are, therefore, to will, require, and authorise you, the high bailiff and others, the bailiffs of this court, immediately upon receipt hereof, to take into your custody the body of the said A. B., and him safely to convey to her Majesty's gaol of and there deliver him to the governor [*or* gaoler] thereof together with this warrant; and the said governor [*or* gaoler] of the said gaol is hereby authorised and required to receive the said A. B. into his custody, and him safely to keep and detain with [*or* but without] hard labour for the period of

Given under my hand and seal of this court, this day of in the year of our Lord 18

To the High Bailiff and others, the bailiffs of the said County Court, and to all peace-officers, and to the governor [*or* gaoler] of her Majesty's gaol at

(Signed) (L. S.) Judge.

No. 16.

Affidavit of Pauper Prisoner.

"The Bankruptcy Act, 1861."

I, the undersigned A. B., of being now a prisoner for debt in the goal [*or* prison] at in the county of and being desirous of petitioning for an adjudication of bankruptcy against myself, do make oath and say that I have not the means of paying the fees and expenses usually payable in respect of a petition by a debtor for an adjudication of bankruptcy.

Sworn this day of 18 at prison or gaol, before me,

A. B., Gaoler.

No. 17.

Form of Adjudication against a Prisoner petitioning in formâ pauperis.

"The Bankruptcy Act, 1861."

In the County Court of holden at

In the matter of A. B. of [*following the description given by the petitioner in his petition*].

Whereas A. B. aforesaid, now a prisoner in the gaol [*or* prison] at in the county of has presented a petition to this court praying that he may be adjudged a bankrupt, and has made an affidavit stating that he has not the means of paying the fees and expenses usually payable in respect of a petition by a debtor for an adjudication of bankruptcy:

And whereas the said A. B. having been brought before this court has been examined by me touching his estates and effects, debts, dealings, and transactions:

Now I [not] being satisfied with the answers made by the said A. B., do [not] adjudge him a bankrupt. [*To be added when protection granted,* and do hereby grant the said A. B. protection from arrest from any claim, debt, or demand now due from or owing by him. Judge.

No. 18.

Order for Registrar to attend Gaol.

"The Bankruptcy Act, 1861."

I, E. F., Judge of the County Court of holden at in pursuance of the power conferred upon me by the Bankruptcy Act, 1861, do order that the registrar of this court do attend at the gaol [*or* prison] at in the county of at o'clock in the noon, and then and there examine the prisoners included in the return made by the gaoler of the said gaol [*or* keeper *or* governor of the said prison], dated the day of 18 and hereto annexed, and proceed thereon and make orders as the said statute directs.

E. F., Judge.

No. 19.

Form of Notice to the Gaoler and detaining Creditors of the Attendance of a Registrar to release Prisoners.

"The Bankruptcy Act, 1861."

Take notice that the Judge of the County Court of holden at has made an order in pursuance of sect. 101 of the above act, that the registrar of the said court do attend at the gaol [*or* prison] at in the county of on next, at o'clock in the noon, and examine A. B. of now a prisoner for debt at such gaol [*or* prison], when the said registrar will have power to make an order of adjudication of bankruptcy against the said A. B., and for his [*or* her] release from prison, and to direct in what court such bankruptcy shall be prosecuted.

(Signed) C. D.
High Bailiff of the said Court.

To the Gaoler of gaol,
or E. F., creditor of the above A. B.

No. 20.

Registrar's Order after Examination.

"The Bankruptcy Act, 1861."

In the matter of late of in the county of a prisoner for debt in the gaol [*or* prison] at in the county of on this day of 18

Whereas in pursuance of an order of the judge of the said court, dated the day of 18 , I a registrar of the said court, attended on the day of 18 at the said gaol [*or* prison], and there examined the said prisoner, whose examination in writing is filed herewith, whereby it appears that the said prisoner being a trader [*or* non-trader], had on the said day been in prison for debt [*or as the case may be*], at the suit of of for fourteen days [for two calendar months], namely, from the day of and that the last place of his abode and place of business [*or* place of abode] within six months next prior to his imprisonment was and that the said prisoner has not been summoned under a judgment-debtor summons [*or*, that having been summoned under a judgment-debtor summons, he has not offered such security for the debt or debts in respect of which he is imprisoned or detained as I deem reasonably sufficient].

I do adjudge the said A. B. a bankrupt, and I do hereby grant the said A. B. protection from arrest from any claim, debt, or demand now due or owing by him. And I do hereby order that the said A. B. be forthwith discharged from custody; and I do hereby direct that the said bankruptcy be prosecuted in the Court of Bankruptcy for the district [*or* in the County Court of holden at].

Registrar.

No. 21.

Registrar's Report of Prisoner refusing to appear, &c.

"The Bankruptcy Act, 1861."

In the matter of A. B., late of in the county of a prisoner for debt [*or as the case may be*] in gaol [*or* prison] on this day of 18

Whereas in pursuance of an order of the Judge of the County Court of holden at dated the day of 18 I attended at gaol [*or* prison] at on this day of 18 and examined A. B., a prisoner confined in the said gaol [*or* prison] for debt [*or as the case may be*]. And whereas the said A. B. refused to appear before me, [*or* refused to be sworn, *or* refused to answer the lawful questions put to him [*or* her] by me, *or* by the execution *or* detaining creditor, *or* a creditor of the said A. B.] respecting his debts, liabilities, dealings, and transactions, *or* to make a full discovery of his estate and effects, and of all his books of account or to produce the same [*or*, that the said A. B. having been examined by me in accordance with the provisions of the above act, refused to sign his examination when taken]: Now therefore do report such refusal to you Esquire, the Judge of the County Court of holden at

(Signed)
Registrar of the said Court.

No. 22.

Warrant of Committal.

"The Bankruptcy Act, 1861."

At the County Court of holden at

In the matter of A. B., late of in the county of a prisoner for debt [*or as the case may be*] in gaol [*or* prison] on this day of 18

Whereas it appearing by the return made to this court by the gaoler of gaol [*or* keeper *or* governor of prison,] dated the day of 18 that A. B., late of was detained in the said gaol [*or* prison] for debt [*or as the fact was stated*], I did in pursuance of the above act order that the registrar of this court should attend at the said gaol [*or* prisou] on the day of 18 And whereas by the report of the said registrar, made in pursuance of the said statute, and dated the day of 18 it appears [*here set out the registrar's report as to the refusal of the prisoner*].

These are therefore to will, require, and authorise you, the high bailiff and others the bailiffs of this court, immediately upon receipt hereof, to take into your custody the body of the said A. B., and him safely to convey to her Majesty's gaol of and him there to deliver to the governor [*or* gaoler] together with this warrant, and the said gaoler of the said gaol is hereby authorised and required to receive the said A. B. into his custody, and him safely to keep and detain without bail or mainprise with [*or* but without] hard labour for the period of [1]

Given, under my hand and the seal of this court, this day of in the year of our Lord 18

(L.S.) Judge.

To High Bailiff and others the bailiffs of the County Court of holden at and to all peace-officers, the governor [*or* gaoler] of her Majesty's gaol at

No. 23.

The Adjudication in Bankruptcy under the last preceding Order.

ADJUDICATION OF BANKRUPTCY.

"The Bankruptcy Act, 1861."

At the County Court of holden at
In the matter of A. B. late of in the county of a prisoner for debt in gaol [*or* prison].

Whereas it appearing to me by a return dated the day of 18 made by the gaoler of gaol [*or* keeper of prison], that A. B., late of was detained in the said gaol [*or* prison] for debt [*or as the fact was stated in the return*], I did order that the registrar of this court should attend at the said gaol [*or* prison] on the day of 18 : And whereas by the report of the said registrar dated the day of it appears [*here set out the registrar's report as to the refusal of the prisoner*] : Now, therefore, I do declare and adjudge the said A. B. a bankrupt.

Given under my hand and the seal of this court, this day 18

Judge.

No. 24.

Order of Discharge to Gaoler by Registrar.

"The Bankruptcy Act."

In the matter of A. B. late of in the county of a prisoner for debt in gaol [*or* prison] on this day of 18

Whereas in pursuance of an order of the Judge of the County Court of holden at dated the day of 18 I attended on the day of 18 at the said gaol [*or* prison], and, having examined the said prisoner, I adjudged him to be a bankrupt: Now, therefore, I do order you forthwith to discharge the said A. B. from your custody; and for so discharging him this shall be your sufficient warrant.

C. D.
Registrar of the said Court.

To the Gaoler of the gaol of [*or* keeper of prison].

No. 25.

Order of Discharge to Gaoler by Judge upon Report of Registrar that a Prisoner refuses to be sworn, &c.

"The Bankruptcy Act, 1861."

At the County Court of holden at
In the matter of A. B. late of in the county of a prisoner for debt in gaol [*or* prison] on the day of 18

Whereas by a return made to this court by you as gaoler of gaol [*or* keeper of prison] dated the day of 18 it appeared that the above A. B. was detained in the said gaol [*or* prison] for debt [*or as the fact was stated*]. And whereas I did in pursuance of the above act order the registrar of this court to attend at the said gaol [*or* prison] on the day of 18 then and there to examine the prisoner as directed by the said act. And whereas it appears by a report of the said registrar dated the day of 18 that the said registrar did so attend, but that the said prisoner did [*here set out the registrar's report as to the refusal of the prisoner*]: And whereas I, in pursuance of the above act, have by warrant under my hand and the seal of this court committed the said prisoner to her Majesty's gaol of and adjudged him to be a bankrupt: I do hereby order that the said prisoner be given up by you to the high bailiff or one of the bailiffs of this court, upon production to you of this order; and for so giving up the prisoner this shall be your sufficient warrant.

(L.S.) X. Y., Judge.

To the Gaoler of gaol [*or* keeper of prison].

[1] Not to exceed one month.

No. 26.

Certificate of Registrar of a County Court of the Particulars of each Case of Prisoners examined by him.

"The Bankruptcy Act, 1861."

I, C. D., Registrar of the County Court of Pembrokeshire, holden at Haverfordwest, do certify that on the 15th day of November I attended at the gaol [*or* prison] at Haverfordwest, in the county of Pembroke, and examined the persons included in a return made by the keeper of such gaol [*or* prison] as being in his custody on the (first) day of November, 1861, and that the particulars of the examination of every such person is as follows.

C. D.

Name of Person detained.	Residence or Place of Business for the longest Period of Six Months next preceding his Imprisonment.	Date of Imprisonment.	Number of Days that he had been detained on the day of my Examination.	Whether Trader or Non-trader.	Amount of Debts for which he is detained.	Names and Addresses of detaining Creditors.	Has been Summoned on a Judgment-Debtors Summons to appear at the Court and on the day stated below. (Sec. 71.)	Nature of Security offered for Debts in respect of which he is detained. (Sec. 71.)	Has not been Summoned on a Judgment-Debtor Summons.	Trade or Calling of Person detained.	Total Amount of Debts and Liabilities as ascertained on Examination.	Total Amount of Assets as ascertained on Examination.	Cause of Insolvency as shown on Examination.	Memorandum of what was done in each Case.
					£ s. d.						£	£		
J. A.	Haverfordwest, in the County of Pembroke.	7th Sept. 1861.	59	Trader.	363 17 6	A. B. C. D.	Bristol District Court of Bankruptcy; to appear 25 Nov. 1861.	Mortgage of a house.	—	Miller.	1500	486	Misfortune in trade.	Adjudged a bankrupt, as I did not deem the security offered by him for the debts in respect of which he is detained reasonably sufficient.
H. F.	Narberth, in the County of Pembroke.	3rd Aug. 1861.	64	Non-trader.	89 4 4	G. H.	. . .	. . .	Has not.	Accountant.	250	34	Illness of himself and family.	Adjudged a bankrupt with protection. Order of release made and adjudication directed to be prosecuted in the County Court of Pembrokeshire, holden at Narberth.
W. S	Neath, in the County of Glamorgan.	1st March 1861.	259	Non-trader.	892 0 0	W. L. E. G. R. S.	. . .	. . .	Has not.	Gentleman.	5009	2084	Extravagance.	Adjudged a bankrupt, without protection. Adjudication directed to be prosecuted in the Bristol District Court of Bankruptcy.
A. L.	Haverfordwest, in the County of Pembroke.	3rd Oct.	23	Non-trader.	69 0 0	A. F.	. . .	. . .	—	Clerk to an Attorney.	—	—	—	Not examined, he being a non-trader, and not having been in prison two calendar months.

No. 27.

Form of Notice to Creditors named in Statement of a Petitioner for Adjudication against himself.

"The Bankruptcy Act, 1861."

In the County Court of holden at
To C. D. of

Take notice, that A. B. of has presented a petition to this court for an adjudication of bankruptcy against himself, and has inserted in the statement of his creditors, filed by him, your name as one of such creditors, to the amount of £ *s. d.*, and that the meeting of creditors will be held on the day of 18 of the holding of which due notice will be given in the *London Gazette* and one or more local newspapers, and at which meeting you will be at liberty to prove your debt against the estate of the said petitioner.

Should you be unable to attend such a meeting, you may prove such debt in the manner provided by the act.

E. F., Official Assignee.

[*Here set out sections* 144, 145, *and* 146 *of the Bankruptcy Act*, 1861.]

No. 28.

Order of Discharge, when granted at the same Sitting of the Court at which the Bankrupt has passed his last Examination.

"The Bankruptcy Act, 1861."

In the County Court of holden at
In the matter of A. B. of adjudged bankrupt on the day of 18

Whereas at a public sitting of this court held on the[1] day of for the said bankrupt to pass his last examination, and also to make application for his order of discharge under the Bankruptcy Act, 1861, whereof and of the purport whereof the notice required in that behalf was duly given), the said bankrupt passed his last examination, and upon application then and there made by the said bankrupt for such discharge, it was adjudged by the court that the said bankrupt was entitled to such discharge. Now, therefore, the court allows and orders such discharge accordingly[2] [*or, if the discharge were suspended, then, after the words "such discharge" proceed as follows:* after suspension thereof for the period of the reasons for such suspension being, that it appeared to the court that, &c. [*stating the reasons*]: And whereas the period of suspension has now elapsed. Now, therefore, the court allows and orders such discharge accordingly].

Given under my hand and the seal of this court, on the day of 18

(L. S.) Judge.

Signed and sealed in the presence of
Registrar.

No. 29.

Order of Discharge, when granted at a Sitting of the Court appointed after the Bankrupt has passed his last Examination.

"The Bankruptcy Act, 1861."

In the matter of A. B. of adjudged bankrupt on the day of 18

Whereas at a public sitting of this court appointed after the bankrupt passed his last examination, and held on the[3] day of for the purpose of considering the question of granting to the bankrupt his order of discharge under the Bankruptcy Act, 1861, (whereof and of the purport whereof the notice required in that behalf was duly given), it was adjudged by the court [*proceed as in the form of order of discharge when granted at the same sitting at which the bankrupt passed his last examination*].

GENERAL ORDERS.

It is ordered as follows, that is to say,—

A fee of one pound shall be paid on every petition for adjudication of bankruptcy when presented to the London Court of Bankruptcy or to a County Court by debtors who are not traders, and whose debts do not exceed 300*l.*, and who do not petition *in formâ pauperis*.

The above fee to be received and taken by means of a stamp having the word "Bankruptcy" impressed or affixed thereon as provided by the act.

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[1] If adjourned, add "and by adjournment on the day of ."

[2] "If the order of discharge be wholly refused, or be granted subject to any condition, or any sentence of imprisonment has been awarded, alter and state the facts accordingly." *See* sects. 157, 159.

[3] If adjourned, add "and by adjournment on the day of ."

GENERAL ORDERS IN BANKRUPTCY AND INSOLVENCY.

It is ordered as follows, that is to say,—

1. That from and after the date hereof, the bills of costs of solicitors, the fees of messengers and high bailiffs, and the charges, fees, and disbursements of auctioneers, brokers, and accountants, with respect to any proceedings in matters of bankruptcy under any petition for adjudication of bankruptcy presented by, or any adjudication of bankruptcy made against a debtor whose debts do not exceed 300*l.* and under, every petition *in formâ pauperis*, in the event of there being assets of the bankrupt's estate applicable to the payment of costs, shall, with the exception of bills of costs on appeals, be taxed, settled, and allowed in the courts of bankruptcy, and in the several county courts acting in bankruptcy, according to the schedule hereunder set forth.

2. That after the same date the bills of costs of solicitors, and the fees of high bailiffs, and the charges, fees, and disbursements of auctioneers, brokers, and accountants, in respect of matters of bankruptcy other than those provided for in the preceding order, transferred to a county court, either by the Court of Bankruptcy in London, or by a resolution of the creditors of a bankrupt, and in respect of all appeals from the decision or order of a judge of a county court, shall be taxed, settled, and allowed on the scale annexed to the General Order in Bankruptcy, dated the 19th May, 1855.

3. The said fees of high bailiffs shall and may until further order be received and retained by every high bailiff as a remuneration in respect of his services in the discharge of his duties as a messenger, pursuant to sect. 11 of "The Bankruptcy Act, 1861."

4. Every high bailiff shall keep an account of the fees so received by him, and of the expenses incurred by him in the discharge of his said duties, and shall on the 13th of October, 1862, and each succeeding 13th of October, render an account of the said fees and expenses for the preceding year to the Chief Registrar of the Court of Bankruptcy, and shall distinguish in such accounts the costs of which he claims the repayment under the 12th and 13th of the General Orders, dated the 12th October, 1861, for regulating the practice of the county courts, and under the 5th of the General Orders, dated the 6th day of November, 1861, and shall verify such account upon oath.

Schedule above referred to.

Solicitor's Costs.

	s.	*d.*
Attending and taking instructions for petition	6	8
Notice in writing to keeper of the prison or gaol of intention to petition when petitioner is in custody	3	4
Drawing and engrossing petition, including parchment or paper	3	4
Paid stamp		
Attending reading over and attesting signature	3	4
Drawing affidavit of verification and attending to be sworn	3	4
Paid oath, when any fee is paid, but whenever practicable the oath should be taken before a registrar		
Attending to file petition and ascertain name of the Commissioner, and attending upon adjudication	6	8
Attending official assignee with or instructing him as to the books and property of bankrupt, if any	3	4
The same as to messenger	3	4
Instructions for statements under sect. 93	5	0
Drawing the same, per folio	0	8
Engrossing, per folio	0	4
Drawing affidavit and attending to be sworn	3	4
Paid oath		
Attending to file	3	4
Attending for copy of causes when bankrupt in custody	3	4
Paid for same		
Attending messenger or high bailiff, instructing him to prepare warrant to bring up bankrupt to surrender	3	4
Paid gaoler's fee	3	0
Do. do. travelling expenses, if at a distance from the court, at 10*d.* per mile one way, for the two, gaoler and prisoner, or sum actually paid at discretion of taxing officer		
Notice to execution-creditor or solicitor of application for release and postage	2	7
If any detaining creditors, each, including postage	1	1

	s.	*d.*
Affidavit of notice and attending to be sworn, if execution or detaining creditor do not appear	3	4
The same for each detaining creditor	1	0
Attending court when discharge ordered absolutely or upon conditions, and drawing order	6	8
Attending meeting of creditors, if it do not exceed three hours	10	0
For every hour after three, if the registrar shall give a certificate that such attendance was necessary and proper to be allowed	3	4

General Charges.

Attending to bespeak, and for copy of proceedings	2	0
Paid for same at the rate of 1½*d.* per folio of ninety words.		
Instructions for special affidavits	3	4
Drawing same, per folio	0	8
Engrossing same, per folio	0	4
Attending court on each sitting of the court	10	0
If by agent, the solicitor being resident at a distance, and including letter of instructions	15	0
Two or more sittings or adjourned sittings held in the same bankruptcy at the same time are to be considered as one sitting only.		
Solicitors residing at a distance from the court are not to be allowed for travelling and loss of time in attending the court beyond the amount allowed for attendance by agent, except by the special direction of the commissioner or judge given at the time of the sitting.		
Notice of the filing of the petition or of adjudication, if necessary, and service	5	0
Drawing summonses for witnesses and copy and personal service, except summons which should be served by the messenger, each	5	0
Beyond three miles, per mile extra	0	5
Attending to bespeak, and for a copy of the statement of account (sect. 141) for creditors' assignee	3	4
Paid for same		
Perusing same and attending assignees thereon	10	0
Writing letters, where necessary, each	2	0
Circular do.	1	0
Attendances, when necessary in the discretion of the master or registrar	3	4
Special attendances	6	8
Attending court on motions, drawing order, &c.	6	8
Instructions for brief, if counsel be allowed by the judge, or a case stated for opinion of counsel	3	4
Drawing brief, per sheet	5	0
Copy do.	2	6
Attending counsel	3	4
Notice of taxing	2	6
Attending taxing	3	4
Letters, messengers' forms, &c.	5	0
The same when agents employed	7	6
Paid allocatur stamp		
Other matters not provided for in the above scale, but necessarily done, may be allowed upon a similar scale as nearly as may be.		

Allowance to Witnesses.

	s.	*d.*		*s.*	*d.*
Gentlemen, merchants, bankers, and professional men, per diem — from	10	0	to	20	0
Tradesmen, auctioneers, accountants' clerks, and yeomen, per diem — from	5	0	to	10	0
Police inspector, artisans, and journeymen, per diem — from	3	0	to	5	0
Police constable, labourers, and the like, per diem — from	2	0	to	3	0
Females, according to station in life — from	1	0	to	5	0
Governors of gaols bringing up prisoners — from	5	0	to	7	6
Travelling expenses, sum reasonably paid, but not more than sixpence per mile one way.					

Messenger's and High Bailiff's Fees.

Attending court on adjudication and serving duplicate on the bankrupt, and affidavit of service	2	6
Preparing and executing warrant of seizure, when directed by the official assignee to take possession	5	0
Keeping possession — for each day the man is actually in possession; including affidavit of possession being actually kept	4	6
3*s.* 6*d.* of the above sum is to be paid to the man in possession, and his receipt produced.		

	s.	d.
Summons to surrender, and service	3	4
Preparing advertisement for *Gazette*, and attending to insert	3	4
If advertisement comprises more than one bankruptcy in one advertisement, each after the first	1	6
Paid insertion		
The fee and payments are to be apportioned by the taxing officer amongst the bankruptcies included in one advertisement as may appear to be fair and reasonable.		
The like charge for newspapers		
Attending court, each sitting or meeting	2	0
Preparing warrant to bring up bankrupt, and transmitting the same to gaoler	2	7
On commitment of any person by commissioner or judge, executing the warrant (besides necessary expenses out of pocket to be also submitted to and taxed by the taxing officer)	10	0
Messenger's man travelling to place of possession, or to execute warrant of commitment, or for any other purpose specially directed by the court, per mile	0	5
His time, per day	4	6
His expenses, per day	4	6
If messenger directed by the court personally to travel, per mile	0	7
" " " his time, per day	10	0
" " " his expenses, per day	10	0
Preparing and service of notice to creditors by post, each creditor (To include postage and affidavit of service.)	0	4
Ditto, if required by commissioner or judge to be served personally	1	6
Mileage beyond three miles, per mile extra	0	5

The same charges for serving summons on witness, &c. and mileage.

When an inventory is deemed requisite, and is directed by the official assignee to be taken, a proper remuneration may be allowed for taking it, having regard to the time occupied and the nature of the property included in it.

Charges of Auctioneers, Brokers, Accountants, &c.

Sales by auction of goods, chattels, or effects, 10*l.* per cent on the first 100*l.* of gross amount realised; and 5*l.* per cent after to 1000*l.*

If sold by valuation, one-half of the above charges.

These charges are to include all advertisements, lotting, delivering, &c.

If valuation made under sect. 126, a sum not to exceed 2*l.* 10*s.* per cent for inventory and valuation up to 100*l.*, and after to 400*l.*, 1*l.* 5*s.* per cent; and all above, 1*l.* per cent.

Sales by auction of freeholds, leaseholds, policies, &c.:—

5*l.* per cent on the first 300*l.*
then 2*l.* " next 700*l.*

If sold by valuation, one-half of the above charges, or if bought in at the sale and afterwards sold by private contract solely by the negotiation of the auctioneer, one-half of the above charge. If not sold, the expenses to be paid, and a fee to be allowed to the auctioneer, at the discretion of the taxing officer.

Sales by auction of farming stock,—5*l.* per cent on the first 100*l.*, and 2*l.* 10*s.* per cent on the remainder.

If sold by valuation, one-half of the above charges.

Sales of linen drapery, hosiery, silk mercery, &c. sold by tender,—

Under 400*l.*	4*l.* per cent.
Above 400*l.*	3*l.* 10*s.* per cent.

Expenses to be allowed, 2*l.*, to include printing.

Accountant's Charges.

For preparing statement, investigating accounts, &c.:—	s.	d.
Principal's time per day of eight hours, including affidavit	30	0
Clerk's time per same day	10*s.* 6*d.* to 15	0

Fees of Registrars of County Courts.

5. Every county-court registrar may, except in cases *in formâ pauperis*, take the registrar's and official assignee's fees set forth in the Schedule hereunder set forth, and shall quarterly, on the 13th of January, the 13th of April, the 13th of July, and the 13th of October in every year, transmit to the Chief Registrar of the Court of Bankruptcy an account of the said fees received by him, and of the number of adjudications of bankruptcy and of orders of discharge made during the preceding quarter, and there shall, except in cases *in formâ pauperis*, be paid to him out of the Chief Registrar's account the sum of 1*l.* in respect of the adjudication, and 1*l.* in respect of the order of discharge in each bankruptcy; and the said fees and payments shall and may, until further order, be received and retained by him as and for a remuneration in respect of his services as Registrar and Official Assignee in all matters under the said act.

SCHEDULE LAST REFERRED TO.

	s.	*d.*
On dividend meeting	15	0
On an adjourned meeting or sitting	5	0
For office copies of proceedings, each folio of ninety words, sect. 53, 12 & 13 Vic. c. 106	0	1½
Drawing statement of account under sect. 143, if the bankrupt require assistance in that behalf, and report upon the state of the bankrupt's affairs, per folio	0	8
Engrossing two copies, one to file and one to keep, per folio	0	4
Drawing abstract of account, sect. 142	5	0
Paid for printing ditto		
Sending copy by post to each creditor who has not proved, including postage	0	3
Preparing list of creditors entitled to dividend (sect. 178) and forwarding statement by post; each creditor, including postage	0	6
A percentage on the estate collected by official assignee, of 5*l.* per cent on the amount collected.		

N.B.—In charging for drawing, engrossing, or copying any matter mentioned in the foregoing Schedules, to which printed forms are applicable, the printed words are not to be computed by the folio, but the paper and print may be charged for as two folios, at the rate fixed for drawing, engrossing, or copying, as the case may be.

19*th November*, 1861.

No. 26.

Monthly Return of Proceedings from the to the day of 185 , both days inclusive.

BANKRUPT.

Name . . . . . .
Address . . . . . .
Trade . . . . . .
Date of Commission . . . .
Fiat or . . . . .
Filing petition . . .

ADJUDICATION.

Date of . . . . . .
If adjourned or annulled insert accordingly . . . .

PETITIONING CREDITOR.

Name . . . . . .
Residence . . . . . .
Trade . . . . . .

OFFICIAL ASSIGNEE.

Date of appointment . . .
If changed insert accordingly . .

SOLICITOR.

Name . . . . . .
Residence . . . . . .
If changed insert accordingly . .

CREDITOR'S ASSIGNEE.

Date of appointment . . . .
If changed insert accordingly . .

LAST EXAMINATION.

Day appointed for . . . .
Adjourned to . . . . .
Passed or otherwise . . . .

CERTIFICATE.

Date of . . . . . .
Class . . . . . .
Refused or suspended . . .
For special conditions, appeal, &c. see remarks.

AUDIT.

Date of . . . . . .
Amount in hand applicable to dividend . . . . .

DIVIDEND.

No. of, or final . . . . .
Date . . . . . .
Rate . . . . . .
Sum divided . . . . .
Surplus undivided . . . .

REMARKS and SPECIAL CIRCUMSTANCES.

BANKS, Joint-Stock. *See* Joint-Stock Bank.

BANKS.[1] *See* Saving Banks.

(A) *Different Classes of.*

(*a*) *The Bank of England.* *See* Bank of England, *ante*, p. 133.

(*b*) *Banks of Six, or fewer than Six Persons.*[2]

(*c*) *Banking Corporations, and Companies of Seven or more Persons.*[3]

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[1] As to license to be obtained, *see* 9 Geo. 4, c. 25, ss. 2, 3; 7 & 8 Vic. c. 32, s. 22.

[2] By 39 & 40 Geo. 3, c. 28, s. 15, more than six persons were prohibited from acting as bankers; and banks of six, or fewer than six persons, who, on the 6th May, 1844, were carrying on the business of a banker in England or Wales, having first obtained a license and given security by bond, may, subject to the restriction hereinafter specified, and except within the City of London, or within three miles thereof, issue, on unstamped paper, promissory notes for five pounds or upwards, payable to bearer on demand, or to order, at any period not exceeding seven days after sight; and also draw and issue, on unstamped paper, bills of exchange, payable to order on demand, or any period not exceeding seven days after sight, or twenty-one days after date; provided such bills of exchange be drawn on a bank in London, Westminster, or Southwark, or be drawn by a banker or bankers at a town or place where he or they shall be duly licensed to issue unstamped notes and bills upon himself or themselves, or his or their co-partner or co-partners, payable at any other town or place where such banker or bankers shall also be duly licensed to issue such notes and bills as aforesaid. 9 Geo. 4, c. 23, s. 1. *See* also 7 & 8 Vic. c. 32, s. 26, as to other bills.

[3] Banking corporations, and companies of more than six persons, are forbidden to issue in London, or within sixty-five miles thereof, any bill or note for the payment of money on demand, or to borrow, owe, or take up any sum of money on their notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the exclusive privileges of the Bank of England; but if they carry on business in London, or within sixty-five miles thereof, they may draw, accept, or indorse bills of exchange, provided they be not payable to the bearer on demand. 7 & 8 Vic. c. 32, s. 26. This restriction was formerly larger. 3 & 4 Wm. 4, c. 98, s. 3; and 39 & 40 Geo. 3, c. 28, s. 15. See *Bank of England v. Anderson*, 3 Bing. N. C. 589. *Booth v. Bank of England*, 6 id. 415. Such a corporation or company, however, having an establishment more than sixty-five miles from London (provided it carried on the business of banking and issued notes on the 6th May, 1844), may, subject to the restrictions hereafter specified, issue bills or notes payable on demand, or otherwise, at the place where they are issued, and also at London (3 & 4 Wm.

4, c. 98, s. 2, and id. c. 83, s. 2); and have an agent in London, or any other place where the same shall be made payable, for the purpose of such payment only. But no such bill or note shall be for less than five pounds, or be re-issued in London, or within sixty-five miles thereof. Even beyond the distance of sixty-five miles from London, such a corporation or company can only issue such bills or notes subject to the regulations prescribed by stat. 7 Geo. 4, c. 46, which directs that their bills and notes shall be made payable at some place or places specified thereon, exceeding the limited distance (subject, however, to the license given by 3 & 4 Wm. 4, c. 98, s. 2; id. c. 83, s. 2; and 7 & 8 Vic. c. 32, ss. 11, 22); that the corporation or copartnership shall have no establishment as bankers in London, or within sixty-five miles thereof; and every member of such corporation or partnership shall be responsible for the payment of bills and notes issued by the corporation or partnership, such person being a member at the date of the bills or notes, or becoming so before they are payable, or while any sum on any of them is unpaid; and that they shall deliver into the Stamp Office before they issue any bills or notes, and every year afterwards, between February 28th and March 25th, an account in form specified in a schedule to the act, which account sets forth the true name of the corporation or partners, and of every bank established by them, and the names and abode of two members, resident in England, who have been appointed public officers of the corporation or partnership. A further account is also to be delivered within the year, if there be any change in the officers or members. The co-partnership is to sue and be sued in the name of one of the above-mentioned officers. This is compulsory. *Steward v. Greaves*, 10 Mee. & W. 711. And in such suits the officer is not allowed to plead his individual bankruptcy; at all events, where the plaintiff will undertake not to sue out execution against his person, lands, or goods (*Steward v. Dunn*, 11 Mee. & W. 63); though the appointment of the officer may be otherwise proved. *Edwards v. Buchanan*, 3 B. & Adol. 788. A copy of the account, certified under the hand of one of the Commissioners of Stamps, is evidence of his appointment. This copy also proves that all persons named therein were members at the period of its date. A copy of the return so certified is evidence by itself of the facts stated in it; and it is not necessary to prove *aliunde* that the person who made the affidavit annexed was the public officer; and his continuance in office, till the contrary is shown, will be presumed. *Steward v. Dunn*, 12 Mee. and W. 655. It will likewise be evidence that the persons named were members at the time of swearing the affidavit, if no other date be assigned, and notwithstanding it may appear not to have been made between February 28th and March 25th, the period prescribed for making the return. *Bosanquet v. Woodford*, 5 Q. B. 310.

As to the degree of certainty required in the return, see *Armitage v. Harmer*, 3 B. & Adol. 793. A decree or judgment against such public officer binds the copartnership, and execution may be taken out against any member for the time being; and if that prove ineffectual, against any person who was a member at the time of the contract, or became a member before it was executed, or was a member at the time of judgment obtained: but no such execution as last-mentioned can be issued without leave first granted on motion in open court, which motion cannot be made without notice to the party sought to be charged, nor more than three years after he has ceased to be a member. See *Barker v. Buttress*, 7 Beav. 134; from which case it would appear, that in the event of the death of a shareholder, against whom execution had not been obtained, a *scire facias* would not be maintainable against his representatives.

The practical mode of charging members after a judgment against the public officer is by *scire facias*, which in the case of an actual member issues as of course; in the case of a late member, by leave on motion made in open court. *Cross v. Law*, 6 Mee. & W. 217; 8 Dowl. 794. *Whittenbury v. Law*, 6 Bing. N. C. 354. *Ransford v. Bosanquet*, 12 Ad. & E. 813. *See post*, Joint-Stock Company. Against the officer himself no *scire facias* is necessary, he being a party on the record. 8 Dowl. 899. *Harwood v. Law*, 7 Mee. & W. 203. The right of suing and being sued by their own members through the medium of their public officer is extended to them by 1 & 2 Vic. c. 96, and they are prohibited from setting off their shares in any such suit.

The issue of bank-notes or bills, whether by banks of many or few partners, is now subject to the following restrictions, imposed by the stat. 7 & 8 Vic. c. 32, the present Bank Charter Act; which does not, however, apply to the Bank of England (sect. 28). It provides, by sect. 10, that no person other than a banker who, on May 6, 1844, was lawfully issuing his own bank-notes, shall make or issue them in the United Kingdom. And by sect. 11, "It shall not be lawful for any banker to draw, accept, make, or issue, in England or Wales, any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand, save and except that any banker who was on May 6, 1844, lawfully issuing his own bank-notes under the authority of a license, may continue to issue such notes, but only to the extent and under the conditions afterwards mentioned." But it declares that the right of any company or partnership to continue the issue shall not be prejudiced by any change which may take place in the personal composition of it, either by transfer of shares or the admission of any new partner, or the retirement of any present member: provided that it shall not be lawful for any company or partnership, then consisting of only six, or less than six persons, to issue such notes

BANKS of Rivers.[1]

after the number of partners shall exceed six in the whole.

By sect. 12, if a banker becomes bankrupt, or ceases to carry on the business of a banker, or discontinues the issue of bank-notes, he may not afterwards issue them.

By sect. 13, every banker who claimed the right of issuing such notes was directed, within one month after the passing of the act, to give notice to the Commissioners of Stamps and Taxes of such claim, who were thereupon to ascertain whether he was on May 6, 1844, a banker lawfully issuing his own notes, and if he were to ascertain the average amount of the bank-notes of such banker, or of united banks, which were in circulation during the period of twelve weeks preceding April 12, 1844, and to certify such amount when so ascertained to the banker, and to publish it in the *Gazette*. *See* sect. 15. The statute then declares that such banker shall not, at any time after October 10, 1844, have in circulation upon the average of four weeks (for the ascertainment of which there are special provisions, ss. 18, 19, 20), a greater amount of notes than the amount so certified. A bank exceeding this limit forfeits a sum equal to the excess (sect. 16); but in the event of two banks, each of which consists of more than six members uniting, the commissioners may make a fresh certificate of the aggregate of the amounts they were entitled to issue, and thereupon the united body may issue notes to the extent so certified.

Banks established since 1857, and banks previously established under the 8 Vic. c. 113, and 10 Vic. c. 57, were bound to register themselves under the 20 & 21 Vic. c. 49, and are subject to the provisions of that act. The formation of new banking corporations is now regulated by the 13th section of 20 & 21 Vic. c. 49, by which "seven or more persons associated for the purpose of banking may register themselves under this act as a company *other than a limited company* (*see* 21 & 22 Vic. c. 91, *infra*), subject to this condition, that the shares into which the capital of the company is divided shall not be of less amount than 100*l.* each; but not more than ten persons shall after the passing of this act, unless registered as a company under this act, form themselves into a partnership for the purpose of banking, or if so formed, carry on the business of banking." The prohibition against limited liability is repealed by 21 & 22 Vic. c. 91. The first section of this statute enacts, that "so much of the Joint-Stock Banking Companies Act, 1857, as prohibits a banking company from being formed under that act with limited liability shall be repealed, subject to the following proviso: that no banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue, but shall continue, subject to unlimited liability in respect thereof, and that, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the shareholders shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as shareholders of a limited company."

The mode of suing or being sued, the service of notices, &c., are the same as with respect to ordinary joint-stock companies. *See* Joint-Stock Banking Companies Act, 1857, 20 & 21 Vic. c. 49, s. 2, incorporating Joint-Stock Companies Acts, 19 & 20 Vic. c. 47, and 20 & 21 Vic. c. 80. *See post*, Joint-Stock Companies.

As to the winding up of banking companies, *see* 20 & 21 Vic. c. 49; 21 & 22 Vic. c. 60; and *post*, Joint-Stock Companies.

Execution cannot issue against the property of individual shareholders. Even in the case of actions pending at the time the 20 & 21 Vic. c. 49 was passed, there is a proviso in the act that "execution shall not issue against the effects of any individual shareholder in or member of such company, upon any judgment, decree, or order obtained against such company in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company in manner directed by the Joint-Stock Companies Acts, 1856 and 1857.

[1] Are thus defined: "The banks of a river are those elevations of land which confine the waters when they rise out of the bed, and the bed is that soil so usually covered by the water as to be distinguishable from the banks by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water." *Per Curtis, J., Howard v. Ingersoll*, 13 How. 426; 2 Hill on Torts, 106 n. Hall on Sea-shores, p. 192.

Where in trespass the object of the plaintiff was to prove himself the owner of the entire bed of a river flowing between his land and that of the defendant, and thus to rebut the presumption that each party was entitled *ad medium filum aquæ* (*Brisco v. Lomax*, 8 Ad. & E. 198; 3 Nev. & P. 388, S. C.), he was allowed to give in evidence acts of ownership exercised by himself upon the bed and banks of the river on the defendant's side lower down the stream, where it flowed between the plaintiff's land and the farm of a third party adjoining the defendant's property; as also repairs which he had done beyond the limits of the defendant's land to a fence, which, dividing that and other land from the river, ran along the side of the stream for a considerable distance, till it came opposite to the extremity of the plaintiff's property on the other side. *Jones v. Williams*, 2 Mee. & W. 237. See *Doe v. Kemp*, 7 Bing. 332; S. C. 2 Scott, 9.

BANS, Proclamation of. *See* Divorce; Marriage.

BAR.[1]

BAR, Plea in.[2] *See* Estoppel; Pleading.

BARRATRY. In Sc. L., the crime of a Judge who accepts a bribe. Bell's *Dict.*

BARGAIN and Sale.

I. As relates to Realty.[3]

[1] The place in court which barristers or advocates occupy while addressing the court or jury. It is also applied to where prisoners are brought for the purpose of being arraigned or sentenced.

A trial at bar is a trial had before the full court in term, in contradistinction to the ordinary trial at Nisi Prius. In Scotland, trials at bar do not occur in civil cases, but trials there on criminal charges usually take place before two or three judges of the Court of Justiciary. A case at bar is a case immediately before the court, a case under argument. Advocates as a public body are figuratively called "the bar."

[2] A special plea constituting a sufficient answer to an action at law, and so called because it barred, *i. e.* prevented the plaintiff from further prosecuting it with effect, and if established by proof, defeated and destroyed the action altogether. Now called a special plea in bar. *See* Abatement, *ante*, vol. i. p. 13 n.; Pleading.

[3] A conveyance that must be in consideration of money, though that consideration be only nominal. Watk. p. 306, 5th edit. All private persons having an estate of freehold in possession, vested remainder or reversion, may convey by bargain and sale, in fee for life or for years (4 Cruise, T. 32, c. 9, s. 4, 11, 15, 18; Watk. *Conv.* 3d ed. by Pres. 203); and not only corporeal hereditaments, but also incorporeal hereditaments in actual existence may be conveyed by bargain and sale. 4 Cruise, T. 32, c. 9, s. 16. But things not *in esse*, such as a right of common or way not before created, or estrovers, cannot be so conveyed (4 Cruise, T. 32, c. 9, s. 17; Pres. Shep. T. 222); for as they are not existing, no one can be seised of them. And a person having only a chattel interest in lands cannot convey it by bargain and sale, because he has no seisin out of which a use can arise. 4 Cruise, T. 32, c. 9, s. 18. A common-law bargain and sale may, however, be made of chattels personal. *See post*, p. 373. A bargain and sale, if enrolled within the proper time, binds the land in point of title from the execution thereof; so that if the bargainor attempt to dispose of or charge the estate between the delivery of the deed and the enrolment, such an intervening disposition or charge would be void. 1 Pres. Shep. T. 226–7; 2 id. 511; 4 Cruise, T. 32, c. 9, s. 34; 3 Jarm. & Byth, by Sweet, 238; Burton, s. 142. And the death of the bargainor or bargainee before enrolment is not material. 4 Cruise, T. 32, c. 9, s. 35. And an assurance made by the bargainee before enrolment is valid if the bargain and sale is afterwards duly enrolled. 3 Jarm. & Byth, by Sweet, 238.

As to enrolment 27 Hen. 8, c. 16, enacts that no "manors, lands, tenements, or other hereditaments shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and enrolled in one of the king's courts of record at Westminster, or else within the same county or counties where the same manors, lands, or tenements so bargained and sold lie or be before the *custos rotulorum*, and two justices of the peace and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one, and the same enrolment to be had and made within six months next after the date of the same writings indented." But by sect. 2 it is provided that this enactment shall not "extend to any manor, lands, tenements, or hereditaments lying or being within any city, borough, or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers have authority, or have lawfully used or enrol any evidences, deeds, or other writings within their precinct or limits, anything in this act contained to the contrary notwithstanding."

The deed must be an indenture, and the enrolment must be on parchment. 1 Pres. Shep. T. 221, 223. The computation of the time for enrolment is by lunar months, except in the case of a disentailing assurance, and from and exclusive of the day of the date of the deed; or, if it bears no date, or an impossible one, from and inclusive of the day of delivery. 3 Jarm. & Byth, by Sweet, 238; Burton, s. 141; 1 Pres. Shep. T. 223. The enrolment may be made after the death of either party. (Id.) The bargain and sale, as such, cannot, after the end of six months, or even during the six months, be given in evidence or pleaded, unless it has been enrolled within the six months. 1 Pres. Shep. T. 222. By the stat. 5 Eliz. c. 26, bargains and sales of lands lying in the counties palatine of Lancaster and Chester, and the

II. As relates to Personalty.[1]

BARGEMEN. *See* Carriers.

BARON and Feme. *See* Husband and Wife.

BARRATOR.[2] *See* Champerty; Maintenance.

BARRISTER.[3] Admissions by, *see* vol. i. p. 202; Advocate, id. p. 217; and Libel; Conveyancer; Slander; Special Pleader.

I. Mode and Qualifications for obtaining Degree of, p. 375.
II. Classes and Degrees of Rank of, p. 377.
III. Exclusive Audience and Pre-Audience of, p. 378.
IV. Right to and Obligation of Parties to Appear by or in Person, p. 378.
V. Retainer of, p. 378.
VI. Power to Compromise or Refer, etc. p. 379.
VII. His Fees a Honorarium, p. 379.
VIII. Not liable to an Action for Negligence, p. 380.
IX. His Privilege of Speech, p. 382.
X. Privilege to lay the Venue in Middlesex, p. 382.
XI. His Privilege from Arrest, p. 383.
XII. Communications to are Privileged, p. 383.

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bishopric of Durham, are required to be enrolled in the respective courts of those counties. And by the stat. 5 Anne, c. 18, 6 Anne, c. 35, and 8 Geo. 2, c. 6, bargains and sales of lands lying within the west, east, and north ridings of the county of York, may be enrolled before the registrars of those ridings. 4 Cruise, T. 32, c. 9, s. 30.

[1] A bargain and sale of personal chattels is an agreement to sell, followed and completed by an actual sale. Com. Dig. Bargain and Sale (A). This term is frequently applied to the transfer of property in goods; the word "bargain" denoting the arrangement of the terms in which the one party sells and the other buys; and the word "sale" expressing the completion of the contract, so as to pass the property from seller to buyer. Shep. Touch. 221. In such cases the seller is called the "bargainor" and the buyer the "bargainee," and the two parts of the transaction taken together (including the offer and acceptance of a consideration) constitute the whole contract of buying and selling personal goods so effectually as to change the property. (Id.)

A bargain and sale of chattels is sometimes termed an assignment, and may in general be made by parol; that is, either by mere writing or by mere word of mouth, and does not require the solemnity of a deed. But instruments in writing are frequent, and in some cases essential, and are either in the form of a mere note or memorandum, or of a regular assignment, which last is ordinarily denominated a bill of sale. 2 Steph. Com. 104. *See* Bill of Sale. They must now be registered. 17 & 18 Vic. c. 36.

[2] Barrator, from *barractator*, Lat. a knave; or *barrateur*, Fr., a deceiver, a common mover and maintainer of suits in disturbance of the peace, and in taking and detaining the possession of houses and lands or goods by false inventions. 8 Rep. 37; Co. Lit. 368; 4 Bl. Com. 134.

[3] L. Lat. "*barrasterius*," from *barra*, a bar (*see* Bar, *ante*, p. 372); in French, from *barreau*, a bar of wood or iron: figuratively, the place in a court of justice appropriated to the advocates. The term "barrister," in England, it is said, arose from the arrangement of the halls of the different inns of courts. The benchers and readers, being the superiors of each house, occupied, on public occasions of assembly, the upper end of the hall, which was raised on a dais, and separated from the rest of the building by a bar. The next in degree were the utter barristers, who, after they had attained a certain standing, were called from the body of the hall to the bar, *i.e.* the first place outside the bar, for the purpose of taking a principal part in the mootings, or exercises of the house, and hence they probably derived the name of "utter" or outer barristers. The other members of the inn, consisting of students of the law under the degree of utter barristers took their places nearer to the centre of the hall and farther from the bar, and from this manner of distribution appear to have been called "inner" barristers. The distinction between utter and inner barrister is at present abolished; the former are called barrister, generally, and the latter are called students. The degree of utter barrister, though it gave rank and precedence in the inns of court, and placed the individual in a class from which advocates were always taken, did not originally give any authority to plead in the courts of justice. In the old reports

of the proceedings of courts the term is unknown; serjeants and apprentices-at-law, who are supposed by Dugdale to be the same persons, being the only pleaders or advocates mentioned in the earlier year-books. In the time of Stowe, however, who wrote in the latter part of Elizabeth's reign, it is clear that utter barristers were entitled to act as advocates, as he expressly says that persons called to that degree are "so enabled to be common-councillors and to practise the law, both at their chambers and at the barres."

The degree of Serjeant is of very remote antiquity. It may be traced to the Norman conquest. The name is derived from special services exacted under the system of feudal tenures introduced by William I. He created serjeanties of various kinds, some were connected with the administration of justice. Many of the great vassals of the crown imitated their sovereign in the creation of similar appointments. Serjeants, or countors, or narrators, have existed from time immemorial. They are recognised in a parliamentary document of 3d Edward I. Whether the Common Pleas is an immemorial court, or was established within the time of legal memory, taking its origin from Magna Charta, is *vexata quæstio*. Its antiquity has been suggested as being as early as 7th Richard I. In the preface to the 10th Report, Lord Coke, expressing the opinion of the profession at that time, attributes the existence of serjeants to a period far more remote—he speaks of them as known anterior to the Conquest. This intimation is based upon passages taken from the *Mirror of Justice*, a work of authority supposed to have existed antecedent to the subjugation of England by the Normans. The writer thus expresses himself: "There are many who know not how to defend their causes in judgment, and there are many who do, and therefore pleaders are necessary; so that that which the plaintiffs in an action cannot know how to do by themselves, they may do by their serjeants, attorneys, or friends. Countors are serjeants skilful in the laws of the realm, who serve the common people to declare and defend actions in judgment for those who have need of them for their fees. Every serjeant is chargeable by the oath that he shall do no wrong, or falsify contrary to his knowledge, but shall plead for his client the best he can, according to his understanding." Lord Coke, in the same preface, states that "there are two sorts of business to be done in prosecutions: one by the countor or serjeant, another sort to be done by the friend or *procuratis;* the latter now called attorney. The only persons spoken of as pleaders are the serjeants or countors." There is no time in which it can be shown that serjeants did not practise with their present privileges, nor can it be shown that there were other practitioners in early times, in other courts, except what were called apprentices.

Fortescue (c. 50, p. 175) writes thus:—"There is an honorary estate no less celebrated and solemn than that of a 'Doctor of Law,' which is called the degree of a 'Serjeant-at-Law.' It is conferred in the following manner:—The Chief Justice of the Common Pleas, by and with the advice and consent of the judges, is wont to pitch upon, as often as he sees fitting, seven or eight persons, such as have made the greatest proficiency in the general study of the laws, and whom they judge best qualified. The manner is to deliver in their names, in writing, to the Lord Chancellor, who, by virtue of the King's writ, shall forthwith command every one of the persons so pitched upon, that he be before the King at a day certain, to take upon him the state and degree of Serjeant-at-Law, under a heavy penalty." The author then describes the oath to be taken; the giving of gold and a banquet. He further states, "No one, be he never so well read and practised in the law, can be made Judge of the King's Bench or Common Pleas, unless he be first called to be a Serjeant-at-Law, wherefore to this day no one hath been admitted to the state and degree of a Serjeant-at-Law till he hath been first a student and a barrister for full sixteen years."

"The ancient practice of appointing judges from amongst the serjeants has of late years been eluded, by making the intended judge a serjeant *pro re nata*, or an occasional serjeant."—*See* Manning, 74, n.

The number of serjeants is unlimited, The Crown has a right to call to that estate any number the interest of the suitors or the convenient administration of justice may require. Indeed, the acceptance of the office has been deemed compulsory. Cases might be cited in which persons have been fined for not taking upon themselves the degree of serjeant. He was always created by a common-law writ, a process which cannot be annulled by the Crown or the judges. *See* Manning's *Case of the Serjeants;* Forsyth's *Hortensius, or the Advocate;* Warren's *Law Stud.;* Smith's *Edu. for the Bar.*

Anciently, the Sovereign commanded the apprentice, or utter barrister, to take upon himself the estate and degree of serjeant; now, it is usually applied for. The Common-Law Commissioners, in their Report of 1829, say, that "The crown has the power to appoint an unrestricted number of serjeants, and that an application for the appointment was rarely unsuccessful. The rank in question entitles a serjeant to audience in all courts, immediately after the junior Queen's counsel."

Serjeants may be required to attend the House of Lords. The rank existed long before that assembly, and even before the peers existed necessary to constitute it, and nearly 400 years before the rank of Queen's counsel was known. The first Queen's counsel was appointed in 1604. A barrister is an esquire by his office. 1 Wils. 244.

Many modern statutes contain provisions relating to the creation and continuance of the office of Serjeant. *See* 39 Geo. 3, c. 113; 6 Geo. 4, c. 95.

The 9 & 10 Vic. c. 54, abolished the ex-

I. Mode and Qualification for obtaining the Degree of.[1]

clusive right of serjeants to practise in the Common Pleas.

[1] A party must be entered a member of one of the Inns of Court, viz. the Inner Temple, Middle Temple, Lincoln's Inn, or Gray's Inn. A *mandamus* will not lie to command admission of an applicant, nor to the degree of barrister, or to restore one disbarred (Tapping 138, 139); the remedy is by appeal to the judges. (Id.) The following regulations are prescribed by these societies. H. T. 1852:—

As to Legal Education.—1. "That the four Inns of Court shall act in concert with each other in the joint establishment and maintenance of an uniform system for the legal education of students before admission to the bar.

2. "That a standing committee or council be established, to consist of eight benchers, two to be nominated by each of the Inns of Court, and of whom four shall be a quorum. The members shall remain in office for two years, and each inn shall have power to fill up any vacancy that may occur in the number of its nominees during that period. To this council shall be entrusted the power and duty of superintending the whole subject of the education of the students.

3. "That for the purpose of affording to the students the means of obtaining instruction and guidance in their legal studies, five readerships or professorships shall be established, which shall consist of the three readerships already established by the Societies of the Middle Temple, the Inner Temple, and Gray's Inn — viz. on Jurisprudence and the Civil Law, the Law of Real Property, and the Common Law — and also of a Reader on Equity, to be named by the Society of Lincoln's Inn, and of a Readership on Constitutional Law and Legal History, to be founded by the four societies jointly. The readers shall be appointed for a period of three years, and the Reader on Constitutional Law and Legal History shall be chosen by the standing council.

4. "That the duties of the readers (subject to regulation by the standing council) shall consist of the delivery of three courses of lectures in each year, of the formation of classes of students for the purpose of giving instruction in a more detailed and personal form than can be supplied by general lectures, and of affording to students generally advice and directions for the conduct of their professional studies.

5. "That the four Inns of Court shall form a common fund by annual contributions, the amounts of which shall be mutually agreed on, and out of which fund shall be drawn the stipends to be assigned to the readers, and such studentships as shall from time to time be conferred upon students.

6. "That the lectures and classes of the readers shall be open to the students of all the societies without distinction, subject to the payment of such fees as are hereinafter directed.

7. "That the stipend of each reader shall be three hundred guineas per annum, and such stipends, and also the expense of the studentships, shall be wholly defrayed out of the common fund, to be raised by the contributions of the several societies.

8. "That each student shall on admission pay a sum of five guineas, which shall entitle him to attend the lectures of all the readers.

9. "That the fund composed of such last-mentioned payments shall be annually divided among the five readers equally, in addition to their stipends.

10. "That (subject to regulation by the council) every student shall be at liberty to attend such classes as he may think necessary, upon payment of a moderate fee to the reader, but care shall be taken by the council that such fees shall not in any year exceed the sum of three guineas.

11. "That for the purposes of education the legal year shall be considered as divided into three terms or periods, one commencing with the 1st of November and ending on the 22d of December, the second commencing on the 11th of January and ending on the 30th of March, and the third commencing on the 15th of April and ending on the 31st of July, subject to a deduction of the days intervening between the end of Easter and the beginning of Trinity Term.

12. "That no student shall be eligible to be called to the bar who shall not either have attended during one whole year the lectures of two of the readers, or have satisfactorily passed a public examination.

13. "That public examinations shall be instituted, to be held three times a-year, for the examination of all such students as shall be desirous of being examined previously to being called to the bar, and such examinations shall be conducted by at least two members of the council jointly with the five readers, and certificates of having honourably passed such examination shall be given to such students as shall appear to the examiners to be entitled thereto.

14. "That such examinations shall be held in Michaelmas Term, Hilary Term, and Trinity Term.

15. "That as an inducement to students to propose themselves for examination, studentships shall be founded of fifty guineas per annum each, to continue for a period of three years, and one such studentship shall be conferred on the most distinguished student at each public examination; and further, the examiners shall select and certify the names of three other students who shall have passed the next best examinations, and the Inns of Court to which such students belong may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such students previously to their being called to the bar. Provided that the examiners shall not be obliged to confer or grant any studentship

or certificate, unless they shall be of opinion that the examination of the students they select has been such as entitles them thereto.

16. "That at every call to the bar those students who have passed a public examination, and either obtained a studentship or a certificate of honour, shall take rank in seniority over all other students who shall be called on the same day.

17. "That the standing council shall have power to grant dispensations to students who shall have been prevented by any reasonable cause from complying with all the regulations as to the attendance on lectures which shall from time to time be established."

As to Uniformity in Admission, &c. of Students.—18. "That it is expedient that henceforward there should be uniformity of usage at the respective Inns of Court as to the admission of students as members of those societies.

19. "That it is expedient that no attorney-at-law, solicitor, writer to the signet, or writer to the Scotch courts, proctor, notary public, clerk in Chancery, parliamentary agent, or agent in any court original or appellate, clerk to any justice of the peace, or person acting in any of these capacities, and no clerk of or to any barrister, conveyancer, special pleader, equity draftsman, attorney, solicitor, writer to the signet, or writer of the Scotch courts, proctor, notary public, parliamentary agent, or agent in any court original or appellate, clerk in Chancery, clerk of the peace, clerk to any justice of the peace, or of or to any officer in any court of law or equity, or person acting in the capacity of any such clerks, should be admitted a member of any of the said societies for the purpose of being called to the bar, or of practising under the bar, until such person, being on the roll of any court, shall have taken his name off the roll thereof, nor until he and every other person above named or described shall have entirely and *bonâ fide* ceased to act or practise in any of the capacities above named or described.

20. "That it is expedient that no member of any of the said societies should be allowed to apply for, or take out, any certificate to practise, either directly or indirectly, as a special pleader, or conveyancer, or draftsman in equity, without the special permission of the Masters of the Bench of each society respectively, and that no such permission should be granted until the member applying shall have kept twelve terms.

21. "That such permission should only be granted for one year from the date thereof, but may be renewed annually by order, as aforesaid.

22. "That it is expedient that no person be allowed to obtain any such certificate unless he shall have attended such lectures, or passed such an examination, as under the preceding rules would be necessary to entitle him to be called to the bar.

23. That it is expedient that the following forms should be adopted by the said societies on applications for admission as members:—

"I, of aged the son of of in the county of [*add* father's profession, if any, and the condition in life and occupation, if any, of the applicant], do hereby declare that I am desirous of being admitted a member of the Honourable Society of for the purpose of keeping terms for the bar, and that I will not, either directly or indirectly, apply for or take out any certificate to practise, directly or indirectly, as a special pleader, or conveyancer, or draftsman in equity, without the special permission of the Masters of the Bench of the said society.

"And I do hereby further declare that I am not an attorney-at-law, solicitor, a writer to the signet, a writer of the Scotch courts, a proctor, a notary public, a clerk in Chancery, a parliamentary agent, an agent in any court original or appellate, a clerk to any justice of peace, nor do I act, directly or indirectly, in any such capacity, or in the capacity of clerk of or to any of the persons above described, or as clerk of or to any officer in any court of law or equity.

"Dated this day of (Signature.)

"We, the undersigned, do hereby certify that we believe the above-named to be a gentleman of respectability and a proper person to be admitted a member of the said society.

Barristers of

"Approved,

Treasurer, or, in his absence, by two Benchers."

24. "That it is expedient that every member of the said societies should have kept twelve terms before being called to the bar, unless any term or terms shall have been dispensed with under the 15th preceding rule.

25. "That it is expedient that every member of the said societies should have attained the age of twenty-one before being called to the bar.

26. "That it is expedient that members of the said societies, who shall at the same time be members of the Universities of Oxford, Cambridge, Dublin, London, or Durham, or of the Queen's University in Ireland, should be enabled to keep terms by dining in the halls of their respective societies any three days in each term.

27. "That members of the said societies, who shall not at the same time be members of the said universities, should be enabled to keep terms by dining in the halls of their respective societies any six days in each term.

28. "That it is expedient that no day's attendance in the respective halls should be available for the purpose of keeping term, unless the member so attending shall have been present at the grace before dinner, during the whole of dinner, and until the concluding grace shall have been said.

29. "That it is expedient that no member of any of the said societies, desirous of being called to the bar, should be so called until the name and description of such candidate shall have been placed upon the screens hung in the halls, benchers' rooms, and treasury or steward's offices, of each society, fourteen days in term before such call.

II. Classes and Degrees of Rank.[1]

30. "That it is expedient that the name and description of every such candidate should be sent to the other Inns of Court, and should also be screened for the same space of time in their respective halls, benchers' rooms, and treasury or steward's offices.

31. "That it is expedient that the above regulations as to screening names, &c., should be applied to members seeking certificates to practise as special pleaders, conveyancers, or equity draftsmen.

32. "That it is expedient that no call to the bar should take place except during term; and that such call should be made on the same day by the several societies, namely, on the 16th day of each term, unless such day happen to be Sunday, and in such case on the Monday after."

Stamp on admission to one of the Inns of Court, 25*l.*; to the degree of barrister, 50*l.* Sched. 55 Geo. 3, c. 184.

As to penalty on unqualified persons, for fee or reward drawing or preparing any conveyance, *&c.*, *see* 44 Geo. 3, c. 98.

[1] The different orders of practisers are thus stated by Fleta (lib. ii. c. 37),— *Servientes, narratores, attornati, et apprenticii.* The apprentices, it should seem, were students, who, it is said (and probably by the above ordinance), were first permitted by Edward I. to practise in the King's Bench, in order to qualify themselves to become, in a course of years, *servientes* or *serjeants.* Whether *servientes* and *narratores* (or, as they were called in French, *countors*) were two distinct orders, or narrator was only an additional description of a serjeant, may be doubted. It has commonly been taken in the latter sense, in stat. Westminster 1, c. 29, where the same words come together, *si serjeant countor, ou autre;* and that statute ordains imprisonment for a year and a day, on a person of that description, who was guilty of any collusion in practice. As neither attorneys nor apprentices are mentioned in that statute, we may suppose such persons were not then entrusted with the conduct of business in court; if so, it is probable they had not that authority till the above ordinance; though it may be observed, that Fleta speaks of them as equally subject to this punishment with *serjeant countors.*" 2 Reeves's *Hist. of Eng. Law*, 284. In his 5th or supplementary volume, relating to the reign of Elizabeth, he says, "We have seen that heretofore there were only two descriptions of advocates: these were serjeants and apprentices. But we find in this reign, and no doubt it had been so some time, that the orders of the profession were these: the lowest was a student, called also an inner barrister; and so distinguished from the next rank, which was that of an outer, or utter, barrister; then came an apprentice; and next a serjeant." 5 Reeves, 247. Manning, App. 169.

There are several degrees of rank amongst counsel:—Attorney and Solicitor-General, Queen's Ancient Serjeant, Queen's Serjeants, Queen's Counsel, Serjeants-at-Law, Barristers, with patents of precedence to rank as stated in the patent, and Barristers-at-Law, called, as we have seen, Utter Barristers, Queen's Serjeants, and Queen's Counsel. Members of the bar with patents wear silk gowns, and sit within the bar. Serjeants wear cloth gowns, and have precedence of barristers; and they have also sometimes patents of precedence, entitling them to rank before Queen's counsel. Barristers wear stuff gowns, and hence are sometimes called "stuff gownsmen." The Queen's counsel are generally elected benchers of their respective inns of courts, but the serjeants form a separate community. By ancient custom, each judge of a common-law court, before sitting in court, is made a serjeant. The Queen's counsel attach themselves to a particular court in Chancery, but this arrangement is not acted upon in the common-law courts. Strictly, at Nisi Prius there is no distinction, but practically only the Queen's counsel and serjeants occupy places within the bar.

In Scotland there are no silk gowns except two, viz. the Lord Advocate and the Solicitor-General. The Dean of the Faculty of Advocates is elected by the faculty to be their head and preside at their meetings. Counsel are there assigned to conduct the cause of pauper and indigent persons.

In France, the bar consisted of an order known as the *noblesse de la robe*, whose only patent of nobility was admission on the roll of advocates, and from whose ranks were taken the magistrates, who, as members of the parliament of Paris, represented the feudal court and council of the ancient kings.

Before any one was admitted as a member of the order, or allowed to enrol his name upon the list or *tableau*, which was kept by the parliament, he was formally presented by some advocate of long standing, as with us — one of the benchers of the inns of court performs that office — and obliged to take an oath of advocacy, "*serment d'advocacerie.*"

The candidate, after taking this oath, became an *ancient écoutant*, and entered upon a novitiate for several years of study and attendance on the court before his name was actually inscribed upon the roll of advocates. He thus became a duly qualified member of the order, and subject to its rules and discipline.

Among a great variety of minute regulations were the following:—

"He was not to undertake just and unjust causes alike without distinction, nor maintain such as he undertook without trickery, fallacies, and misquotations of authorities.

"He was not to compromise the interests of his clients by absence from court when the cause in which he was retained was called on.

"He was not to exhibit a sordid avidity of gain by putting too high a price upon his services.

III. Exclusive Audience and Pre-audience, of.[1]

IV. Right to and Obligation of Parties to Appear by or in Person.[2]

V. Retainer of.[3]

"He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

"He was not, under pain of being suspended, to refuse his services to the indigent and oppressed."

The "order" of advocates, and the rules and regulations by which it was governed, were extinguished by the Revolution. But in 1804 Napoleon I. decreed the re-establishment of the order, "as one of the means most proper to maintain the probity, delicacy, disinterestedness, desire of conciliation, love of truth and justice, an enlightened zeal for the weak and oppressed, which are the essential foundations of their profession." In 1810 he issued an imperial ordinance, containing a number of rules, for the purpose of regulating "that salutary discipline of which advocates showed themselves such jealous guardians in the palmy days of the bar." Amongst the rights and duties thus prescribed occur the following: "We expressly forbid advocates to add their signatures to opinions, pleadings, or writings which are not their own, or which they have not duly considered; we likewise forbid them to make any bargains for their fees, or to compel their clients to recompense them before the conclusion of a case (*à reconnaître leurs soins avant les plaidoiries*), under the penalty of a reprimand for the first offence, and expulsion from the bar in case it is repeated."

[1] In all the superior courts of law and equity barristers have exclusive audience; but in inferior courts, including the Bankruptcy Court, attorneys or solicitors are allowed to plead orally and conduct cases. Prior to 14th December, 1814, the Queen's ancient serjeant took precedence of the attorney and solicitor-general; but by an order of court the latter are to have precedence, and in the Queen's business the attorney-general has pre-audience in the Court of Exchequer over the postman and tubman. 7 Mee. & W. 188; 9 Dowl. 276; 8 id. 834. 1 Scott, N. R. 391. The Queen's ancient serjeant, it is said, has precedence of the Queen's advocate; the Queen's advocate has precedence of the attorney and solicitor-general; and the attorney and solicitor-general have precedence of the Queen's ancient serjeant. Manning's *Serjeants' Case*, p. 19, n.

By 9 & 10 Vic. c. 54, all barristers-at-law, according to their rank and seniority, may exercise equal rights and privileges of practising, pleading, and audience in the Court of Common Pleas with the serjeants-at-law.

By 20 & 21 Vic. c. 85, s. 15; id. c. 77, ss. 40, 41, 42, persons admitted to practise as advocates or proctors respectively in any ecclesiastical court in England, and all barristers, attorneys and solicitors entitled to practise in the superior courts at Westminster, shall be entitled to practise in the Court of Divorce and Matrimonial Causes; and such advocates and barristers shall have the same relative rank and precedence which they now have in the Judicial Committee of the Privy Council, unless and until her Majesty shall otherwise order. *See ante*, vol. i. p. 218.

By the 13 & 14 Vic. c. 25, Queen's counsel and barristers having patents of precedence, although not of the degree of the coif, may act as judges of assize.

By the 5 & 6 Vic. c. 109, s. 6, barristers and special pleaders are exempt from serving as parish constables.

In all the courts the senior counsel begins the argument, and his junior follows. At Nisi Prius the latter opens the pleadings by shortly stating their substance. In Scotland the junior always begins, then the opposite side, then the seniors respectively.

[2] Every suitor is entitled to conduct his own case, without the intervention of either attorney or counsel; but he must appear *himself*. He cannot do so by an unprofessional agent, not even by his wife, except the husband is in prison, or the application be for a *habeas corpus*. *Re Cobbett*, Q. B. 1859. *Bunyon's case*, mentioned by Lord Campbell, id. *See* vol. i. p. 218. It has been intimated, that in a civil case, if a party conduct his own cause and examine witnesses, he cannot be allowed to have the assistance of counsel to argue points of law. *Moscati v. Lawson*, 7 C. & P. 32. See *Burdett's case*, cited id. 54, n., and *Shuttleworth v. Nicholson*, 1 M. & Rob. 254. When points of law arise incidentally, all the counsel on both sides are usually heard, and the leading counsel of the party making or submitting the point alone replies. But on the claim of a right to begin, Lord Denman has ruled that one counsel only is to be heard on each side. *Rawlins v. Desborough*, 2 M. & Rob. 71. This rule, however, is not always adhered to. See *Bastard v. Smith*, id. 132. If the defendant's counsel goes for a nonsuit on a point of law, and the plaintiff's counsel answers it, the defendant's counsel has a right to reply on the law only. *Arden v. Tucker*, 1 id. 192.

The objection of a witness to a question which he considers himself not bound to answer, is not a point on which counsel are heard. *R. v. Adey*, 2 id. 94. Nor is his obligation to produce documents.

A barrister was not allowed to be heard in his own cause after counsel had addressed the court. *Newton v. Chaplin*, 10 C. B. 356; 19 L. J. C. P. 374. Separate co-defendants, whose interests are identical, cannot insist on the counsel of each addressing the jury. 4 Camp. 174; M. & M. 314, 392; 2 Ex. 213; 2 M. & Rob. 319, 407.

[3] The court will not interfere in questions

VI. Power to Compromise or Refer, etc.[1]

VII. His Fees a Honorarium.

Morris v. Hunt, 1 Chit. 545.

The fees paid to counsel are a *honorarium*, and cannot be sued for;[2] but they are allowed to the successful party as part of the costs of litigation.[3]

The defendant being unsuccessful in the action, the Master allowed to the plaintiff, on taxation of his costs, the fees paid to his counsel. The defendant moved for a review of the taxation, on the ground that counsels' fees could not be allowed.

Baylcy, J. "The suggestion is, that by law no man is liable to pay for counsel at all, and therefore the whole charge for counsel is improper. This appears to me to arise entirely on a mistake in point of law. It is never expected, it has never been the practice, and in many instances it would be wrong, that counsel should be gratuitously giving up their time and talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability, and certainly of great integrity, and with every qualification which is necessary to adorn the bar, to exercise their talents. It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health in a long attendance at the bar; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence, and I know of nothing more likely to destroy that independence and integrity than to deprive them of the honourable reward of their labours. But it is said that counsel can maintain no action for their fees. Why? Because it is understood

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arising upon the practice of retainer. *Baylis v. Grant*, 2 Mylne & K. 316.

A motion for an injunction to restrain a particular counsel, who had acted for the defendants, from acting at a subsequent stage of the proceedings on behalf of the plaintiffs, from whom he had received a retainer, was refused. (Id.)

A counsel who draws and signs the bill may sign the answers, and act as counsel to the other parties to the suit, unless retained for the plaintiff. *Anon.* 3 Jur. 603.

On an application by a person against whom a commission of bankruptcy had issued, that counsel might be permitted to attend the commissioners on his behalf before adjudication, the Lord Chancellor declined to make any order, but intimated his opinion, that under the circumstances it would be proper for the commissioners to comply with the request. *Ex-parte Taylor*, 1 Mont. & Mac. 427.

[1] *Ante*, vol. i. p. 438. Counsel have complete authority over the suit and the mode of conducting it, but not over matters collateral. 6 Jur. N. S. 1034; 29 L. J. Ex. 382; 1 F. & F. 519. Where there has been a conference between a party to an action, and his counsel and attorney as to the terms of compromising such action, and there was evidence that the client had authorised his counsel to do the best for him he could, and the counsel afterwards settled such action in court whilst the client was actually present, the court refused to set aside the order of *nisi prius*, made according to the terms of such settlement, notwithstanding the client made an affidavit that the action was settled without his authority, and that, although present in court, he did not understand what was going on. *Chambers v. Mason*, 4 Jur. N. S. 1037; 28 L. J. C. P. 10. See *Swinfen v. Swinfen*, vol. i. p. 438; and *post*, 380.

Where the jury had given excessive damages, and the court were reluctant to interfere to set aside the verdict, but recommended a compromise, counsel have authority to consent to such compromise in the absence of their clients, such consent being clearly within their ordinary authority. *Thomas v. Harris*, 27 L. J. Ex. 353.—*Pollock.*

[2] The employment of a barrister is presumed to be entirely honorary, and therefore he cannot maintain an action for his fees (3 Bl. Com. 28; 2 Atk. 332, *per Cur. Pouchee v. Norman*, 3 B. & C. 745; S. C. 5 D. & R. 648); nor can he be sued for the recovery of a fee paid with a brief to attend on a trial in his professional character, although he neglected to attend (*Turner v. Phillips*, Peake, 122); *post*, p. 380, n. [1].

But a certificated conveyancer (*Pouchee v. Norman*, 3 B. & C. 744; S. C. 5 D. & R. 648; see *Crammond v. Crouch*, 3 C. & P. 77), or special pleader not at the bar, may maintain an action to receive compensation for his professional services. And where an action was brought by him as returning officer in an election of guardians for a union, and an express contract was proved for remuneration at so much per day, he was held entitled to recover. *Egan v. The Guardians of the Kennington Union*, 3 Q. B. 935, n. a.

[3] As to the allowance of counsels' and clerks' fees on taxation, *see post*, Costs.

The court will not interfere to compel the attorney in a cause to pay counsels' fees which are unpaid, even though it be alleged that the attorney has received from the client the money to pay them with. *Angell v. Oodeen, in re Angell*, 6 Jur. N. S. 1373; 29 L. J. C. P. 227. *In re May*, 6 Jur. 1169.

that their emoluments are not to depend on the event of the cause, and that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it was for the purpose of promoting the honour and integrity of the bar that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand; and therefore the law will not allow them any remedy if they disregard their duty in that respect." *See* Add. on Contracts, 446, 2d ed.; Forsyth, 410; Pref. to Davy's *Reply*.

VIII. Not liable to Action for Negligence.

Swinfen v. Lord Chelmsford, 6 H. & N. 10; 29 L. J. Exch. 382; 6 Jur. N. S. 1035; 2 L. T. 406.

An action will not lie against a barrister acting honestly within the scope of his authority, although he pursue a mistaken course.[1]

This was an action against Lord Chelmsford for having, while acting at the bar as counsel for the plaintiff in an issue directed out of Chancery to try the validity of a will, under which the plaintiff in the issue claimed as devisee, without the authority of his client, entered into a compromise with the counsel for the defendant, the heir-at-law, by which it was agreed that a juror should be withdrawn, that the estate should be conveyed in fee to the heir-at-law, and that an annuity should be settled on his client, the devisee. His client afterwards was put to costs in opposing an application for an attachment for disobedience to a rule of court founded on the compromise, and in proceedings to set aside the compromise, which were successful. In the former proceedings no costs were allowed; in the latter, costs were awarded the devisee. The Lord Chief Baron, before whom the cause was tried, directed the jury that a barrister was not liable to an action at the suit of his client, although he may have been utterly wrong in the course pursued by him, if his intention were honest, and he acted *bonâ fide*, meaning to act for the benefit of his client. A rule for a new trial, on the ground of misdirection, was discharged.

Pollock, C. B. "There are, no doubt, *dicta* in Rolle's *Abridgment*, which would seem to imply that 'a man of law,' as he is called, might be responsible for not performing his duty; but when the year-books are referred to, it seems very uncertain whether these *dicta* proceeded from the bench or from the bar, and if from the bench, they are not given as a judgment in the case before the court, but merely as an illustration of the argument or point under discussion. More recently, expressions occur which appear to have the same tendency, such as leaving the suitor to his remedy against the counsel, as in the case of *Sir George*

A barrister cannot sue for his fees upon any implied contract for their payment. *Hobart v. Butler*, 9 Ir. Com. Law. Rep. 157. Ex. But they are recoverable by an express contract. (Id.)

A solicitor in a cause has no implied authority to bind his client by an undertaking to a barrister that the client will pay him if he give receipt for the purpose of taxation. (Id.) The subsequent receipt out of court by the client of the taxed costs, which include those fees, will not, without more, make him liable to the barrister for the money had and received. (Id.)

B., clerk of counsel, in 1846 absconded, and it was then discovered that he had received and appropriated to his own use fees belonging to plaintiff, his employer. In 1854 B. died abroad, and after that event a suit for the administration of his estate was instituted, and under the decree, made in 1855, the plaintiff carried in a claim as creditor for the amount of fees retained before the chief clerk, who disallowed the claim, on the ground of its being barred by the Statute of Limitations. Against that decision an appeal was made, but the plaintiff, in 1857, filed a bill against the legal personal representatives of B., praying for a declaration that he might be allowed to stand as creditor against his estate, and that he might be paid the amount found due; and the court held that the claim against the estate of B. (the relationship being of a confidential nature) was not barred by the statute; and also that his remedy against the estate was not barred by the proceedings in the administrative suit. *Teed v. Beere*, 5 Jur. N. S. 381; 28 L. J. Ch. 782.—V. C. S.

[1] Nor for unskilfulness in drawing or settling proceedings at common law or in chancery (*Fell v. Broom*, Peake, 96); or for not attending a trial. 2 L. T. Ir. 134.

Downing. The case is reported in the *Equity Cases Abridged*, p. 165; but the remarks referred to were made by *Lord Chancellor Talbot* in *Bradish v. Gee*, Kenyon, 176, when the case of *Sir George Downing* was cited. But in all modern cases, where any question has arisen, it has been decided in favour of the barrister, and it may be very safely asserted that there is no instance of any action being successfully brought against a barrister for neglect of duty; and, on the other hand, there are instances where such an action has been successfully resisted. Upon an express agreement he would no doubt be liable, as any other person party to a contract; so if he intentionally did a wrong, and acted with malice, fraud, or treachery, we think he would be responsible, like every other wrongdoer, for the mischief thereby occasioned, notwithstanding his position as a barrister. The case of *Fell v. Brown* (1 Peake, N. P. C. 131) was an action against a barrister for unskilfully and negligently setting and signing a bill in equity, which was referred to the master, and the plaintiff was obliged to pay the costs of the reference. It was contended that the negligence was gross. *Lord Kenyon* nonsuited the plaintiff on the opening, stating his clear opinion that the action could not be supported. He said it was the first action of the kind, and he hoped it would be the last. The opinion of *Lord Kenyon* was never questioned, although he invited an appeal to the court. About six months afterwards another action came before Lord Kenyon (*Turner v. Phillips*, id. 166). It was an action to recover back the fee paid to a barrister to attend the trial of a cause, he not having attended. The parties agreed to settle the matter out of court, but *Lord Kenyon* expressed a clear opinion that the action would not lie, and referred to the case of *Chorley v. Bolcot*, 4 T. R. 317, then recently decided, in which it seems to be taken for granted that a barrister would not be liable. The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under the peril of an action by every disappointed and angry client. We think, therefore, that no action lies against the defendant for consenting to withdraw a juror, though even contrary to the client's instructions, provided it be done *bonâ fide*, as the jury have found it was done.

"The other complaint made in the first count is, that the defendant agreed on the plaintiff's behalf that the estate should be given up, and a conveyance of it executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement; that it was not binding, and that the agreement was a nullity; and we are of opinion that, although counsel has complete authority over the suit, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit and the conduct and management of the trial, we think he has not, by virtue of his retainer in the suit, any power over matters collateral to it: for instance, we think in an action for a nuisance between owners of adjoining land, however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale, and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void. If the act of compromise was a nullity, the rights of the plaintiff remain the same, and are uninjured. But then it is said, that she has been put to expenses and incurred costs in resisting attempts to enforce the agreement of compromise in the Common Pleas and in Chancery; but it is a general rule of law, that to subject a person to law proceedings without malice gives no cause of action. The courts of

equity awarded such costs as the law allows; we think she cannot in this action recover more. The Court of Common Pleas thought fit not to give her costs, and we think it must be taken she was not entitled to them, and cannot claim them in this action." *See* 3 P. Wms. 277; Amb. 229; 4 Russ. 192; 26 J. M. 519.

IX. His Privilege of Speech.

Hodgson v. Scarlett, 1 B. & A. 232. S. P. Needham v. Dowling, 15 L. J. C. P. 9.

An action does not lie against a barrister for words spoken by him in the course of his speech, and which were pertinent to the matter at issue.[1]

This was an action for slander, in saying of the plaintiff that he was "a fraudulent and wicked attorney." The words complained of were spoken by the defendant in the course of his speech in a cause in which he acted as counsel. The judge ruled that the occasion was privileged, and nonsuited the plaintiff. A rule to set aside the nonsuit was discharged,—

Lord Ellenborough saying, "A counsel entrusted with the interests of others, and speaking from their information, for the sake of public convenience is privileged in commenting fairly and *bonâ fide* on the circumstance of the case, and in making observations on the persons concerned, and their instruments and agents in bringing the cause into court. Now the plaintiff in this case was not merely the attorney, but was mixed up in the concoction of the antecedent facts, out of which the original cause arose. He was cognisant of all the circumstances, and knew that the plaintiff had no ground of action in that case, in consequence of having already received more than the amount demandable by him. It was in commenting on this conduct that the words were used by the defendant. He had a right so to comment, for the plaintiff was mixed up with the circumstances of the case, and was the agent and instrument in the transaction. The defendant then says that he is 'a fraudulent and wicked attorney.' These were words not used at random and unnecessary, but were a comment on the plaintiff's conduct as attorney. Perhaps they were too strong; it may have been too much to say that he was guilty of fraud as between man and man, and of wickedness *in foro divino*. The expression, in the exercise of a candour fit to be adopted, might have been spared. But still a counsel might *bonâ fide* think such an expression justifiable under the circumstances. It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable." *See* Cro. Jac. 90.

X. Privilege to lay the Venue in Middlesex.[2]

[1] In *Flint v. Pike*, 4 B. & C. 473, *Holroyd, J.*, said:—"With a view to the due administration of justice, counsel are privileged in what they say. Unless the administration of justice is to be fettered, they must have free liberty of speech in making their observations, which, it must be remembered, may be answered by the opposing counsel, and commented on by the judge, and are afterwards taken into consideration by the jury, who have an opportunity of judging how far the matter uttered by the counsel is warranted by the facts proved. Therefore, in the course of the administration of justice, counsel have a special privilege of uttering matter even injurious to an individual, on the ground that such a privilege tends to the better administration of justice; and if a counsel, in the course of a cause, utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not, therefore, be responsible to the party injured in a common action for slander; but that it would be necessary to sue him in a special action on the case, in which it must be alleged in the declaration, and proved at the trial, that the matter was spoken maliciously and without reasonable or probable cause." In *Mackay v. Ford*, 24 Jur. 587, 8 W. R. 586, an attorney, acting as counsel at a police-court, in defending persons charged with an assault, stated that the prosecutor had plundered his master; the court, being of opinion that this was relevant to the inquiry, the defendants justifying under a command of the master to turn the plaintiff out of the premises, made a rule absolute to enter a nonsuit. 5 B. & A. 645.

[2] A barrister is entitled to the same privilege as that enjoyed by attornies with reference to laying the venue in Middlesex (*ante*, p. 17: 1 Mod. 642; Stra. 824; although he may have retired from practice. 2 Show, 242), unless he sue jointly with an unprivileged person. *Newton v. Harland*, 6 Dowl. 630. But a plaintiff, who has been called to the bar since the commencement of an action, the venue in which has been laid in some other county, cannot avail himself of his privilege so as to have it brought back to Middlesex (Id.); and the privilege will always be waived by laying the venue in the

XI. Privilege from Arrest.[1]

XII. Privileged Communications.[2]

Brown v. Foster, 1 H. & N. 736; 21 Jur. 245.

Communications by counsel are not to be divulged; but where a fact has come to his knowledge from his own observation there is no privilege, although it tell against his former client.

A barrister attended as counsel for B., on the occasion of two examinations before a magistrate, on a charge of embezzlement against B. Upon both occasions a book, into which it was B.'s duty to enter sums received by him for his master, the prosecutor, was produced and put in evidence on behalf the prosecution. On the second examination, B.'s counsel pointed out to the magistrate an entry, under the proper date, of the sum to which the charge referred, and he was thereupon discharged. B. brought an action for malicious prosecution against the prosecutor, at the trial of which it was suggested that the entry had

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first instance in any other county. *See Lewis v. Shelley*, 7 Taunt. 146. *See* Serjeant Maynard's case, cited Manning, 237; and as to privileges of serjeants to have been sued only by original writ (Id. 230), and only in the Common Pleas; and might have sued by writ of privilege. (Id.)

[1] Barristers are protected from arrest while going to the place of trial of a cause in which they are retained, while attending there for the purposes of *the cause*, and *while returning home—eundo, morando, et redeundo.* And it seems that while on circuit he is privileged, whether he has business to attend to or not. *Meekins v. Smith*, 1 H. Black. 636; case of *Sheriff of Oxfordshire*, 2 C. & Kir. 200; case of *Sheriff of Kent*, 2 id. 197. *Newton v. Harland*, 8 Scott, 70. A barrister, however, is not privileged from arrest by reason of his attendance on petty sessions for the purpose of obtaining practice (*Newton v. Constable*, 2 Q. B. 157); and a doubt has been expressed whether the privilege can be extended further than to protect the bar while attending the superior courts, or, perhaps, such counsel as are actually engaged in professional business before the inferior tribunals. *Newton v. Constable, supra;* but see *Luntly v.*——, 1 Car. & M. 579.

A practising barrister was arrested on mesne process on returning from court to his chambers, there being at the time three writs of *ca. sa.* against him at the sheriff's office. He thereupon appealed to a judge for his discharge, on the ground of his having been arrested while privileged, but made no application to be discharged in respect of the writs of *ca. sa.* The judge having ordered him to be discharged, the sheriff detained him in custody on the writs of *ca. sa.*:—*Held*, that the sheriff was justified in so doing. *Watson v. Carrol*, 7 Dowl. P. C. 271; 1 Horn & H. 427; 3 Jur. 49.

A barrister who has been actually engaged at petty sessions, but without a previous retainer, for a defendant in a case of summary conviction, where counsel are allowed by 6 & 7 Wm. 4, c. 114 (Prisoners' Counsel Act), is not privileged from arrest *redeundo. Newton v. Constable*, 1 Gale & D. 408; 9 Dowl. P. C. 933; 2 Q. B. 157; 6 Jur. 317.

Semble, that the privilege from arrest is confined, at common law, to barristers attending on the superior courts, and on the circuits, and that the Prisoners' Counsel Act, if it has extended the privilege to a barrister attending before justices of the peace on behalf of a person accused in a case of summary conviction, has only done so when he has a previous retainer. (Id.)

A barrister of the Oxford circuit had attended court, as a barrister, at the Abingdon and Oxford assizes. The latter assizes concluded on the 25th July, and the commission-day at the next town (Worcester) was on the 27th July. The barrister was taken on a *ca. sa.* at Oxford, on the 26th of July:—*Held*, that he was entitled to be discharged, as being a barrister on circuit. *In re Sheriff of Oxfordshire*, 2 C. & Kir. 200.—*Abbott.*

Held, that the fact that the barrister had no brief at Abingdon or Oxford was immaterial to his discharge. (Id.)

Held, also, that the fact that he was not in the habit of attending the Worcester assizes, and that he made no affidavit that he intended to do so on the present circuit, was immaterial to his discharge. (Id.)

A barrister of the Home Circuit had attended the assizes at Hertford and Chelmsford, which latter assizes had ended on Friday, the 6th of March. On Monday, the 9th of March, the commission-day was at the next town (Maidstone); but before the commission was opened there he was arrested at his own house, six miles from London, on a *capias utlagatum*, he having retainers in cases at Maidstone:—*Held*, that he was entitled to be discharged, as being a barrister on circuit. *In re Sheriff of Kent*, 2 C. & Kir. 197; 15 L. J. Q. B. 268. (Den. & Ald.)

Semble, that for this purpose a *capias utlagatum* be considered as civil process. (Id.)

[2] A barrister, when a witness, cannot be forced to prove what was stated by him on a motion before the court (*Curry v. Walter*, 1 Esp. 456); and the like privilege has been strenuously claimed, though not expressly recognised, where a counsel was called upon, as a witness, to disclose a confidential negotiation into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed. *Baillie's case*, 21 How. *St. Tr.* 358. The rule as to privileged communications is the same as in the case of attornies; the reader is therefore referred, on this head, to that title, *ante*, p. 19.

been made by B. after the first examination, and it was proved that the book was accessible by him ; and the counsel who appeared for B. at the examination before the magistrate, was examined as a witness upon the point whether the book contained the entry on the first examination. A rule for a new trial, on the ground that this evidence was improperly admitted, the matter being privileged, was discharged.

Per Cur. The witness was not examined as to anything communicated by his client, but merely whether he had seen a certain book (a book, moreover, not produced by his client, but by the opposite side against his client), and whether it contained a certain entry. This he was bound to disclose.

BASTARD.[1] *See* Affiliation, vol. i. p. 256; Liability of Parents to Maintain. Id. p. 257; Settlement of. *See post*, Settlement.

I. Who is, p. 384.

II. Husband or Wife cannot prove Non-access, p. 385.

III. Custody of, p. 386.

I. Who is.

Morris v. Davies, 3 C. & P. 215.

If there be an opportunity of sexual intercourse between husband and wife, the law will presume such intercourse took place, so as to preclude the idea of bastardy, unless that presumption be rebutted.[2]

On an issue directed from the Court of Chancery,—

Vaughan, B., told the jury, every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate ; but this presumption may be repelled by proof of such facts as satisfy the jury that no sexual intercourse took place between the husband and wife at a time when the husband could, by possibility, be the father of the child ; and the jury, before they can find against the legitimacy, must be

Cases and statements for the opinion of counsel, admitted by the answer of the defendant to be in his custody, possession, or power, were ordered to be produced for the usual purposes; but it would seem that, for the future, cases laid before counsel in the progress of the cause, or prepared in contemplation of, or with reference to, the cause, will not be ordered to be produced for the purposes of the cause. *Newton v. Beresford*, 1 Younge, 377.

A case laid before counsel was excepted in an order for production of documents; the court considering itself bound by the decision, upon the authority of which the case was held to be privileged, but expressing dissent from that decision. *Nias v. Northern & Eastern Railway Co.* 2 Keene, 76.

A case for the opinion of counsel, stated by the answer to have reference to the matters in question in the cause, and to have been submitted to counsel after the matter in dispute in the cause had arisen, is a privileged communication, which the defendant is not bound to produce. S. C. 3 Mylne & C. 355; 2 Jur. 275, 310.

[1] A bastard is a person begotten and born out of lawful matrimony. A child of a woman who has never been married is a bastard. A child of a woman whose marriage is unlawful and void is a bastard; as, for instance, where the person to whom she was married had at the same time another wife living: in such case the children of the second marriage are bastards, whether born during the lifetime or after the death of the first wife. A child of a widow born at such a time after her husband's death that the husband could not have been the father of it, is a bastard; but if born within the time of gestation, namely, forty weeks after the husband's death, it is otherwise.

[2] In *Morris v. Davies* (3 C. & P. 427), *per Gaselee, J.*: "Where the husband and wife are in such a situation that sexual intercourse might have taken place, or that the husband, at such a time, could have been the father, the law presumes that it did, unless the facts prove, beyond all doubt, that no such intercourse did in fact take place."

In *Cope v. Cope* (5 C. & P. 604; 1 M. & Rob. 269), *per Alderson, J.*: "If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that, under these circumstances, he would avail himself of such opportunity."

If the husband be found to have gone beyond seas above two years before the birth of a child born by his wife, she remaining at home, the conclusion is irresistible that such child is a bastard. *Rex v. Maidstone*, 12 East, 550. Non-access of the husband need not be proved during the whole period of the wife's pregnancy; it is sufficient if the circumstances of the case

convinced that no such sexual intercourse took place by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an opportunity of sexual intercourse between the husband and wife, the law presumes that such intercourse did take place, unless the contrary be satisfactorily proved.

DOE D. BIRTWHISTLE v. VARDILL, 5 B. & C. 438; 8 D. & R. 185; in error, 2 Clark & Fin. 571.

A child born before marriage is illegitimate, and cannot inherit real property, though he would by the law of the country where born.[1]

The question in this case was, whether a child who is born before the marriage of his parents can inherit real property in England, even though by the law of the country in which he was born, and in which his parents were married, he should be declared legitimate and capable there of inheriting.

Per Cur. "It appears to us that we should not be warranted in saying that we can give effect to this legitimising of the child by the subsequent marriage of the parents in Scotland. It by no means follows that, because we allow the validity of the marriage, therefore we are to allow all the consequences of that validity. It is not contrary to the law of England to say that a marriage celebrated in any part of the world, according to the law of that particular place in which it is celebrated, is a good marriage in England. On the contrary, the law of England would be the law of all foreign countries, at least as to the manner and form of the celebration of the marriage, and allows every marriage to be a good marriage in England which is a good marriage by the law of the country in which it happened to be solemnised. It is part of the law of England to allow the validity of this marriage; but it by no means follows that it is part of the law of England to allow the consequence which follows that marriage in this kingdom, and to allow the effect by which a child born before the marriage of its parents is considered to be born after their marriage. It appears to us by no means to follow, because you allow the validity of the marriage, you are to allow all the consequences which the law of the country in which the land is situated does *not allow*."[1]

II. HUSBAND OR WIFE CANNOT PROVE NON-ACCESS.[2]

show a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth. *Rex v. Luffe*, 8 East, 193.

[1] The heir-at-law must have been born in lawful wedlock, and so must have been legitimate at his birth; and he cannot succeed to real property in England where he was born illegitimate in another country, though by the law of such country he was afterwards made legitimate, and would have succeeded if the property had been situated in that country. Paterson's *Comp.* p. 254.

In Scotland, it is quite enough if the child be legitimate at the time he or his issue succeeds to heritage. Thus, a child legitimated *per subsequens matrimonium* is legitimate for all purposes in Scotland. But where the child is born in a country where his parents are domiciled, and where the law of legitimation *per subseq. matr.* is unknown, it is different. (Id.)

[2] The testimony of the husband or wife that, though living together, they have had no connexion, and that, therefore, the offspring is spurious, has, on the general ground of decency, morality, and policy, been uniformly rejected. *Goodright v. Moss*, 2 Cowp. 594. *Cope v. Cope*, 1 M. & Rob. 269; 5 C. & P. 604. *R. v. Luffe*, 8 East, 193. *R. v. Rook*, 1 Wils. 340. *R. v. Reading*, Ca. Temp. Hard. 79. *R. v. Mansfield*, 1 Q. B. 444; 1 Gale & D. 7. *Corn v. Shepherd*, 6 Bing. 283. This rule excludes not only all direct questions, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to prove a different point in the cause (*R. v. Sourton*, 5 Ad. & E. 180); and it applies to the depositions of the parents equally with their *viva voce* testimony. *Goodright v. Moss*, *supra*. Neither is it affected by the circumstance that at the time of the examination of one of the parents the other is dead; because the rule has been established, not simply on the ground that the tendency of such evidence is to promote connubial dissension, but on the broad basis of general public policy. *R. v. Kea*, 11 East, 132. But this rule does not preclude the parents from proving that the proposed marriage was either invalid or valid (*R. v. Bramley*, 6 T. R. 330. *Standen v. Standen*, Pea. R.); or that their children were born before or after its celebration; though the effect of such evidence is in the first and third case to bastardise the issue, and in the others to establish its legitimacy.

III. Custody of.[1]

BATTERY. *See* Assault and Battery, vol. i. p. 562.

BAWDY-HOUSE.[2] *See* Brothel; Nuisance.

BEERHOUSE. *See* Alehouse, vol. i. p. 275.

BEGIN, Right to. As to the right to begin in Appeals from Justices, *see* vol. i. p. 383.

Mercer v. Whall, 5 Q. B. 447.

The party on whom proof of the affirmative lies has in general the right to begin.[3]

This was an action of covenant by an attorney's clerk for improper dismissal, to which the defendant pleaded that the plaintiff had been guilty of misconduct in the service. The court held that the plaintiff was entitled to begin. *Lord Denman*, in pronouncing the judgment of the court, after observing that "the natural course would seem to be that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict or as to the amount of damages to which he conceives the proof of such facts

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For this purpose, too, their declarations or their answers in Chancery are admissible evidence. *Goodright v. Moss*, *supra*. It is clear, also, that in a case of bastardy a married woman may, when the fact of non-access has already been proved by independent evidence, confess her adulterous connexion with another person, and thus enable the justices, in the event of her testimony being corroborated in some material particular, to make the order of maintenance. *R. v. Reading*, Ca. Temp. Hard. 79; 1 Bott, 439. *Cope v. Cope*, *supra*. But this exception to the general rule of exclusion is founded on necessity; since the fact to which she is permitted to testify is probably within her own knowledge and that of the adulterer alone. *R. v. Luffe*, 8 East, 203. As to the presumption that the children of a married woman are legitimate, *see post*, Presumptions.

[1] It is doubtful whether the putative father of an illegitimate child has any right by law to the custody of the child. *Strangeways v. Robinson*, 4 Taunt. 498. *Pope v. Sale*, 7 Bing. 477; 5 M. & P. 336. Certainly within the age of nurture he has no right to the custody. *R. v. Soper*, 5 T. R. 278. *Rex v. Hopkins*, 7 East, 579. *Rex v. Moseley*, 5 East, 223. In the case of *Re Lloyd* (3 Man. & G. 547; 4 Scott, N. R. 200), the mother of an illegitimate child of between eleven and twelve years of age obtained an *habeas corpus*, directed to the putative father, to bring her up before the court. On the child being produced in obedience to the writ, the court declared that she might use her own discretion as to where she would go; and the child being unwilling to go with her mother, the court would not permit the mother to take her by force.

[2] Keeping a bawdy-house is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons, and has also a tendency to corrupt the manners of both sexes, by such an open profession of lewdness. 1 Hawk. c. 74, s. 1. And a lodger, who keeps only a single room for the purpose, is indictable as for keeping a bawdy-house. (Id. s. 3.) Also, a *feme covert* is punishable for this offence, as much as if she were *sole*. (Id. s. 2.) But the fact of a woman keeping a house for the purpose of her *own* prostitution *merely*, it seems, would not be sufficient, in law, to make the house a disorderly house; it must be a house for the common reception of men and women generally, for the purpose of prostitution.

[3] The first general rule on the subject is—that the party on whom the *onus probandi* lies, as developed on the record, must begin. As to the *onus probandi*, *see* vol. i. p. 266. It has been sometimes asserted that the right of beginning belongs to the party in whom the affirmative of the issue lies; but this assertion, if literally understood, is by no means accurate, since it does not apply to cases where either the affirmative allegation is supported by a legal presumption, or the truth of the negative averment is peculiarly within the knowledge of the party who relies on it. (Best, on Right to Begin, p. 29.) Indeed the rule, as we have stated it, is subject to some exceptions: *first*, if the defendant will admit at the trial the whole *primâ facie* case of the plaintiff, he will be entitled to begin, provided he could not by his pleading have made this admission at an earlier period. For instance, if a party claiming premises as heir-at-law of the person last in possession brings an action of ejectment against a devisee under such person's will, the defendant will be entitled to begin, on admitting not only that the lessor of the plaintiff is heir, but that the ancestor through whom he claims died seised of the estate. *Doe v. Barnes*, 1 M. & Rob. 386: *per Lord Denman*. *Doe v. Smart*, id. 476: *per Gurney, B.*, after consulting *Patteson, J.* In this last case the defendant was allowed to begin, though the plaintiff, as to part of the premises, was prepared to prove that he was assignee of an outstanding term. So if

may entitle him," proceeded thus:—"In ejectment, the defendant may entitle himself to begin, by admitting that the plaintiff must recover possession unless the defendant can establish a certain fact in answer; and if in an action for damages the damages are ascertained, and the plaintiff has a *primâ facie* case on which he must recover that known amount, and no more, unless the defendant proves what he has affirmed in pleading, here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But if the extent of damages is not ascertained, the plaintiff is the person to ascertain it, and his doing so will have the effect of making even the defence in a vast majority of cases much more easily understood for all who are intrusted with the decision."

BENEFICE. *See* Advowson, vol. i. p. 219; *post*, Church.

BENEFIT Building Society. *See post*, Friendly Society.

(A) *Act authorising Establishment of Societies*, p. 388.
(B) *Provisions of Friendly Societies' Acts apply*, p. 389.
(C) *Receipt indorsed on Mortgage is sufficient Discharge*, p. 389.
(D) *Act does not authorise Investment of Funds in Savings' Bank*, p. 389.
(E) *Redemption by Member of Mortgage*, p. 389.
(F) *Of the Rules of the Society, their Construction and Effect*, p. 390.
(G) *Effect of Rule for Reference of Disputes to Arbitration*, p. 392.

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the defendant, admitting at the trial a will under which the lessor of the plaintiff claims, relies on a subsequent devise or codicil, he will be allowed to begin. *Per Lord Denman in Doe v. Barnes*, 1 M. & Rob. 388. *Doe v. Corbett*, 3 Camp. 388: *per Bayley, J.* But if the defendant's title rests upon a conveyance from the ancestor (*Doe v. Tucker*, M. & M. 536: *per Bolland, B.*); or if he claims, even in part, under the ancestor's marriage settlement (*Doe v. Lewis*, 1 C. & Kir. 122: *per Maule, J.*), he cannot, by simply admitting the heirship of his opponent and his own possession, deprive the former of his right to begin, because such an admission will not cover the entire title of the lessor of the plaintiff. So where each party claimed as heir-at-law, and the defendant was clearly the heir, if legitimate, his admission of the plaintiff's conditional title was held insufficient to give him the initiative, because the plaintiff, in order to recover, must prove his own title; and although in this particular case the title might depend on the defendant's legitimacy, the fact of legitimacy did not constitute the direct issue. *Doe v. Bray*, M. & M. 166: *per Vaughan, B.* It seems, indeed, that to entitle the defendant to begin, he must make such an admission as, if set out on the record, would, together with the facts which he is about to prove, amount to a plea in confession and avoidance. *Bonfield v. Smith*, 2 M. & Rob. 519. *Morris v. Lotan*, 1 id. 233.

Another exception to the rule under discussion rests upon the broad principles of public convenience and justice, and provides that the plaintiff shall begin in all actions where he seeks substantial and unliquidated damages, though the general issue be not pleaded, and the affirmative lie upon the defendant. This doctrine was promulgated by the judges many years back, as applicable to actions for libel, slander, and injuries to the person (*Carter v. Jones*, 6 C. & P. 64; 1 M. & Rob. 281, S. C.), its operations are now extended to actions of covenant and *assumpsit;* and indeed, as it would seem, to all actions where the plaintiff is seeking to recover actual damages of an unascertained amount. *Mercer v. Whall, supra* in text. A second general rule respecting the right to begin is, that if the record contains several issues, and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he will undertake to give evidence upon it. *Rawlins v. Desborough*, 2 M. & Rob. 328: *per Lord Denman.* This rule will equally prevail, though it clearly appear, as matter of calculation, that if the defendant should eventually succeed on one of the issues which he is bound to prove, the plaintiff could recover nothing on the issue which lies upon him. *Cripps v. Wells*, Car. & M. 489: *per Rolfe, B. Booth v. Millns*, 15 Mee. & W. 669; 4 Dowl. & L. 52, S. C. But the proviso at the end of the rule constitutes a material part of it; and, therefore, if to some special count claiming liquidated damages, the plaintiff adds the common money counts, and the defendant, confessing and avoiding the former, pleads the general issue to the latter, this will not entitle the plaintiff to begin, unless, in fact, he intends to rely on the common money counts, and to adduce evidence in support of them, for the only object of an opening is to explain to the jury the facts which are to be proved by the witnesses. *Smart v. Rayner*, C. & P. 721: *per Parke, B. Mills v. Oddy*, id. 728, per id., overruling *Homand v. Thompson*, id. 717. *Faith v. M'Intyre*, 7 id. 444, per id.

(H) *Remuneration of Officers of Society*, p. 394.

(I) *Qualification of Member to Vote in Parliamentary Elections*, p. 394.

(A) *Act authorising Establishment of Societies.*

Societies may be established for the purchase or erection of dwelling-houses.

The 6 & 7 Wm. 4, c. 32, "An Act for the Regulation of Benefit Building Societies," sect. 1,[1] recites, that "whereas certain societies, commonly called building societies, have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies[2] and the property obtained therewith; be it therefore enacted, that it shall and may be lawful for any number of persons in Great Britain and Ireland to form themselves into and establish societies for the purpose of raising, by the monthly or other subscriptions of the several members of such societies, shares[3] not exceeding the value of one hundred and fifty pounds for each share, such subscriptions not to exceed in the whole twenty shillings per month[4] each share, a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured, by way of mortgage to such society, until the amount or value of his or her share or shares shall have been fully repaid to such society, with the interest thereon, and all fines or other payments incurred in respect thereof; and to and for the several members of each society from time to time to assemble together, and to make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same, as to the major part of the members of such society so assembled together shall seem meet,[5] so as such rules shall not be repugnant to the express provisions

[1] Sect. 19 enacts, "that this act shall be deemed a public act, and shall extend to Great Britain, Ireland, and Berwick-upon-Tweed, and be judicially taken notice of as such by all judges, justices, and other persons whatsoever, without the same being specially shown or pleaded."

[2] Sect. 7 enacts, "that all building societies, established prior to the first of June, 1836, shall be entitled to the protection and benefit of this act, on their present rules being duly certified and deposited as directed by the said recited acts; and no such society shall be entitled to the benefit of the act until their rules shall have been so certified and deposited; and that no such society shall be required to alter in any manner the rules under which they are now respectively governed."

[3] By s. 8, "no rules of any such society, or any copies thereof, or any transfer of any share or shares in any such society, shall be subject or liable to or charged with any stamp-duty or duties whatsoever."

The exception from stamp-duty conferred by this act is not limited by the 3 & 4 Vic. c. 73, s. 8. It has been held that a mortgage given to a building society by one of its members, to secure the payments to become due on his shares, is exempt from stamp-duty. *Walker v. Giles*, 6 C. B. 662; 18 L. J. C. P. 323. *Barnard v. Pilsworth*, 6 C. B. 698, n. It was held, that where the society had taken a mortgage from a member before its rules had been certified and deposited, but these formalities were afterwards complied with, that the deed was exempt from stamp-duty. *Williams v. Hayward*, 22 Beav. 220; 25 L. J. Ch. 289.

The certificate of the registrar under the Building Societies' Act has reference back to the formation of the society. *Williams v. Hayward*, 1 Jur. N. S. 1128; 25 L. J. Ch. 289.

[4] It is enacted, by s. 2, "that it shall and may be lawful to and for any such society to have and receive from any member or members thereof any sum or sums of money, by way of bonus on any share or shares, for the privilege of receiving the same in advance prior to the same being realised, and also any interest for the share or shares so received, or any part thereof, without being subject or liable, on account thereof, to any of the forfeitures or penalties imposed by any act or acts of parliament relating to usury."

[5] By s. 3, "it shall and may be lawful to and for any such society, in and by the rules thereof, to describe the form or forms of conveyance, mortgage, transfer, agreement, bond, or other instrument, which may be necessary for carrying the purposes of the said society into execution, and which shall be specified and set forth in a schedule to be annexed to the rules of such society, and duly certified and deposited as hereinafter provided."

of this act, and to the general laws of the realm; and to impose and inflict such reasonable fines, penalties, and forfeitures upon the several members of any such society who shall offend against any such rules as the members may think fit, to be respectively paid to such uses, for the benefit of such society, as such society by such rules shall direct; and also from time to time to alter and amend such rules as occasion shall require, or annul or repeal the same, and to make new rules in lieu thereof, under such restrictions as are in this act contained: Provided that no member shall receive, or be entitled to receive, from the funds of such society, any interest or dividend, lying at annual or other periodical profits, upon any shares in such society, until the amount in value of his or her share shall have been realised, except on the withdrawal of such member, according to the rules of such society then in force."

(B) *Provisions of Friendly Societies' Acts apply to these Societies.*

Provisions of Friendly Societies' Acts apply to these societies.[1]

Sect. 4. "That all the provisions of a certain Act made and passed in the Tenth Year of the reign of his late Majesty King George the Fourth, intituled 'An Act to Consolidate and Amend the Laws relating to Friendly Societies,' and also the provisions of a certain other act made and passed in the fourth and fifth years of the reign of his present Majesty King William the Fourth, intituled 'An Act to Amend an Act of the Tenth Year of his late Majesty King George the Fourth to Consolidate and Amend the Laws relating to Friendly Societies,' so far as the same or any part thereof may be applied to the purpose of any Benefit Building Society, and to the framing, certifying, enrolling, and altering the Rules thereof, shall extend and apply to such Benefit Building Society and the rules thereof, in such and the same manner as if the provisions of the said acts had been herein expressly re-enacted."

(C) *Receipt indorsed on Mortgage is sufficient Discharge.*

Receipt indorsed on mortgage is sufficient discharge without reconveyance.

Sect. 5. "That it shall be lawful for the trustees named in any mortgage made on behalf of such society, or the survivor or survivors of them, or for the trustees for the time being, to indorse upon any mortgage, &c. for the shares given by any member of such society to the trustees thereof for monies advanced by such society to any member thereof, a receipt for all monies intended to be secured by such mortgage, or for the charge which shall be sufficient to vacate the same, and vest the estate of and in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged, which receipt shall be specified in the schedule to be annexed to the rules of such society duly certified and deposited as aforesaid."

(D) *Act does not authorise Investment of Funds in Savings' Bank.*

Not to authorise investment of funds in savings' bank.[2]

Sect. 6. "Provided always, that nothing herein contained shall authorise any Benefit Building Society to invest its funds or any part thereof in any Savings' Bank, or with the Commissioners for the Reduction of the National Debt."

(E) *Redemption by Member of Mortgage.*

FLEMING v. SELF, 3 De Gex, M. & G. 997; 1 Jur. N. S. 25.[3]

Redemption by member of mortgage.

The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares. He subsequently gave notice of his desire to redeem the mortgaged premises, and a difference having arisen as to the terms of redemption, he filed a claim.

[1] *See post*, Friendly Societies.

[2] The society is not precluded from investing its funds in the purchase of a real estate. *Mullock v. Jenkins*, 14 Beav. 628; 21 L. J. Ch. 65.

[3] *See* also *Archer v. Harrison*, 7 De Gex, M. & G. 404; 3 Jur. N. S. 174.

In *Mosley v. Baker* (6 Hare, 87; 17 L. J. Ch. 257, in error; 1 Hall & T. 301; 18 L. J. Ch. 457), the plaintiff became a member of and

The *Lord Chancellor* (Cranworth) made a decree for redemption, directing calculation of the longest possible duration of the society at the date of the notice, having regard to the net assets of the society, and to the monthly subscriptions and redemption money still continuing payable, and to the number of 100*l.* shares to be provided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him, assuming the society to endure for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members.

(F) *Of the Rules of the Society, their Construction and Effect.*[1]

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purchased twelve shares and a half in a building society, and the society advanced a sum of 750*l.* in respect of such shares upon a conveyance of property to the society by way of mortgage. According to this, the 10*s.* per month subscription, and 4*s.* per month redemption monies, were payable on each share until 120*l.* per share should be realised for the non-purchasing members. A bill being filed against the non-purchasing members for redemption, it was held, that upon the terms of the mortgage-deed and rules the plaintiff was entitled to redeem only on the payment of all the future subscriptions on his shares until the dissolution of the society; the probable duration of the society to be ascertained by calculation, and the future payments to be treated as if immediately due. *See* also to same effect, *Seagrave v. Pope*, 1 De Gex, M. & G. 783; 16 Jur. 1099.

By a rule of a benefit building society, a member who had purchased or received in advance his shares might redeem his mortgage on payment of the difference between the amount of profits and subscriptions paid and the amount expressed to be secured by the deed. In taking the account in a redemption suit by a purchasing or borrowing member, credit was given to him for the redemption or interest monies paid by him. On appeal by the trustees, this was held to be correct. *Smith v. Pitkington*, 29 L. J. Ch. 227.

The mortgagor, being one of three trustees of the society, executed the mortgage to the other two, one of whom subsequently resigned, and a successor was appointed. *Semble*, that the interest of the original mortgagees vested without assignment in the remaining trustee and the successor exclusively of the mortgagor. *Walker v. Giles*, 6 C. B. 662; 18 L. J. C. P. 323.

In support of an avowry by G. for a distress for rent due under a demise to L. at a yearly rent of 200*l.*, a deed was given in evidence whereby L., a member of a building society, assigned to G. and others, trustees thereof, a lease of certain premises as security for the monthly contributions payable in respect of his shares, and thereby agreed to become tenant to the trustees of the demised premises thenceforth during their will, at the net yearly rent of 200*l.*, payable quarterly, subject to a power of re-entry for non-payment thereof, and to all usual covenants in leases of the like property; it was declared that the assignment should not be for security for a greater sum than 840*l.*:—It was held that this did not amount to a demise to the trustees at a yearly rent of 200*l.*, so as to support the avowry, for if it did, L. must be deemed to have contracted to pay his contributions and a rent of 200*l.* a-year as well, which was contrary to the intention of the parties. *Walker v. Giles*, 6 C. B. 622; 18 L. J. C. P. 323.

[1] It was held that the members of a benefit society whose rules had been duly confirmed according to the 10 Geo. 4, c. 56, had no right to compel the secretary or other chief officer of the society to sign a notice pursuant to s. 9, to convene a general meeting for the purpose of considering the question of altering the rules of the society; but such officers have under that section a discretionary power to give or withhold their signatures to any such notice. *Reg. v. Bannatyne*, 23 L. J. Q. B. 210.

Where a rule of a building society provided that if any member shall, for any cause whatever, permit any monthly subscription on any share or shares held by him or her to be in arrear for six months, such share or shares and all monies paid in respect thereof shall, at the expiration of such six months, become absolutely forfeited to the company:—It was held, that the neglect of a member to pay his subscriptions and fines for six months operated as a forfeiture of the share or shares, at the option of the directors. *Moore v. Rawlings*, 6 C. B. (N. S.) 289.

In *Reeves v. White*, 21 L. J. Q. B. 169, 16 Jur. 637, the rules of a building society provided that before a member should be allowed to receive the amount of the appropriation mentioned in the rule, he should deliver to the manager of the association a written statement of the nature and situation of the premises offered as a security, and the manager should forthwith transmit the same to the surveyor of the association, and he should survey the premises and report to the directors; and if the directors were satisfied, they were to have such security examined and approved of in the manner pointed out in the same rule: and then 200*l.* should be advanced out of the funds of the association upon a mortgage by the member of the property, purchased property, &c.

By another rule it was provided, that if after execution of a mortgage a member failed for six monthly nights to pay and observe all subscriptions, payments, and regulations, then the directors should appoint a person to collect the rents and profits of the premises; and if insufficient, or the member refused to allow or to empower such collection, or if required himself to collect and pay over the same, then the directors were empowered to sell the property, &c. To an action for arrears due by a member who had executed a mortgage the defendant pleaded, setting out these rules, and alleging that the mortgaged premises were a sufficient security for the money advanced, and that if the directors had appointed a person to collect the rents and profits of the premises, there would have been sufficient to reimburse the plaintiffs all costs, charges, and expenses, and all subscriptions and other payments due from the defendant:—The court held that, although the directors might have a remedy by appointing a receiver to collect the rents, or by exercising the power of sale, an action might, notwithstanding such remedy, be maintained for breach of the express covenant to repay the mortgage money.

By the 33d rule of a building society it was provided that every member should pay 10*s.* per share subscription at every monthly meeting; and any member not having executed a mortgage to the society, continuing to neglect payment of his monthly subscription for six consecutive monthly nights, should thereupon cease to be a member of the society, and forfeit all his interest therein. By other rules the entire management of the society was vested in twelve directors, five to be a quorum. The plaintiff, a member, not having executed a mortgage for seven consecutive months, made default in payment of his monthly subscriptions, but on a subsequent monthly meeting night paid them to two of the directors, who attended for the purpose of receiving subscriptions, and they accepted the arrears in ignorance of the stringency of the rule, and gave receipts for them. At the first monthly meeting after that the directors resolved that the plaintiff had on the sixth default ceased to be a member of the society, and had forfeited all his interest therein. They erased his name from the list of members, and returned him the arrears paid by him to the two directors:—The court held, that under the thirty-third rule the plaintiff had forfeited his interest in the society, that the acceptance of the arrears by the two directors did not wave the forfeiture, and that the rule was not unreasonable. *Card v. Carr*, 1 C. B. (N. S.) 197; 26 L. J. C. P. 113.

The construction of several of the rules of a benefit building society came in question in the case of *Cutbill v. Kingdom*, 1 Ex. 494; 17 L. J. Ex. 177. In that case the object of the Metropolitan Building Association was to purchase freehold or leasehold property within twenty-five miles of London. By rule 3, actions and suits were to be brought in the names of the trustees; but no such proceedings were to be taken or defended until the approbation of a majority of the members present at a special meeting should have been obtained. The president had power to call a special meeting of the committee; and on receiving a written request, signed by twelve of the members, to convene a special general meeting, he was, within three days after, to convene such meeting:—The court held, that an action brought with the consent of the majority of the members present at a special general meeting was well brought within this rule.

By the 28th rule the committee were to determine all disputes which might arise respecting the construction of the rules or any of the clauses, matters, or things therein contained; the decision to be conclusive if satisfactory, but if not satisfactory, reference to be made to arbitration:—The court held that this related only to disputes respecting the construction of the rules, and did not prevent the trustees suing for subscriptions and fines. (Id.)

By the 11th rule, if the committee were satisfied that the premises offered by any member to whom shares had been awarded were a sufficient security, they were to direct the trustees to pay to such member the money he was entitled to receive on his executing a deed in trust to sell, or other valid conveyance, mortgage, or assurance:—The court held, that the society might lend money to its own members as well as to strangers. (Id.)

By the 8th rule, as often as the funds amounted to a share or sum of 120*l.*, the share was to be awarded to the highest bidder, the purchaser to have the privilege of taking as many additional shares at the same rate as he might choose. It was doubted, as the society enabled its members to hold an unlimited number of shares, each of which might be the maximum share, whether it was within 6 & 7 Wm. 4, c. 32. (Id.)

By the rules of a benefit building society it was provided, that the funds of the society should from time to time be put up for sale, the highest bidder to be the purchaser, and to receive shares at the rate of his bidding. Shares were paid for by monthly subscription. The nominal value of the shares was 120*l.* When the actual value reached that amount by the payments made, all arrears of subscriptions, &c. to be called in, the 120*l.* per share to be paid, and the society dissolved. In the meantime, any member desirous of receiving the actual value of his share or shares by way of loan, might obtain it on mortgage of buildings, paying then 4*s.* monthly beyond his subscription for redemption money or interest. The directors were empowered to borrow money for the purpose of making advances on shares. By the declared practice of the society, members who did not wish to take loans might allow their monthly subscriptions to accumulate at compound interest till the society dissolved, and thus were in fact capitalists, who so placed their money, without any view to bor-

(G) *Effect of Rule for Reference of Disputes to Arbitration.*

MORRISON v. GLOVER, 4 Ex. 430; 19 L. J. Ex. 20.

A rule for the reference to arbitration of disputes between a member and the

The trustees of a building society lent money on a mortgage of leasehold

rowing for building purposes or otherwise:—The court held, that the rules and practice of the association did not contravene the statute, or deprive the society of the protection against the usury laws, and thereby render it an illegal association if the loan produced more than five per cent annually. *Doe d. Morrison v. Glover*, 16 Q. B. 103.

One of the rules of a benefit building society, empowered the directors to invest any surplus money in land. The directors, with the view of altering the character of the society, changed the title of the society into "Freehold Land Society," but no alteration was made in the rules. A contract was entered into by the directors for the purchase of land, to be divided among the members of the society, and a portion of the funds of the society was applied in part payment of the purchase-money. Upon a bill filed by some of the members it was held, that the purchase was unauthorised by the rules and constitution of the society, and the directors were ordered to make good to the funds of the society the monies which had been so misapplied. *Grimes v. Harrison*, 28 L. J. Ch. 823; 5 Jur. N. S. 528.

Members of a building and investment society, which contemplates equal advantage to all, cannot borrow from the *fund* of investing members, without returning the benefits held out to them by the rules. *Sparrow v. Farmer*, 28 L. J. Ch. 537; 5 Jur. N. S. 520.

By the rules of a benefit building society, members were to pay a monthly subscription of 10*s.* per share, until the objects of the society were accomplished. One of the objects was the formation of a fund, from which shareholders might receive advances according to a table in respect of each share subscribed for, in which table the amount was stated which each shareholder was entitled to receive on each share for thirteen years; and according to the rules, if he did not elect to receive his advance on his share, he should receive 120*l.*; and it was declared by the rules, that when the sum of 120*l.* upon each unadvanced share, with all the expenses and liabilities of the company, should have been fully realised, the society should terminate, and the trustee should deliver up to each shareholder, who should have received an advance, the title deed deposited with them as security, and indorse upon the mortgage a receipt of all money secured thereby pursuant to the 6 & 7 Wm. 4, c. 32, s. 5, which operates as a reconveyance of the lands mortgaged:—The court held, first, that a shareholder who had received his advance was not discharged from all liability to subscribe at the termination of the thirteen years from the commencement of the society, the funds being inadequate to pay unadvanced shareholders 120*l.* per share in consequence of losses sustained by the fraud and embezzlement of the manager, and that such liability continued until the fund was sufficient to pay such unadvanced shareholders 120*l.* per share. Secondly, that an advanced shareholder, who executed a mortgage security for his subscriptions, and redeemed within thirteen years by payment of the gross amount of the prospective subscriptions calculated up to the end of the thirteen years, in accordance with a table appended to the rules, was, notwithstanding such redemption, liable, at the end of the thirteen years, to subscribe upon his share until the fund was adequate to pay unadvanced members 120*l.* per share. Thirdly, that he was so liable upon his covenant, as well as subject to be proceeded against under the rules, notwithstanding the indorsement upon the mortgage deed in pursuance of 6 & 7 Wm. 4, c. 32, s. 5, and the provision of that section that such indorsement shall operate as a reconveyance of the land mortgaged. *Farmer v. Smith*, 4 H. & N. 196; 28 L. J. Ex. 226.

Where the period fixed for the termination of a building society expired by effluxion of time, but the funds were insufficient to pay the investing members the sum it was by the rules calculated they ought to receive upon their shares, it was held that the borrowing members were, by the rules, entitled to have the deeds relating to property purchased by them with the borrowed money delivered up at the end of the time fixed for the termination of the society, and also to have a receipt indorsed on the deed mortgaging the property to the society, acknowledging the payment of all monies intended to be secured thereby; but as the object of the society was not complete, that all the members still continued liable to pay monthly subscriptions to the funds until they were sufficient to pay to each investing member the sum he was to receive per share, if the calculations had realised the proposed objects of the society. *Sparrow v. Farmer*, 28 L. J. Ch. 537.

A building society under the usual rules, duly certified, is within the operation of the Winding-up Acts, 11 & 12 Vic. c. 45, and 12 & 13 Vic. c. 108. *In re St. George's Benefit Building Soc.* 4 Drew, 154; 3 Jur. N. S. 683.

A building society, the object of which is to supply each of its members with a house worth 150*l.*, is not a society associated for a commercial purpose, so as to be entitled to registration under the 7 & 8 Vic. c. 110, although in the deed of settlement powers are given to the directors (as incidental to the main object of the society) to make and sell bricks, to buy and sell materials, and to contract with builders; nor are the contracts of such a body void because of its non-enrolment. *Moore v. Rawlings*, 5 Jur. N. S. 941; 28 L. J. C. P. 247.

property to one of the members, who covenanted to observe and fulfil the rules of the society, and also to pay certain rent due to the superior landlord. To an action on this covenant, the defendant pleaded that the claims and demands of the plaintiffs were matters in dispute between the society and the defendant, within the meaning of a rule which required that all disputes which might arise between the society and any member thereof should be referred to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27. The plaintiff demurred to the plea.

Reference to arbitration under rules of a benefit building society, does not preclude an action for arrears of premiums on the covenant in the mortgage deed.[1]

Per Cur. "Some of the grounds of action were undoubtedly between the society and the defendant in the character of a member, and there may be strong reason for saying, that if the claim had been entirely confined to a right on the part of the plaintiff of that description, *Crisp v. Bunbury* (8 Bing. 394) would apply, and the plea would be good. But it is clear that some of the breaches relied upon by the plaintiffs—for instance, a covenant to pay rent to Lord Cadogan—were matters not between the defendant as a member of the society and the society. They were merely between the defendant and the society as a mortgagor. Now we are of opinion, that if any other rule be established than that, the dispute must be with the party as member (if he go beyond that one step); the consequence must be, that any extraneous matter of any sort that might happen to arise between the society and any of its members, having no connexion with the society, would become the subject matter of reference. It appears to us, therefore, the words 'matter in dispute,' must be read matter in difference between the society and the members as members, and not in any other capacity. The demurrer, therefore, to the plea must be allowed."

REG. v. TRAFFORD, 4 E. & B. 122; 24 L. J. M. C. 20.

This was a rule calling on certain justices to show cause why a *certiorari* should not issue to remove an order for the delivering up by a benefit building society of a mortgage deed on payment of the principal monies. In support of the application it was contended, that the claim of the member as mortgagor to redeem his mortgage upon the disputed terms was not a dispute between the society and one of its members in respect of mutual rights and duties arising solely out of that relation under the rules, but a dispute between mortgagee and mortgagor, arising out of an indenture of mortgage containing only incidentally a reference to the rules of the society; that questions upon rights to lands arising out of a mortgage are within the jurisdiction of the courts at Westminster, although the mortgage should be made according to the rules of a benefit building society, and although the point in question really should be the construction of one of those rules, and that if these questions were within the superior jurisdiction, the justices had no authority to make the order in question.

And justices have no jurisdiction under 4 & 5 Wm. 4, c. 40, s. 7, to hear and determine a claim under such a deed.

[1] *See* also *Fleming v. Self*, 3 De Gex, M. & G. 99; but see *contra*, *Reeves v. White*, 21 L. J. Q. B. 169. By the rules of a building society, it was provided that all matters in dispute should be referred to two of her Majesty's justices of the peace. It was held on motion for a *mandamus* to the judge of one of the county courts to proceed and hear a plaint brought by one of the members against an officer of the society, that the jurisdiction of the county court did not extend to any disputes arising between the members of any such societies. *Ex-parte Payne*, 5 D. & L. 679; 18 L. J. Q. B. 197. *In Farmer v. Giles*, 5 H. & N. 753, 8 W. R. 649, by a deed between the trustees of a benefit building society and a member, after reciting that the member was entitled to receive 600*l.* in respect of his shares, by way of anticipation upon executing a mortgage security, the member covenanted to pay "the subscriptions and interest payable on his shares, according to the rules of the society, on the day and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares:"—The court held, that the trustees might sue the member upon the covenant for arrears of subscriptions, notwithstanding a rule providing for the reference to arbitration of all disputes which might arise between the trustees and any member concerning the affairs of the society, or respecting the construction of the rules or of any bye-laws. And, further, that the member was liable on his covenant, notwithstanding he had ceased to be a member before the subscriptions became due. *See* Russell on Arbitrations, p. 8, 41, 2d ed.

Erle, J., delivering the judgment of the court:—"We are of this opinion: In *Cutbill v. Kingdom*, 1 Ex. 494, the Court of Exchequer took this view of a claim on behalf a benefit building society for a breach of covenant. In *Fleming v. Self*, 24 L. J. Chan. 29, the *Lord Chancellor* took the same view with regard to a question arising upon a mortgage to a benefit building society, and cited two cases in which *Lord Cottenham* and *Lord Truro* had acted on the same view of the law. We therefore think that, on principle as well as authority, this rule should be made absolute."

(H) *Remuneration of Officers of Society.*

ALEXANDER v. WORMAN, 30 L. J. Ex. 198.

Surveyor and other officers can in general look only to the funds of the society for payment.

This was an action for work and materials. The plaintiff was the surveyor to a building society. He was an officer named in the rules, and by one of them his compensation was to be paid out of the funds of the society. The object of the society was to advance money to its members, to enable them to buy or build houses. The directors leased a piece of land, on which they proposed to build. At one of the regular meetings of the society the plaintiff was directed to prepare plans, and a resolution was entered in a book of the society to that effect. At another meeting, it was agreed that the compensation to the plaintiff should be 3*l.* 10*s.* per cent on the outlay, for which per-centage the action was brought. The plaintiff made the plans and superintended the building for some time, but ultimately the society became insolvent. The plaintiff made several applications for payment, but always to or through the secretary, and until the society was broken up he made no demand upon the defendant, or any other of the directors, that they should pay him out of their own funds. By a section in one of the acts of parliament regulating such societies, the surveyor is to be deemed to have notice of the rules.

The court held that he could not maintain an action against a director who had been present at the meetings when the resolutions were passed, saying, that it was clear upon the evidence that the defendant thought he was dealing with an officer of the society and not with a surveyor, whom he was to pay out of his own private funds, either solely or in conjunction with others. That it is a mistake to suppose that in societies of the kind the surveyor, or the secretary, or the officers do work and labour upon the same terms as professional men of their class ordinarily do. They generally have a much greater interest in these societies than the directors, and in the great majority of cases are the individuals who get them up, and at whose request the directors consent to accept the trust and take upon themselves the liabilities and duties of their situation. Such officers discharge duties and perform services with the understanding on all hands that they are to be remunerated out of the funds, and that if the funds fail, the officers must remain unpaid.

(I) *Qualification of Member to Vote in Parliamentary Elections.*

BEAMISH, App., v. STOKE, Resp., 11 C. B. 29; 21 L. J. C. P. 9.

Member not qualified to vote in parliamentary elections unless his estate of value of 40*s.*[1]

The claimant, a member of a building society, purchased land of the yearly value of 6*l.*, and mortgaged it to the trustees of the society for the amount of the purchase-money which they had advanced to him. He was also a holder of three shares in the society. By the rules of the society he was bound to pay 1*s.* 6*d.* weekly for each share (11*l.* 14*s.* per annum). And by the mortgage, which was in accordance with the rules of the society, power was reserved to the trustees, on neglect or refusal to observe any of the regulations, &c., to sell the premises, &c., and receive the rents. By the mortgage a sum equal to 5*l.* per

[1] The monthly payments, secured by mortgage to the trustees of a building society, constitute a charge upon the estate within the meaning of stat. 8 Hen. 6, c. 7.

cent as premium for prior advances, was to be and was secured ; and the sum fixed to be paid for incidental expenses was 6*s.* per annum, which was also secured. Of the 11*l.* 14*s.* per annum, 2*l.* 16*s.* was appropriated to the payment of interest on the money still due upon the mortgage and for incidental expenses, and the remainder was taken in part discharge of the mortgage debt, and a receipt given from time to time.

Per Cur. The whole 11*l.* 14*s.* must be deducted from the annual value of the estate ; and therefore the claimant had not an estate of the value of 40*s.* by the year within the meaning of 8 Hen. 6. c. 7, and 6 & 7 Vic. c. 18, s. 74, and is not entitled to a vote for a knight of the shire.

BIGAMY. The 24 & 25 Vic. c. 100, repeals the 9 Geo. 4, c. 31, s. 22, and enacts, "Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland,[1] or elsewhere, shall be guilty of felony, and being

What constitutes the offence.

[1] It is immaterial that the marriage took place in a foreign country. 1 Hale, 692. And a British subject resident in Ireland may be indicted and convicted of bigamy in England, although both marriages took place in Scotland. *Reg. v. Topping*, 25 L. J. M. C. 72. If celebrated abroad, it may be proved by a person who was present at it; and circumstances should also be proved from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. In order to prove that a marriage in Scotland is valid according to the law of Scotland, a witness conversant with Scotch law as to marriage ought to be called. *Reg. v. Povey*, 22 L. J. M. C. 19.

Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and custom of the foreign country, would be sufficient presumptive evidence of it (see *R. v. Inhabitants of Brampton*, 10 East, 283), so as to throw upon the defendant the *onus* of impugning its validity. (*See* further, as to Scotch marriages, *Dalrymple v. Dalrymple*, 12 Haggard's Rep. 54. *Ilderton v. Ilderton*, 2 H. Black. 145. *Crompton v. Bearcroft*, Bull. N. P. 113.) It is now established, by the case of *Reg. v. Millis* in the House of Lords (10 Clark & Fin. 534; *see* also *Catherwood v. Caslon*, 13 Mee. & W. 261), that by the common law of England a marriage between British subjects, although celebrated according to the rites of our church, is void, unless solemnised in the presence of a person in holy orders; and therefore, that all marriages not so solemnised in those parts of the British dominions to which the Marriage Act (26 Geo. 2, c. 33) does not extend, are still void, and will not subject the parties, if they afterwards contract a second marriage in the lifetime of both, to the penalties of bigamy. As to marriages of Roman Catholics in Ireland, see *R. v. Hanley*, Car. Sup. 254. *Reg. v. Orgill*, 9 C. & P. 80. As to French marriages, see *Lacon v. Higgins*, 1 D. & R. (N. P. C.) 38; 3 Stark. 178. As to marriages in the houses of ambassadors, &c., abroad, *see* 4 Geo. 4, c. 91; and as to marriages in Newfoundland, 5 Geo. 4, c. 68. If celebrated in this country, the marriage may be proved by the production of the register of the marriage or an examined copy of it, together with some proof, either direct or presumptive, of the identity of the parties. Where the marriage was solemnised under the provisions of stat. 6 & 7 Wm. 4, c. 86, the certificate authorised by the 7th section of that act, and by stat. 6 & 7 Wm. 4, c. 86, s. 38, coupled with evidence of the identity of the party by persons present at the marriage, is sufficient *primâ facie* evidence of a valid marriage. *Reg. v. Hawes*, 1 Den. C. C. 270. The procuring evidence that the prisoner married his first wife at a Wesleyan chapel in the presence of the registrar, who entered the marriage in his book, is, it seems, sufficient proof of the marriage, without proving that the chapel was duly registered for marriages; for the fact of the solemnisation of the marriage in a chapel in the presence of the registrar, who could not lawfully have been present had the chapel not been registered, and the entry of the marriage in his book, raised a *primâ facie* presumption that the chapel was duly registered. *Reg. v. Mainwaring*, 26 L. J. M. C. 10.

The prisoner's admission of a prior marriage is evidence that it was lawfully solemnised. *Reg. v. Renton*, 2 M. & Rob. 503. *Reg. v. Simmons*, to 1 C. & Kir. 164. If the marriage were by license, and celebrated under the stat. 26 Geo. 2, c. 33, it was necessary by s. 11, if either of the parties were a minor at the time, to prove that the marriage was solemnised with the consent of the father, guardian, or mother of the minor, as required by that act (*R. v. Butler*, R. & R. 61. *R. v. Morton*, id. 19. In *R. v. James*, id. 17: *per Bayley, J. Smith v. Huson*, 1 Phil. 287); but it seems that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent. R. & R. 61, n. Provisions were made to remedy this by stat. 3 Geo. 4, c. 75, and 4 Geo. 4, c. 17, s. 2, and the stat. 4 Geo. 4, c. 76, s. 14, merely re-

Punishment.

Venue.

Proviso as to absence or want of knowledge for seven years, divorce, &c.

convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined and punished, in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: Provided always, that nothing herein contained shall extend to any second mar-

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quires consent in such cases, but does not proceed to make void marriages solemnised without such consent (*R. v. Birmingham*, 8 B. & C. 29), and therefore such consent need not now be proved. And *see* now 6 & 7 Wm. 4, c. 85, s. 25. Where a minor was married, without consent, in the interval between the 22d July, 1822 (when the 3 Geo. 4, c. 75, received the royal assent, by which s. 11 of stat. 26 Geo. 2, c. 33, was repealed), and the 1st of September, 1822 (when the stat. 3 Geo. 4, c. 75, came into operation), it was held that the marriage was valid, because during that interval there was no enactment in force relating to marriages by license. *R. v. Waully*, 1 M. C. C. 163. It was the intention of the Marriage Act that the bans should be published in the true names of the parties. Under the old act (26 Geo. 2, c. 33), the rule on this subject was, that if the bans were published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage, in pursuance of that publication, was invalid, and it was immaterial in that case whether the mis-description had arisen from accident or design, or whether it were fraudulent or not; but if there were a partial variation of the names only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names were such as the parties had used and been known by at one time, and not at another, in such cases the publication might or might not be void, the supposed misdescription might be explained, and it became a most important inquiry whether it was consistent with honesty of purpose, or was done from a fraudulent intention. *R. v. Inhabitants of Tibshelf*, 1 B. & Adol. 190. But now, under the stat. 4 Geo. 4, c. 76, s. 22, in order to invalidate a marriage, the misdescription in the bans must be with the knowledge of both parties, for the words of the statute are, "knowingly and wilfully." *R. v. Inhabitants of Wroxton*, 4 B. & Adol. 640. *See* also stat. 6 & 7 Wm. 4, c. 85, ss. 42, 43. Where a man and woman were married in Ireland with the ceremonies making a marriage of Roman Catholics valid, they declaring themselves to be Roman Catholics, it was holden that the man could not on an indictment for bigamy set up his alleged Protestantism to defeat such marriage. *Reg. v. Orgill*, 9 C. & P. 80. A valid marriage must be proved (*per Bayley, J.*, in *Smith v. Huson*, 1 Phil. 287); the law will not presume it in cases of bigamy as it will in civil cases. (Id.) It is not necessary, however, to prove the registration of the marriage, the license, or the publication of the bans; the marriage may be proved by some person who was actually present and saw the ceremony performed. *R. v. Allison*, R. & R. 109. With respect to the place where the bans may be published and a marriage solemnised, *see* the Marriage Acts, 4 Geo. 4, c. 76; 6 id. c. 92; and 6 & 7 Wm. 4, c. 85. The non-residence of the parties where the bans were published, or if by license, where the marriage was solemnised, is immaterial. 4 Geo. 4, c. 76, s. 26. *R. v. Hind*, R. & R. 253; 6 & 7 Wm. 4, c. 85, s. 25.

The marriages of Jews (see *Lindo v. Belisario*, 1 Hag. 216. *Goldsmid v. Bromer*, id. 324), and Quakers (see *Dean v. Thomas*, M. & M. 361), where both parties are Jews or Quakers, were excepted out of the 4 Geo. 4, c. 76; but they are now provided for by the 6 & 7 Wm. 4, c. 85, and 10 & 11 Vic. c. 58. The act does not extend to marriages beyond seas, or in Scotland. *See*, as to marriage of illegitimate children by license in England, *Priestly v. Hughes*, 11 East, 1.

Proof of a marriage which is voidable merely will support an indictment for bigamy. 3 Inst. 88. Thus, a marriage by a minor in Ireland without consent, which by the Irish Marriage Act is voidable only within a year, will support a conviction for bigamy if the marriage be not vacated. *R. v. Jacobs*, 1 M. C. C. 140. But it is otherwise if the marriage be not voidable merely, but void; as, for instance, if a woman marry A., and in the lifetime of A. marry B., and after the death of A., whilst B. is alive, she marry C., she cannot be indicted for bigamy in her marriage with C., because the marriage with B. was a mere nullity. 1 Hale, 693. So the marriage of an idiot or of a lunatic not in a lucid interval is void, because he is deemed in law incapable of entering into such a contract. 1 Bl. Com. 438, 439. So if a boy under fourteen, or a girl under twelve, contract matrimony, it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. Co. Litt. 79. See *Reg. v. Gordon*, R. & R. 48. The stat. 5 & 6 Wm. 4, c. 54, s. 2, makes all marriages which thereafter should be celebrated between persons within the prohibited degrees of consanguinity or affinity (*i. e.* all marriages which were at that time voidable in the ecclesiastical courts by reason of their being within the prohibited degrees) absolutely null and void to all intents and

riage contracted out of England by any other than a subject of his Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last passed, and shall not have been known by such person to be living within that time,[1] or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage,[2] or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."[3]

purposes. Since this statute, therefore, a marriage with the sister of a deceased wife is absolutely void. *Reg. v. Chadwick*, Q. B. 1847; Arch. *Cr. Law*, 650.

It was formerly necessary to prove that the second marriage took place in England, for it is the second marriage which constitutes the offence (1 Hale, 692, 693); but now it is immaterial whether the second marriage take place in England or elsewhere, provided, if the second marriage take place out of England, the defendant be a subject of her Majesty. 24 & 25 Vic. c. 100, s. 57.

It seems that the offence will be complete, though the defendant assume a fictitious name at the second marriage. *R. v. Allison*, R. & R. 109. And where upon an indictment for marrying Anna T., the defendant's first wife being alive, it appeared that her name was not Anna, but Susanna, but the defendant wrote her name Anna in the note for the publication of the bans, and signed the register in which she was so called, it was held that, although her name might not be Anna, he could not defend himself on the ground that he did not marry Anna T. *R. v. Edwards*, R. & R. 283. So also where the second wife was married by the name of Eliza Thick, which name she had assumed when the bans were published, purposely that she might not be known to be the person intended (her name being Eliza Brown), *Gurney, B.*, held it to be no answer to the charge. *R. v. Penson*, 5 C. & P. 412. Though the subsequent marriage would have been void as for consanguinity or the like, the defendant is guilty of bigamy. *Reg. v. Brown*, 1 C. & Kir. 144. It must be proved that the first wife was alive at the time the second marriage was solemnised, which may be done by some person acquainted with her, and who saw her at the time or afterwards. The first wife is not a competent witness to prove any part of the case, either for or against her husband, but the second wife is.

[1] The words, "the wife or husband of the party indicted has been continually remaining absent from the other for the space of seven years then last passed, and has not been known by the other to be living within that time," means, has not been known at any period during the seven years to be alive. *Reg. v. Cullen*, 9 C. & P. 681; 9 Geo. 4, c. 31, s. 22. Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who, it appeared, had been living seventeen miles from where the defendant (a poor labouring man) resided, he was held entitled to an acquittal under this proviso. *Reg. v. Thomas Jones*, Car. & M. 614. Where, on the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of the second marriage, she knew he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them, the Court of Criminal Appeal held, that on this finding the conviction could not be supported. *Reg. v. Mary Briggs*, 26 L. J. M. C. 7.

[2] A divorce *à vinculo* for adultery, in a court in Scotland, of persons married in England, is not within the statute, because no sentence or act of any foreign country or state can dissolve an English marriage, *à vinculo*, for grounds for which it cannot be dissolved in England. *R. v. Lolley*, R. & R. 237. See *Dolphin v. Robins*, 29 L. J. P. & M. 11.

[3] The corresponding clause of the statute, 1 Jac. 1, c. 11, s. 3, was held not to extend to the sentence of an ecclesiastical court in a cause of jactitation of marriage (*Duchess of Kingston's case*, 11 *St. Tr.* 262); and even sentences within this clause of the act may be impeached, on the part of the Crown, upon the ground of fraud or collusion. Id. 1 Phil. *Ev.* 338.

Form of Indictment for Bigamy.

Central Criminal Court,
to wit.

The jurors for our Lady the Queen upon their oath present that P. S., late of the parish of B. in the county of M., labourer, on the 1st day of May, in the twenty-second year of the reign of our Sovereign Lady Victoria, at the parish of C. in the county of D., did marry one A. C., spinster, and her, the said A., then and there had for his wife; and that the said P. S. afterwards, and whilst he was so married to the said A. as aforesaid, to wit, on the 1st day of June, in the twenty-fourth year of the reign of our Sovereign Lady Victoria, at the parish of F., in the county of G., feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. was then and there married (the said A., his former wife, being then alive), against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown

BILL in Chancery. *See* Equity, Bill in.

BILL of Costs. *See* Attorney, *ante*, p. 5; and *post*, Costs.

BILL of Exceptions.[1]

and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present that the said P. S. afterwards, to wit, on the 10th day of June in the year last aforesaid, at the said parish of B., in the county of M. aforesaid, and within the jurisdiction of the said court, was apprehended [*or* that the said P. S. now is in custody at the parish of B. in the county of M. aforesaid, and within the jurisdiction of the said court] for the felony aforesaid.

If the defendant be not indicted in the county in which the second marriage took place, it must be proved that he was apprehended, or is in custody, in the county in which he is indicted. By the repealed statute, 1 Jac. 1, c. 11, the defendant might be tried in the county where he was apprehended, but the words "in custody" were not in that act. Where, the defendant being in custody in the county of N. for larceny, a bill was preferred against him for bigamy in another county, upon which he was detained by order of the court, it was holden sufficient to warrant the trial in the county of N., because, being in custody upon a criminal charge, he was liable to be tried where he was imprisoned. *R. v. Gordon*, R. & R. 48.

The averment in the above form of indictment of the prisoner's apprehension is only necessary where the second marriage did not take place in the county where the defendant is indicted, but in such case it is essential. *R. v. Fraser*, 1 M. C. C. 407. So where the indictment is found in a different county from that in which the offence was committed, it must allege that the prisoner was in custody at the time of the finding of the inquisition in the county of the finding. *Reg. v. Whiley*, 2 id. 186. The allegation that the defendant married again, the said A., his wife, being then alive, sufficiently charges the offence, without any further averment that he was still married to A. when the offence was committed. *Reg. v. Murray*, 7 Q. B. 700.

[1] The right to tender a bill of exceptions is given by the 13 Edw. 1, stat. 1, c. 31, and may be exercised. Where a party, during the trial, conceives that a judge has been mistaken in some point of law, as in rejecting or admitting evidence, or refusing a challenge, or refusing to direct the jury in a particular way submitted by the party.

And it has been said, that if a judge at the trial leaves as a fact to the jury any matter which he should determine as a point of law, the counsel should interpose and tender a bill of exceptions; otherwise, if in the opinion of the court the jury decide the question left to them correctly in point of law, the judge's misdirection is no ground for a new trial. *Doe d. Strickland v. Strickland*, 19 L. J. C. P. 89.

The party at the time merely makes a memorandum of the exception and the ground thereof, and so does the judge, and the exception is afterwards formally drawn up by counsel, engrossed, and sealed by the judge. Bull. N. P. 316. *R. v. Rowley*, 2 Dowl. N. S. 335. Where the judge dies before the bill is sealed, and the party thus loses the benefit of the bill without any fault of his own, it is not competent for another judge of the court out of which the record issues to seal the bill; but the court will grant a new trial, though the proper time for moving has elapsed. *Newton v. Boodle*, 3 C. B. 795. *Hind v. Arthur*, 7 D. & L. 252. Where the draft of the bill had been submitted to the judge, who shortly after resigned and fell into ill health, and the draft had stood unsettled a long time, the court remitted the parties to their right by granting a new trial. *Bennett v. Peninsular & Oriental Co.* 16 C. B. 20. If the judge refuses to sign the bill, a compulsory writ may be obtained to compel it; and if it state falsely the exception, an action lies. Bull. N. P. 316. See *Money v. Leach*, 3 Burr. 1693. A bill of exceptions is available in all cases where error would lie, and in inferior courts, though not of record. *Strother v. Hutchinson*, 4 Bing. N. C. 83. It is doubtful whether it can be resorted to where a judge executes a writ of inquiry. *Price v. Green*, 16 Mee. & W. 346. It does not lie, it seems, at the trial of a feigned issue (*King v. Simmons*, 7 Q. B. 289), or of an issue from Chancery. *Armstrong v. Lewis*, 3 Mylne & K. 52.

And it is considered doubtful whether a bill of exceptions will lie in an information for penalties under the Smuggling Acts. *The Attorney-general v. Otto Radloff*, 23 L. J. M. C. 240.

The exception must be tendered before verdict. *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1013. *Armstrong v. Lewis*, 4 M. & Scott, 1; 2 C. & M. 275.

The ground of exception should in general distinctly appear, so that the judge may have an opportunity of correcting the error before it is too late. *Bain v. Whitehaven Railway Co.* 7 Bell's *App. C.* 80. It is for misdirection, and not non-direction, that the bill lies; *i.e.* it is not enough to state in the bill, that the judge declined to direct the jury in the way suggested, without showing what the direction was. *M'Alpine v. Mangnall*, 3 C. B. 496. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. But if the judge says there is no case to go to the jury, and the defendant tenders an exception to that, and

states as his ground of exception that which is bad law, it is immaterial, for the judge's attention must have been sufficiently called to the point. *Paterson v. Wallace*, 23 L. T. Rep. 249. A bill of exceptions cannot be tendered after a nonsuit, on the ground that such nonsuit was improperly directed. *Corsar v. Need*, 17 Q. B. 540.

The proper course in such a case is for the plaintiff, when called, to appear, and require the judge to direct the jury in point of law in his favour, and then, on the judge's refusal, to tender the exception. (Id.) On considering a bill of exceptions the attention of the court is confined to the specified exceptions alone, and the court cannot pronounce an opinion on the whole evidence stated on the record. *Lord Trimlestown v. Kemmis*, 9 Clark & Fin. 749.

A party who has tendered a bill of exceptions may also move for a new trial, provided the ground on which he does so could not have been included in the bill of exceptions (*Gregory v. Slowman*, 1 E. & B. 360. *Allen v. Hayward*, 7 Q. B. 969. *See post*, New Trial); but if it might have been included, the bill of exceptions must be abandoned before the new trial can be moved for. *Adams v. Andrews*, 15 Q. B. 1001.

The bill of exceptions when signed is either tacked to the record or contains the record set forth at the beginning, and the bill states the proceedings at the trial, and so much of the evidence as is necessary to render the exceptions intelligible. *Davis v. Lowndes*, 1 Scott, N. R. 336; 1 Man. & G. 4. No exception which is not stated in the bill can be taken notice of by the court of error. *Rutter v. Chapman*, 8 Mee. & W. 1. Judgment being signed in the usual way, and the bill of exceptions having been sealed, and not before (*Dillon v. Parker*, 1 Bing. 17), error is then brought on the judgment to the Exchequer Chamber, and after argument judgment is given as in ordinary cases. If the judgment is in favour of the exceptions a *venire de novo* is awarded (*Davies v. Pierce*, 2 T. R. 125); or the court of error may give such judgment as the court below ought to have done. C. L. P. Act, 1852, 15 & 16 Vic. c. 76, s. 157. And if a trial *de novo* is awarded, the parties may at once bring error to the House of Lords before going to a new trial. 17 & 18 Vic. c. 125, s. 43. In case of affirmance of the judgment, the court of error may adjudge costs to the defendant in error (id.); but no costs in error are given by the Exchequer Chamber on reversal. *Fisher v. Bridges*, 4 E. & B. 666. In the House of Lords, when the exceptions are allowed, costs are not awarded, because it is the judge's mistake; but when they are disallowed costs are awarded, because then it is the party's mistake. Cited *Paterson v. Wallace*, 1 Macq. A. C. 748.

Form of Bill of Exceptions.

After the end of the issues as delivered proceed thus:—Which said several issues, in manner aforesaid respectively joined between the plaintiff and the defendants, afterwards at the assizes holden at in and for the county of before Sir Knight, one of the Justices of our Lady the Queen, and Sir Knight, one of the Barons of her Majesty's Court of Exchequer at Westminster, Justices of our said Lady the Queen, assigned to take the assizes in and for the said county of according to the form of the statute in such case made and provided, on came on to be tried, at which day before the said justices came the said parties by their respective attornies aforesaid, and the juries of the party being called, likewise came and were sworn to try the said several issues in manner aforesaid respectively joined. And thereupon to maintain the issue thirdly above joined, the defendant then and there gave in evidence to the jury so impanelled and sworn as aforesaid, that [*here state the evidence*] and thereupon the plaintiff offered to prove that [*state the evidence excepted to and wrongfully admitted*], whereupon the counsel on the part of the defendant interposed, and insisted that the said evidence so offered to be given by the plaintiff to the jurors aforesaid was not good or admissible in law upon the issue aforesaid, and prayed the said justices to inform the said jurors aforesaid that the said last-mentioned evidence was not good or admissible in law upon the issue aforesaid, and that the issue aforesaid thirdly above joined ought to be found for the plaintiff. But the said justices held and affirmed that the said evidence so offered to be given by the plaintiff as aforesaid was good and admissible in law, and thereupon the plaintiff gave in evidence and proved to the jury aforesaid that [*state the evidence objected to*]. And the said justices by their direction to the said jury according to their opinion, left the consideration thereof to the jurors aforesaid, and the jurors aforesaid gave their verdict against the defendant upon the issue last mentioned. Whereupon the counsel for the defendant, conceiving that by law the matter aforesaid so as aforesaid given in evidence to the said jurors by the plaintiff on the issue aforesaid thirdly above joined, was admissible in law upon the said issue, made their exceptions to the said opinions of the said justices; and inasmuch as the matters aforesaid do not appear by the record of the verdict aforesaid, the counsel on behalf of the defendant prayed that the said justices would set their hands and seals to this bill of exceptions, containing the several matters so proved and given in evidence as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said Sir Knight, hath set his hand and seals thereto, according to the form of the statute in such case made and provided, at [*assize town*] aforesaid, the day of in the year of the reign of our Sovereign Lady Queen Victoria.

Judge's signature. (L. S.)

BILLS of Exchange and Promissory Notes. *See* also Accord and Satisfaction, vol. i. p. 88; Bankruptcy, *ante*, p. 141; Chose in Action; Composition with Creditors; Forgery; Guarantee; Larceny; Principal and Assignee; Principal and Surety.

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(I) Their Nature and Properties.

(*a*) *General Requisites.*[1]

[1] A bill of exchange is a written order for the payment of a certain sum of money unconditionally. He who makes this order is called the drawer: he to whom it is addressed, the drawee; and if he accept it, the acceptor: he in whose favour it is made, the payee. See *Stock v. Mawson*, 1 B. & P. 291: *per Heath, J.*; *Gibson v. Minet*, 1 H. Black. 602: *per Eyre, C.J.*

A promissory note is a written promise to pay a certain sum of money unconditionally. He who promises is called the maker; he to whom the promise is made, the payee. A cheque is a bill of exchange addressed to a banker, and payable to a certain person or bearer. *See ante*, p. 123. A bank-note is a promissory note made by a banker. *See ante*, p. 130.

A promissory note differs in nothing from a bill of exchange except in its form. "While a promissory note," said *Lord Mansfield*, "continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed the resemblance begins, for then it is an order by the indorser upon the maker of the note (his debtor by the note) to pay to the indorsee. This is the very definition of a bill of exchange. Therefore, as soon as a note is indorsed by the payee, the indorser is the drawer; the maker of the note is the acceptor, and the indorsee is the person to whom it is payable." *Heylin v. Adamson*, 2 Burr. 669.

Bills of exchange derive their peculiar properties from the custom of merchants; promissory notes from stat. 3 & 4 Anne, c. 9, which places them on the same footing with bills of exchange.

That act was passed in consequence of the refusal of Lord Holt to concede to the custom which had sprung up among merchants of treating promissory notes as negotiable. His lordship, departing, perhaps, somewhat from that excellent good sense which usually characterised him, treated the endeavour to uphold the negotiability of notes with some indignation, saying, that "it proceeded from the obstinacy and opinionativeness of the merchants, who were endeavouring to set the law of Lombard Street above the law of Westminster Hall." *Clerk v. Martin*, 2 Ld. Raym. 757; Sm. M. L. 189.

A bill of exchange operates as an undertaking from the drawer to the payee, and any subsequent holder, that the drawee is a person competent to accept, that he is engaged to pay it, and that he will, when requested, accept, and when it becomes due, pay it. If he refuse to accept, the contract is broken, and the Statute of Limitations be-

gins to run from that period (*Whitehead v. Walker*, 9 Mee. & W. 507), for the engagement is not a double one; first, that the drawee shall accept upon presentment for acceptance; and, secondly, pay upon presentment for payment; but single: namely, in the case of a bill payable after sight, that the drawee shall, upon the bill being presented to him in a reasonable time after date, accept the same, and having accepted, shall pay it when duly presented for payment; and in the case of a bill payable after date, that the drawee shall accept it if it is presented to him before the time for payment, or if it is not presented for acceptance at all, then that he shall pay it when duly presented for payment. (Id.)

A note operates as an undertaking by the maker to the payee, and every subsequent holder, that he will pay the money therein named in the mode therein specified.

No particular form of words is requisite to constitute a note or bill (*Chadwick v. Allen*, 1 Stra. 706. *Morris v. Lea*, 2 Ld. Raym. 1396; 1 Stra. 629. *Shuttleworth v. Stephens*, 1 Camp. 407. *Greig v. Milner*, 8 Taunt. 739. *Stark v. Cheesman*, Carth. 509. *Dehers v. Harriot*, Show, 163. *Robinson v. Bland*, 2 Burr. 1077. *Ridout v. Bristow*, 1 Clark & Fin. 231; 1 Tyr. 84. *Green v. Davies*, 4 B. & C. 235. *Block v. Bell*, 1 M. & Rob. 149); and if it appear doubtful for which of the two a particular instrument was intended, it may be treated as either. *Edis v. Bury*, 6 B. & C. 433. See *Dickenson v. Teague*, 1 C. M. & R. 241; 4 Tyr. 450. *Block v. Bell*, *supra*. But it must fall strictly within one of the above definitions. Thus, there must be an order or promise to pay; the mere acknowledgment of a debt, such as an I. O. U., is not a promissory note. *Fisher v. Leslie*, 1 Esp. 426. *Childers v. Boulnois*, 1 Dowl. N. P. C. *Ellis v. Ellis*, Gow. 216. *Israel v. Israel*, 1 Camp. 499. Nor does a supplication to the drawee that he will pay, amount to constitute a bill of exchange; there must be *an order*. *Little v. Slackford*, 1 M. & M. 171. A mere authority to pay is not a bill. *Norris v. Solomon*, 2 M. & Rob. 266. *Rupell v. Powell*, 14 Mee. & W. 418. Again, it must be for the payment of money alone. *Martin v. Chauntry*, 2 Stra. 1271. *Anon.* Bull. N. P. 272. *Ex-parte Imeson*, 2 Rose, 225. *Ex-parte Davison*, Buck, 31. *R. v. Wilcox*, Bayl. 5th ed. p. 11. *Bolton v. Dugdale*, 4 B. & Adol. 619.

An order or promise to pay "in cash or Bank of England notes" is insufficient (*sed quare* since 3 & 4 Wm. 4, c. 98, s. 6; continued 7 & 8 Vic. c. 32, s. 27); and that money must be a certain sum; for a promise to pay "J. E. 65*l.*, with all other sums that may be due to him;" or to pay "13*l.* and all fines according to rule" (*Ayrey v. Fearnsides*, 4 Mee. & W. 168) is not a promissory note. *Smith v. Nightingale*, 2 Mer. 375. Moreover, the money must be payable unconditionally. If it contain any condition precedent, or defeasance, or be payable at an uncertain time, or out of an uncertain fund, it is no bill or note. *Colehan v. Cooke*, Willes, 393. *Appleby v. Biddulph*, 8 Mod. 363; 4 Vin. 240, pl. 16. *Roberts v. Peake*, Burr. 323. *Beardesley v. Baldwin*, 2 Stra. 1151. *Josselin v. Laerei*, 10 Mod. 294, 316. *Haydock v. Lynch*, 2 Ld. Raym. 1563. *Dawkes v. Deloraine*, Bl. 782. *Jenny v. Herle*, 2 Ld. Raym. 1361; 1 Stra. 591. *Hill v. Halford*, 2 B. & P. 413. *Leeds v. Lancashire*, 2 Camp. 205. *Hartley v. Wilkinson*, 4 Camp. 127; 4 M. & S. 25. *Williamson v. Bennett*, 2 Camp. 417. *Crowsfoot v. Gurney*, 9 Bing. 574. *Clarke v. Percival*, 2 B. & Adol. 660. *Worley v. Harrison*, 3 Ad. & E. 669. *Wheatley v. Williams*, 1 Mee. & W. 533. *Drury v. Macauley*, 16 Mee. & W. 147. *Moffatt v. Edwards*, Car. & M. 16. Where the instrument was in the following form:—

£1200. Warrington, 4th March, 1824.

On demand we promise to pay to Mr. George Clarke, or order, twelve hundred pounds for value received in stock, ale, brewing vessels, &c., this being intended to stand against the undersigned, Mary Percival, as a set-off for the sum left in my father's will above my sister Ann's share.

THOMAS PERCIVAL.
MARY PERCIVAL.

Witness, William Hull.

The Court of King's Bench held that the 1200*l.* was not payable at all events, and the instrument, therefore, not a promissory note. *Clarke v. Percival*, 2 B. & Adol. 660. *See* also *Robins v. May*, 11 Ad. & E. 213.

But an order by the freighter of a ship to pay money on account of freight (*Pierson v. Dunlop*, Cowp. 571), or an order to pay so much as the drawer's quarter's half-pay (*M'Cleod v. Snee*, 2 Ld. Raym. 1481); or for value deposited and registered (*Haussoullier v. Hartsinck*, 7 T. R. 733); or, "I promise to pay M. A. on demand £ by giving up clothes and papers" (*Dixon v. Nuttall*, *post*, p. 466. *See* also *Shenton v. James*, 5 Q. B. 199. *Fox v. Frith*, Car. & M. 502); or, when J. S. comes of age, to wit, June 12, 1750 (*Goss v. Nelson*, 1 Burr. 226); or, six weeks after the death of A. B. (*Colehan v. Cooke*, 2 Stra. 1217; Willes, 393. *Raffey v. Grenwell*, 10 Ad. & E. 222); have been held payable at all events, and therefore good: for, to use the words of *Willes, C. J.*, "If a bill or note be made payable at ever so distant a day, yet if it be a day that must come, it is no objection to the bill or note;" and therefore a bill payable within two months after his Majesty's ship A. B. shall be paid off is good, for the paymaster being government, it is morally certain that payment will be made. *Andrews v. Franklin*, 1 Stra. 24. "I promise to pay, or cause to be paid," is a good note. *Lovell v. Hill*, 6 C. & P. 238.

An instrument is not the less a note because it contains a memorandum that the maker has deposited title deeds with the payee as a collateral security. *Wise v. Charlton*, 4 Ad. & E. 786. *Fancourt v. Thorne*, 16 L. J. Q. B. 344. So an instrument, the effect of which was, "I promise to pay 600*l.* by instalments, and I agree to set off 95*l.*,"

was held not to be a note, for, besides its complexity, the 95*l.* could not be payable to an indorsee. *Davies v. Wilkinson*, 10 Ad. & E. 98. If at the time of making a bill or note an indorsement be written on it, making it payable only on certain conditions, that will deprive it of the character of negotiability, and turn it into an agreement as between the parties privy to it. *Leeds v. Lancashire*, 2 Camp. 205. *Hartly v. Wilkinson*, 2 Mod. 25. *Stone v. Metcalf*, 1 Stark. 53. But the indorsement on a note, of a mere reference to an agreement for the purpose of ear-marking it as the note named in that agreement, has not such an effect. *Brill v. Crick*, 1 Mee. & W. 232. See *Cholmley v. Darley*, 14 id. 344. Nor can such an instrument ever be rendered conditional by a contemporaneous parol agreement, for it is one of the first principles of the law of evidence that oral testimony should never be permitted to vary or contradict the terms of any written contract. *Foster v. Jolly*, 1 C., M. & R. 705, 772. *See* 3 Camp. 57; 10 C. B. 895.

Although conformity with all of the above definitions is in general strictly required, yet if a word be fraudulently inserted by the maker or drawer, in order to prevent the instrument from acquiring the legal properties of a bill or note, as where the maker of a note worded it thus, "I promise not to pay," the court will reject the word as fraudulently introduced, and read the instrument without it. *Per Lord Macclesfield*, cited by *Lord Hardwick*, 2 Atk. 32. *Allen v. Mawson*, 4 Camp. 115.

A bill or note is called inland when made and payable in England; a bill drawn in England on a person residing abroad, but payable in England, is an inland bill. *Amner v. Clark*, 2 C., M. & R. 468. A bill is foreign where made or payable abroad. A bill drawn in England, and payable abroad, is governed by the law of the country where it is made payable, according to the maxim of the civilians,—"*Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligaverit*," &c. *Gibbs v. Fremont*, 9 Ex. 25. *Rothschild v. Currie*, 1 Q. B. 43. In pleading, such an instrument is always presumed to be inland unless the contrary be shown. *Armani v. Castrique*, 13 Mee. & W. 443.

Form of an Inland Bill of Exchange.

£100.

London, Jan. 1, 1861.

(Stamp.) At sight [*or* on demand, *or* at days after sight, *or* at days after date], pay to Mr. or order [*or* bearer], one hundred pounds, for value received.

JOHN WOOD.

To Mr. Thomas Jones,
Merchant at Liverpool.

The usual form of a promissory note is this:—

£100. Liverpool, 1 September, 1861.

Two months after date I promise to pay to Mr. George Brown, or order, one hundred pounds for value received.

At, &c. ALEXANDER SMITH.

In *Cashborne v. Dutton*, Selw. N. P. 401, the following instrument was, after solemn argument, held to be a good note:—

I do acknowledge myself to be indebted to A. £ to be paid on demand, for value received.

The words "to be paid," being held to amount to promise to pay.

In *Brooks v. Elkins*, 2 Mee. & W. 74, the following instrument was held to require a stamp:—

11th October, 1831.

I. O. U. 20*l.*, to be paid on the 22d instant.

W. BROOKS.

I have received the imperfect books, which, together with the cash overpaid in the settlement of your account, amounts to 80*l.*, which sum I will pay in two years.

Held, a note. *Wheatley v. Williams*, 1 Mee. & W. 533.

I have received the sum of 20*l.*, which I borrowed from you, and I have to be accountable for the said sum, with interest.

Held, on argument, not a note. *Horne v. Redfearne*, 4 Bing. N. C. 433.

11th November, 1839.

I. O. U. 45*l.* 13*s.* which I borrowed of Mrs. Melanotte, and to pay her five per cent till paid.

ROBERT TEASDALE.

Held, not a note, and not to require a stamp as an agreement. *Melanotte v. Teasdale*, 13 Mee. & W. 216.

Memorandum. Mr. Sibree has this day deposited with me 500*l.* on the sale of 10,300*l.* 3 per cent Spanish, to be returned on demand.

JAMES T. TRIPP.

Held, not a note. *Sibree v. Tripp*, 15 Mee. & W. 23.

John Mason, 18th Feb. 1836, borrowed of his sister, M. A. M., the sum of 14*l.* in cash, as per loan, on promise of payment; for which I am truly thankful for, and shall never be forgotten by me, John Mason. Your affectionate brother. £14.

Held to be a note. *Ellis v. Mason*, 7 Dowl. 598.

11th September, 1839.

I undertake to pay to Mr. Robert Jarvis the sum of 6*l.* 4*s.* for a suit of clothes ordered by Daniel Page.

J. W. WILKINS.

Held, a guarantee, not a note. *Jarvis v. Wilkins*, 7 Mee. & W. 410. *Baron Parke* said, that had "supplied" been inserted instead of "ordered," it would have been a note.

So an instrument in the form of a note, but with a memorandum written upon it, stating that it is taken "for securing payment of all such balances as shall be due

(B) *The Money must not be Payable on a Contingency.*[1]

ROBINS v. MAY, 3 Per. & D. 147; S. C. 11 Ad. & E. 213.

A promise to pay on realising securities is not a valid note;

"*Devonport, June* 22, 1837.—At twelve months after date I promise to pay Messrs. Robins, Foster, and Co. 500*l.*, to be held by them as collateral security for any monies now owing to them by Mr. Joseph Malachy, which they may be unable to recover on realising the securities they now hold, and others which may be placed in their hands by him.—THOMAS MAY." It was contended, there is here a clear contingency, for it depends on intermediate occurrences, not only whether the instrument itself is to be paid, but whether or not the amount is to be realised to the payees. *Ayrey v. Fearnsides*, 4 Mee. & W. 169.

Per Cur. This is a conditional promise, and the instrument, therefore, not a promissory note; it gives notice to all the world that it is payable on a contingency. See *Drury v. Macauley*, 16 Mee. & W. 146.

(C) *The Amount*[2] *must be Certain.*

BOLTON v. DUGDALE, 1 Nev. & M. 412; S. C. 4 B. & Adol. 619.

nor one to pay the demands of a sick club.

"Received and borrowed of Timothy Bolton, labourer, in Blackburne, in the county of Lancaster, the sum of 30*l.*, which I do hereby promise to pay, together with the interest at the rate of 5*l.* per cent. I also promise to pay the demands of the sick club at Haworth, in the county of York, in part of interest, and the remaining stock and interest to be paid on demand to the said Timothy Bolton, his executors, administrators, or assigns." It was stamped with an agreement stamp. It was contended that it was a promissory note, and not an agreement.

Per Cur. This is not a promissory note. The amount to be paid to the sick club was uncertain.

(D) *With respect to the Date.*[3]

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from one of the makers to the payee to the extent of the sum mentioned therein" (*Leeds v. Lancashire*, 2 Camp. 203); or "that if any dispute shall arise respecting the subject which is the consideration for it, it shall be void," is no note. *Hodley v. Wilkinson*, 4 Camp. 127; 4 M. & S. 259.

Where the instrument was in the form of a bill of exchange, but was addressed to the payee, and the defendant wrote his acceptance upon it, the court held that it was a case of a bill of exchange not addressed to any one, and might therefore be treated as a promissory note. *Fielder v. Marshall*, 31 L. J. C. P. 158.

[1] The addition to a promissory note of the words "as per memorandum of agreement" is not a qualification of the express promise to pay the amount, and therefore the note is not affected by them. *Jury v. Barker*, 27 L. J. Q. B. 255.

The principal parts of these instruments are the amount, stamp, date, time for payment, place of payment, designation of payee, name of drawer, and name of drawee.

[2] With regard to the amount, it is usual to specify this in figures on the lower left-hand corner of the instrument, as well as in writing in the body. Where a difference appears between the words and figures, evidence cannot be received for the purpose of explaining it; and the Court of Common Pleas has decided that it is proper to adopt the rule of commercial writers, viz. that where a difference appears between the figures and words of the bill, it is safer to attend to the words. *Saunderson v. Piper*, 5 Bing. N. C. 425.

[3] The date, though a usual and convenient part of every bill and note, is not, in general, an essential one; for if it be omitted, the instrument dates from the day on which it was made. *De la Courtier v. Bellamy*, 2 Show. 422. *Hague v. French*, 3 B. & P. 173. *Giles v. Bourne*, 6 M. & S. 73. Post-dating, in order to evade the stamp laws, is an offence by stat. 55 Geo. 3, c. 184, and renders the instrument incapable of being used in evidence. *Field v. Woods*, 6 Dowl. 24; 7 Ad. & E. 114. *Serle v. Norton*, 9 Mee. & W. 309. These cases occurred when the stamp was governed by the time the instrument had to run.

As an undated bill or note dates from the time when it was made, so, *vice versâ*, if a question arises as to the time of making, it is, *primâ facie*, taken to have been made on the day upon which it is dated. *Sinclair v. Baggaley*, 4 Mee. & W. 312. *Anderson v. Weston*, 6 Bing. N. C. 296. If it bear no date, the time of making may be inferred from the circumstances. (Id.)

There is no legal objection to a bill being dated on a Sunday. *Drury v. De Fontaine*,

The 23 & 24 Vic. c. 111, s. 19, reciting, "that by the 18th section of the act 55 Geo. 3, c. 184, the issuing of promissory notes, payable to bearer on demand, with printed dates thereon, is prohibited, and such prohibition is an unnecessary restriction," enacts, "that the said section of the last-mentioned act is hereby repealed." The date of a promissory note may be printed.

(E) *Time for Payment.*[1]

(F) *Place of Payment.*[2]

(G) *Designation of Payee.*[3]

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1 Taunt. 131. *Begbie v. Levi*, 1 C. & J. 180. A mere omission or mistake of the date may be corrected without affecting the validity of the instrument; as, where an agent of the drawer and acceptor discovered that a bill was improperly dated 1822, and altered it to 1823, the plaintiff recovered. *Brutt v. Picard*, R. & M. 38. *Fitch v. Jones*, 5 E. & B. 244.

The law of France, with reference to the date of a bill, strongly resembles the law of this country. 1 Pardess. No. 333.

[1] When the word month is used for expressing the time for payment, it is, as in other mercantile contracts, to be understood of a calendar month. The time for payment is generally expressed to be "on demand," or "at sight," or a certain time "after sight," or a certain time "after date." If no time of payment be specified the instrument is payable on demand. *Whitlock v. Underwood*, 2 B. & C. 157; 1 C. B. 491; 4 B. & C. 333. *See* further on this subject, as to Presentment, *post*, p. 455.

[2] The drawer may, if he think proper, fix a place of payment, and if he do so, presentment must be made at the place mentioned (*Roche v. Campbell*, 3 Camp. 247. *Gibb v. Mather*, 8 Bing. 216), in order to charge him with the acceptor's default; but it is otherwise if it be only named in a memorandum at the foot of a promissory note (*Exon v. Russell*, 4 M. & S. 505. *Williams v. Waring*, 10 B. & C. 2. See *Hardy v. Woodroffe*, 2 Stark. 319. *Saunderson v. Judge*, 2 H. Black. 510. *Wild v. Rennard*, 1 Camp. 425. *Callaghan v. Aylott*, 2 id. 549); though a distinction has been taken in this respect between a memorandum printed and one written. *Trecothick v. Edwin*, 1 Stark. 468.

Without, however, the words "only and not elsewhere" appended to the drawer's direction, the acceptance will be general within 1 & 2 Geo. 4, c. 78, so as to charge the acceptor. *Selby v. Eden*, 3 Bing. 611; 11 Moore, 511. *Fayle v. Bird*, 6 B. & C. 531; 9 D. & R. 639. The drawer himself cannot be charged, unless the bill have been presented at the place where he has himself made it payable. *Gibb v. Mather*, *supra*.

Where the drawee particularises the place of payment in his acceptance, a presentment at such place will suffice (*see* 1 & 2 Geo. 4, c. 78); and it will not be necessary to present the bill at the residence of the drawee, or to him personally; because a presentment at such place accords with the intention of the parties, and will, therefore, be sufficient. *De Bergareche v. Pillin*, 3 Bing. 476. *Saunderson v. Judge*, 2 H. Black. 509. *Ambrose v. Hopwood*, 2 Taunt. 61. See *Burchfield v. Moore*, 3 E. & B. 683.

The stat. 1 & 2 Geo. 4, c. 78, does not apply to promissory notes; and therefore, if any place of payment be mentioned in the body of a note, it is part of the contract. *Saunderson v. Bowes*, 14 East, 500.

[3] The bill or note may be payable to a particular individual, "or his order," or generally "to the bearer." Where an individual is mentioned, a mistake in his name is of no importance if it be sufficiently clear who was intended. *Rex v. Box*, 6 Taunt. 325. If the instrument be made payable to an individual without further words it will not be negotiable. If it be payable to an individual or his order, he may transfer his rights to a third party by indorsing his name upon it. If to bearer generally, or to a specific individual, "or bearer," it may be transferred by mere delivery, and in the last case it matters not though the individual named never existed. Thus, a draft payable to "the ship Fortune or bearer," is negotiable by delivery. *Grant v. Vaughan*, 3 Burr. 1516. If payable to a fictitious person or his order, although no order can be made by the payee, who is not in existence, yet if the instrument be issued into the world with an indorsement in blank, purporting to be made by such fictitious person, it will, as against the drawer or maker, be considered payable to bearer, and so will a bill drawn in a fictitious name, as against the acceptor, who knew that it was such. *Tatlock v. Harris*, 3 T. R. 174. *Vere v. Lewis*, id. 182. *Minet v. Gibson*, id. 481; 1 H. Black. 569. *Collis v. Emett*, 1 H. Black. 313. But though a bill or note with a fictitious payee may be negotiable, yet it is not so if he be uncertain; *ex. gr.* if the instrument be payable to A. or B. *Blanckenhagen v. Blundell*, 2 B. & A. 417. But a note may be made payable to the trustees acting under a will, and parol evidence will be admissible to show who they are and what the trusts are (*Megginson v. Harper*, 4 Tyr. 96; 2 C. & M. 322); and the same law applies to the case of a bill or note payable to the manager of a bank. *Robertson v. Sherard*, 1 Man. & G. 511; and see *R. v. Box*, 6 Taunt. 325. *Cartridge v. Griffiths*, 1 B. & A. 57. *Metcalf v. Bruin*, 12 East, 400; 2 Camp. 422. *Soares v. Glyn*, 14 L. J. Q. B. 313. If a blank be left for the payee's name, any *bonâ fide* holder may insert his

(H) *Name of Maker or Drawer.*[1]

(I) *Name of Drawee.*[2]

own, by which he will acquire all the rights of payee, and convert the instrument from a mere writing into a bill of exchange. *Crutchly v. Clarance*, 2 M. & S. 90. *Crutchly v. Mann*, 5 Taunt. 529. *Atwood v. Griffin*, 1 R. & M. 425.

The payee must be a person, however he may be described, capable of being ascertained at the time the bill is drawn. A bill drawn in the following form was held to be invalid:—

"Six months after date pay to the order of the treasurer for the time being of, &c. the sum of 20*l.* for value received. A. B. to C. D. Accepted, payable at, &c. C. D." *Yates v. Nash*, 29 L. J. C. P. 306; 8 W. R. 764.

The payee ought, in order to constitute the instrument a promissory note, to be certain at the time of the making. *Cowie v. Stirling*, 6 E. & B. 333.

[1] The name of the maker or drawer must be inserted or subscribed (*Taylor v. Dobbins*, 1 Stra. 399. *Elliott v. Cowper*, id. 609; Lord Raym. 1376. *Smith v. Jarvis*, 2 Lord Raym. 1484. *Ereskine v. Murray*, id. 1542) by himself or his agent; but as there must be no uncertainty about the payee, so neither must there be about the maker or drawer. Thus, a note must not be signed "A. B. or else C. D." *Ferris v. Bond*, Bayley, 5th edit. 17. The name of the drawer, however, may be inscribed before it is certain what will be the exact form of the instrument, for it has been decided that he who signs his name upon a sheet of stamped paper which he delivers to another is liable on any bill which that person may think fit to draw on it, and which the stamp is sufficient to cover. *Montagu v. Perkins*, 22 L. J. C. P. 187. *Collis v. Emett*, 1 H. Black. 313. *Leslie v. Hastings*, 1 M. & Rob. 119. *Molloy v. Delves*, 7 Bing. 428. See *Abrahams v. Skinner*, 12 Ad. & E. 763. If a man draw a bill or make a note in the name of another without authority, he may be personally liable on it. See *Wilson v. Barthrop*, 2 Mee. & W. 863. *Polhill v. Walter*, 3 B. & Ad. 116.

The signature of the drawer or maker of a bill or note is usually subscribed in the right-hand corner, but it is sufficient if written in any other part. Thus, "I, J. S., promise to pay," has been held a sufficient signature of a promissory note. *Taylor v. Dobbins*, 1 Stra. 399. *Saunderson v. Jackson*, 2 B. & P. 238. A man who cannot write may sign a bill by his mark. *George v. Surry*, 1 M. & M. 516. An allegation in pleading that a man made his bill or note is sufficient, without alleging that he signed it, for making implies signing. *Elliott v. Cowper*, 1 Stra. 609; 2 Ld. Raym. 1376; 8 Mod. 307. *Ereskine v. Murray*, 2 Ld. Raym. 1542; 1 Barn. 88; Bayley on Bills, 38; Byles on Bills, 72.

In an action for a balance due on a promissory note, it appeared that the amount had been advanced by the payee to one of the makers, on his undertaking that three other persons, of whom defendant was one, would sign it with himself as his sureties. Two of the three did sign it, and the money was advanced. Defendant, when afterwards applied to, declined to sign it for some time, declaring that he had not authorised a note for so large an amount, but ultimately he signed it, and made payments upon account. It was objected at the trial that the defendant's name was affixed after the note was perfect, but the court held that the defendant was notwithstanding liable. "It was not only the actual giving of his name to a note after having represented it as one which he had not authorised, he became a party to it by adoption; he had made payments upon it, and had thus acted upon it. As the application of the money was made upon a promise that the defendant would become a surety for it, and in point of fact he did afterwards become so, and made payments upon the note after becoming a party to it, he could not say that he was not a party to it, for it having been originally intended that he should become a party to it, and he having become a party to it, he was liable upon it." *Dodge v. Pringle*, 29 L. J. Ex. 115.

[2] A bill of exchange, being in its nature an open letter of request from the maker to a third person, should be properly addressed to that person by the Christian and surname; or, if to a partnership, by the full style of their firm. No one can be made liable as the acceptor of a bill but the person to whom it is addressed, unless he be an acceptor for honour. *Polhill v. Walter*, 3 B. & Adol. 114. *Davis v. Clarke*, 6 Q. B. 16. *Nicholls v. Diamond*, 9 Exch. 184. *Mare v. Charles*, 5 E. & B. 978. *Price v. Taylor*, 29 L. J. Ex. 33; Bayley on Bills, 176–182; Byles, 73.

A bill may be addressed to the drawer himself, though, in legal operation, such an instrument is rather a note than a bill. *Block v. Bell*, 1 M. & Rob. 149. *Starke v. Cheeseman*, Carth. 509. *Dehers v. Harriott*, Show. 163. *Robinson v. Bland*, 2 Burr. 1077. *Jocelyn v. Lacerre*, Fort. 282. As to a note payable to the maker's order, see *Miller v. Thomson*, 3 Man. & G. 576, where a bill, drawn by a bank on its own branch, was treated as a note. An instrument will not be less a bill because, instead of being addressed to a particular person, it is addressed to a particular house, at least as far as the person who accepts it is concerned (*Gray v. Milner*, 8 Taunt. 739; 3 Moore, 90); nor because the word "at" is prefixed to the drawee's name. *Shuttleworth v. Stephens*, 1 Camp. 487. *Allan v. Mawson*, 4 id. 115; Bayley, 6.

In France, a bill must not be drawn upon a person residing where the drawer is domiciled, but must be drawn upon a person at another place; but they give effect to bills drawn differently in foreign countries, where

(J) *Sum payable.*[1]

(K) *The Request to Pay.*[2]

(L) *The words "Value received."*[3]

(M) *Direction to place to Account.*[4]

(N) *The words "as per Advice."*[5]

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the French local regulation does not prevail. 2 Pardess. No. 232. The address of the bill, it is said, is usually made by the Italians and Dutch on the back of the bill, but the French and the English uniformly put the direction on the face; and the latter mode is recommended as preferable to the other, because, as the paper on which a bill is usually written is small, if the direction were on the back of it, there would be little room left for indorsements, which are frequently numerous, and there would be no space on which to write the receipt for payment. Mar. 44, Com. Dig. Mer. F. 5.

[1] The sum for which the bill is drawn should be clearly expressed, in the body of it in words at length, and in figures at the top of the bill, in order the better to prevent alteration. *Master v Miller*, 4 T. R. 320. The drawee, to guard himself from the consequences of fraudulent alterations, ought, before he accepts or pays, to be quite certain not only that the drawer signed the bill, but also that he originally authorised the payment of the sum appearing on the face of it; because, if he should accept for or pay more than the sum inserted by the drawer, he may be without remedy. *Hall v. Fuller*, 5 B. & C. 750. *Bulkley v. Butler*, 2 id. 434. Chit. on Bills, 110, 10th ed. With respect to foreign bills, there is no restriction of the amount for which they may be made payable; but it is otherwise with respect to inland bills and drafts, which, by the stat. 48 Geo. 3, c. 88, are forbidden to be drawn for any sum under twenty shillings; a restriction which does not, however, apply to bankers' cheques, the 23 & 24 Vic. c. 111, s. 19, enacting that "notwithstanding anything in any act of parliament contained to the contrary, it shall be lawful for any person to draw upon his banker, who shall *bonâ fide* hold money to or for his use, any draft or order for the payment to the bearer, or to order on demand, of any sum of money less than twenty shillings." *See* also 17 & 18 Vic. c. 33. Bills under 5*l.* are regulated by 17 Geo. 3, c. 30; 7 Geo. 4, c. 6; and 9 Geo. 4, c. 65.

[2] The order to pay need be in no particular form, any expression amounting to an order or direction is sufficient. The bill, however, must contain an order or request to pay as a matter of right, and not of favour (*Little v. Slackford*, M. & M. 171); although the word "pay" is not indispensable, for the words "deliver" or "credit in cash" (*Edwin v. Collingridge*, 9 C. B. 570) would be equally operative.

[3] The words "value received" are not essential. It appears, indeed, that in France it is not only essential to the validity of a bill that it should express whether or not value had been received, but likewise the nature of the consideration which constitutes the value. Poth. No. 8, 34; 2 Pardess. No. 340; Code Com. Art. 110. But in this country it is otherwise, for value received is implied in every bill as much as if expressed *in totidem verbis*. *Grant v. De Costa*, 3 M. & S. 352. *White v. Ledwick*, 4 Dougl. 247. *Popplewell v. Wilson*, 1 Stra. 264. *Wigan v. Fowler*, 1 Stark. 463. *Watson v. Kightley*, 11 Ad. & E. 702. *Watkins v. Wake*, 7 Mee. & W. 488. As suggested by *Lord Denman, C. J.*:—"These words expressing what the law must imply from the nature of the instrument and the relation of the parties apparent upon it." *Watson v. Kightley*, *supra*.

There is sometimes an ambiguity about the meaning of the words "value received," in a bill payable to a third person, *i. e.* as to whether it means "value received" of the payee or of the drawee; but where the bill was in this form:—"Pay to F. G. B., or order, 315*l.* value received," and was subscribed by the drawer, the court held it to be a bill for value received by the drawer from the payee. *Grant v. Da Costa*, 3 M. & S. 351. In a subsequent case, where a bill was drawn by F. S., payable to his own order, "value received," it was held that this must mean value received by the drawee; and as it had been alleged in the declaration to be "for value received by the said F. S." this was adjudged to be a fatal variance, though the plaintiff was permitted to recover on the account stated. *Highmore v. Primrose*, 5 M. & S. 65. So, in general, the words "value received," in a note, import value received from the payee. *Clayton v. Gosling*, 5 B. & C. 360. But the words "value received" in an instrument which contains a promise to pay, but which, being payable on a contingency, is not a promissory note, do not of themselves import a money consideration so as to be evidence of money lent by plaintiff to defendant; nor, as it seems, is such an instrument evidence of an account stated, even as between the original parties thereto. *Morgan v. Jones*, 1 C. & J. 162; Byles, 385.

[4] The direction to place to account is unnecessary. *Laing v Barclay*, 1 B. & C. 398; 2 D. & R. 530.

[5] A bill is sometimes directed to be paid "as per advice," sometimes "without further advice," and sometimes, and more commonly, without any of these words. In the first case, it is said, the drawee is not justified in paying without further advice. Chit. 111, 10th ed.

(O) *Superscription of Sum payable.*[1]

(P) *Subscribing Witnesses.*[2]

(Q) *Interest.*[3]

II. Of the Capacity of Persons Parties to Bills and Notes.

(A) *Agents.*[4]

Thomas v. Bishop, Ca. Temp. Hard. 1; 2 Stra. 955; 3 Bac. Ab. 563; 2 Keb. 136, pl. 1, 16; Ridgw. 911; 1 Barnard, 320, 325; 7 Mod. 181.

If a person accept a bill in his own name, without stating that he accepts as agent, he will be personally liable.[5]

A bill of exchange was drawn in this manner:—

"At 30 days' sight pay to J. S. or order 200*l.* and place the same to the account of Y. B. company, value received by yours, C. M."

Directed to B., cashier of the Y. B. company in W., and was accepted by B. in this manner: "Accepted, B., 13th June, 1732." This bill was indorsed to the plaintiff, who brought an action thereon against B., the acceptor. At the

[1] The sum for which a bill is made is usually superscribed in figures; in a note or cheque the figures are commonly subscribed. The superscription or subscription is not necessary if the sum be stated in the body of the note; but it will aid an omission in the body, as where the word "fifty" was written in the body without the word "pounds." *Elliott's case*, 2 East, P. C. 951; 1 Leach, 175. If there be a discrepancy between the sum in the body of the bill and the superscription the former will prevail. *Saunderson v. Piper*, 5 Bing. N. C. 425. See *Hamelin v. Bruck*, 9 Q. B. 306.

[2] In general, a witness is not essential to the validity of a bill of exchange or promissory note; but in the case of bills drawn for a less sum than 5*l.* a witness is necessary (17 Geo. 3, c. 30, s. 1); and the execution of the instrument must be proved by his testimony. 17 & 18 Vic. c. 125, s. 26. *Lemon v. Deane*, 2 Camp. 636. *M'Craw v. Gentry*, 3 id. 232. *Stone v. Metcalfe*, 1 Stark. 53. But if he purposely keep out of the way, or, after diligent search has been made, he cannot be found, his attendance will be dispensed with (*ante*, p. 3).

[3] By the usage of trade, interest is allowed on bills of exchange and promissory notes from the time the bill or note becomes due. A bill or note, therefore, payable on a certain day, carries interest from that day, unless the non-payment at the appointed time was occasioned by the negligence of the holder. *Laing v. Stone*, 2 M. & R. 561. But country bankers' notes payable on demand do not in general carry interest. *Parker v. Hutchinson*, 3 Ves. 133.

If made payable by the bill itself, interest is recoverable as a debt. *Florence v. Jennings*, 2 C. B. 454. In other cases it is recovered as damages for breach of contract. *Cameron v. Smith*, 2 B. & A. 305. *Du Belloix v. Lord Waterpark*, 1 D. & R. 16. It will not, it seems, be allowed after a tender. *Dent v. Dunn*, 3 Camp. 296.

As against the acceptor of a bill and the maker of a note payable at a certain time, after date or sight, interest is recoverable from the day on which the bill or note becomes due, without proof of any demand. *Upton v. Lord Ferrers*, 5 Ves. 801. *Farquhar v. Morris*, 7 T. R. 124. The drawer or indorser of a bill or indorser of a note is only liable to pay interest from the time he receives notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240.

The bill or note may by its terms be payable "with interest" from the day of its date. *Kennerley v. Nash*, 1 Stark. 452. *Doman v. Dibden*, R. & M. 381. *Ruffey v. Greenwell*, 10 Ad. & E. 222.

And it was held, in an action against the drawer of a bill for 200*l.* with 10*l.* per cent interest, that the holder might recover interest at 10*l.* per cent from the time when the bill became due, as well as for the time during which it was running. *Keene v. Keene*, 27 L. J. C. P. 88.

The rate of interest allowed in this country in the absence of contract or enactment is 5*l.* per cent per annum, as well in courts of equity as of law; but when a higher rate of interest is allowed in a foreign country it may be recovered here. *Anon.* 3 Bing. 123. *See* further on this subject, *post*, Interest.

[4] When a bill is drawn, accepted, or indorsed by an agent, it is said to be drawn, accepted, or indorsed by procuration.

[5] General authorities to transact business and receive and discharge debts do not confer upon an agent the power of accepting or indorsing bills, so as to charge his principal. *Hogg v. Snaith*, 1 Taunt. 347. *Murray v. East India Company*, 5 B. & Ald. 204; and see *Howard v. Baillie*, 2 H. Black. 618. *Gardner v. Baillie*, 6 T. R. 591. *Kilgour v. Finlyson*, 1 H. Black. 155. *Hay v. Goldsmidt*, 2 Smith's Rep. 79. *Esdaile v. Lanauze*, 1 You. & C. 394; Bayley on Bills, 359.

An agent or bill-broker, intrusted to discount, has no right to pledge the bill as a security for money previously due from himself. *Haynes v. Foster*, 2 C. & M. 237. And it is very doubtful whether a usage entitling him to do so would be legal. *Foster v. Pearson*, 1 C., M. & R. 849. *Primâ facie*, a bill-broker has no right to pledge the bills of his different customers in one mass; for that might subject a bill to a lien beyond

trial a letter of advice was proved, which was directed to the governor and company of the Y. B., wherein notice was taken of this bill amongst others, in the following words:—"J. S. 30 days' sight, 200*l.*" But, according to the direction of the judge, the jury found for the plaintiff; and now, on a motion for a new trial, it was urged that the defendant in his own right was not liable, but only the company; that this is the case of the cashier of the bank, who never accepts bills in any other manner, and that the acceptance by the servants of bankers is always so, and binds their master, though it be not specified to be on their account; that it ought to have been left to the jury to determine if he did it for himself or the company.

Per Cur. "A bill of exchange is a contract of a very particular nature, depending on the custom of merchants, and must be in writing; the drawer contracts that he will pay if the drawee does not, and so does the acceptor, and so do the indorsers. There may be cases where a writing may have all the forms of a bill of exchange, and yet not be so; but then it is where the money is made payable out of a particular fund, as were the cases in 10 Mod. 294, 316; Fort. 281; Stra. 24, 219; 2 Stra. 762; 2 Raym. 1362, 1481; 8 Mod. 265; Stra. 591; 2 Raym. 1361; and if this were within the reason of those cases we should not be for charging the defendant but as a servant; but this case is a plain bill of exchange, the words placing it to account of the Y. B. company, and not to the account of the drawer, is an uncommon direction, and shows that it is a bill drawn in favour of the company; but they do not alter the bill with respect to the indorsee, it is the same to him as if they were not there; and then this general acceptance of the defendant is a contract to pay according to the tenor of the bill: but then, does the letter of advice vary the case? No,

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the amount advanced upon it. *Haynes v. Foster*, 2 C. & M. 237. But the usage of a particular district may enlarge the authority of a bill-broker to give him a right to pledge the bills of different customers in one mass. *Foster v. Pearson*, 1 C., M. & R. 849. Such is the usage of bill-brokers in the city of London; and, as such, it is not an unreasonable one: for, although it may occasionally be attended with inconvenience, yet, on the other hand, the bill-broker may often raise money on a large scale on better terms than a small one, or discount, with other bills, bills which alone could not be discounted at all. (Id.)

An agent should either write the name of his principal, or state in writing that he draws, indorses, or accepts as agent or "per procuration of A, B, E, F," for otherwise the act will not in general be binding on the principal, so as to subject him to be sued on the bill or note (*Thomas v. Bishop*, 2 Stra. 955. *Sowerby v. Butcher*, 2 C. & M. 368); and the agent may unintentionally pledge his own personal credit. *Leadbetter v. Farrow*, 5 M. & S. 349. *Ducarry v. Gill*, M. & M. 450. The drawing, accepting, or indorsing, as agent for another person, may be effected by merely writing the name of the principal, as if he himself were actually the party signing; but the most explicit and regular course is to sign the name of the principal, and then immediately under it to add, "per procuration, E. F.," the agent writing his own name. See *Wilks v. Back*, 2 East, 142.

If the agent sign only his own name, whether as drawer, indorser, or acceptor, he will be considered as the principal, and be personally liable as such, unless he add some restrictive or qualified words, as "*sans recours*," or "without recourse to me," or "drawn and indorsed to transfer the interest only, and not to incur any personal liability."

It is a universal rule, that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion, unless he says plainly, "I am the mere scribe, he becomes liable." *Leadbetter v. Farrow*, *supra: per Lord Ellenborough.*

The defendant, agent of a banker, drew the following bill:—"Pay to the order of A. B. 50*l.*, value received, which place to the account of the Durham Bank, as indorsed," and subscribed his own name:—It was held that the defendant was personally answerable, and he alone, though the plaintiff, the payee, knew that he was only agent. *Leadbetter v. Farrow*, *supra.*

So, if a broker draws upon the buyer of goods which he has sold for his principal in favour of the latter, to whom he indorses the bill, he is liable, as drawer, to his principal. *Lefevre v. Lloyd*, 5 Taunt. 749; 1 Marsh. 318.

Under a commission *del credere*, if a factor sells goods, and takes accepted bills from the purchasers, which bills he indorses to a banker at the place of sale, and receives the banker's bills, payable to the factor's order to a house in London, which latter bill the factor indorses and transmits to his principal, who gets the same accepted, and the acceptors and the drawer fail, the factor is

not with respect to the indorsee, for that is always a private transaction, and the person to whom the bill is payable is never conusant of it. But even that letter is in very general terms. You say it was proved at the trial that the governor and company directed the defendant to accept this bill; but are we to take notice of a transaction that passed between the drawee and a stranger? No. If any other evidence was to be allowed to be given to a jury than what arises on the face of the note, it must have very bad consequences with respect to trade, therefore we can take notice of nothing but what appears on the face of the bill. There are cases reported in 2 Vent. 307; Carth. 5; Show. Rep. 42; id. 509, pl. 473; Skin. 264; where more appeared on the face of the bill in favour of the defendant than does here, and yet judgment was given for the plaintiff. The circumstances here are equitable circumstances between the company and B., and we do not apprehend that in this case the present plaintiff can charge the company. No doubt but a general acceptance by a banker's servant of a bill drawn on his master will charge the banker only, but here the bill is drawn on the servant; and in considering bills of exchange, we should not allow a liberty of going into extrinsic circumstances, for the action brought on such bills is not an *indebitatus assumpsit*, but an action brought specially on the custom, which custom arises from the terms of the bill, and the acceptance is an acceptance according to the tenor of the bill, so that the defendant here has accepted it as the bill imports, that is, as a direction to him to pay so much money. Therefore, when an action is brought by an indorsee, if we were to allow evidence to be given without the note, there would be an end of bills of exchange, for if the bill itself is not to be an evidence of the contract to him, how should he know what is?"—Rule refused.

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answerable for the amount of the bill, being personally liable under his commission *del credere* to satisfy his principal to the amount of the price of the goods sold. *Mackenzie v. Scott*, 6 Bro. P. C. 280.

Commissioners under an inclosure act drawing drafts upon their bankers requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners, are personally liable to the bankers, though it might be otherwise if the bankers were required to place the same to the account of the inclosure. *Eaton v. Bell*, 5 B. & A. 37.

So, if A. and B. sign a formal promissory note, by which they promise, "as churchwardens and overseers," to pay to C. or order, a sum of money, with interest, which sum was, in fact, the amount of a loan made by C. for the use of the parish; A. and B. are personally liable upon such note. *Rew v. Pettet*, 1 Ad. & E. 196.

Where a bill on the face of it professed to be for machinery supplied to a company of adventurers in a mine, and was accepted "for the company, W. C., purser," the acceptor was held personally liable. *Male v. Charles*, 5 E. & B. 978.

By a promissory note the makers jointly and severally promised to pay on behalf of a newspaper association. The note was signed by two persons, the word "directors" being appended to their signatures:—*Held*, that the makers were bound individually. *Healey v. Story*, 3 Ex. 3. *See* also *Penkivil v. Connel*, 5 Ex. 381. *Price v. Taylor*, 29 L. J. Ex. 33.

Where, however, an agent, to meet the convenience of his principal, and to avoid the suspicion with which words of restriction might affect the instrument, puts his name without reservation in a bill, under circumstances which show that it was not intended by either that he should be liable to his principal, in that case there arises the contract on which the latter can recover against him. Therefore, though an indorser makes no reservation in his indorsement as to his liability, but his course of dealing was to act as agent for the indorsee, on whose account he bought and remitted the bill, he is not liable to the indorser in the absence of special circumstances showing that such liability was intended. *Castrique v. Buttigieg*, 27 L. T. (P. C.) 111.

Where an agent, in the course of his employment as such, procured a banker's bill, which was accurately drawn in his favour, and indorsed it to his employer, who deposited it with a banker, and the banker gave credit for the amount, but was cognisant of the circumstance under which the bill had been indorsed, the Court of Exchequer, in the exercise of its equitable jurisdiction, restrained an action brought by the banker on the bill against the agent as indorser. *Kidson v. Dilworth*, 5 Price, 564.

Where a person employed to get a bill discounted was unable to do so without indorsing it, and he therefore indorsed it in his own name, it was held that he was entitled to be indemnified by his employer, although the name of the latter was not on the bill, and a claim and proof under a

(*a*) *Evidence of Authority.*[1]

commission of bankruptcy were allowed accordingly. *Ex-parte Robinson*, 1 Buck, 113. *Fenn v. Harrison*, 4 T. R. 177.

If a bill or note appear to be drawn, accepted, or indorsed in the name of another, or by procuration for him, it will not bind the principal, unless the act were within the scope of the agent's authority. *Davidson v. Harley*, 2 Man. & G. 721. *Alexander v. M'Kenzie*, 6 C. B. 766. For an agent who exceeds his authority in negotiating a bill cannot in any case convey a title to it if overdue at the time, and a party who takes a bill from an agent under such circumstances that his title is affected by the wrongful act of the agent, is liable to refund to the principal money which he may receive from the previous parties in discharge of the bill; or if in lieu of money he take a substituted bill, such substituted bill belongs to the principal, and the principal may countermand payment. For neither in the first bill, nor in the fruit of it, the second bill, or in money received on either, has he any greater interest than his indorser could convey, namely, the interest of an agent, and a principal has a right to countermand payment to his agent. *Lee v. Lagury*, 8 Taunt. 114; 1 Moore, 556.

But the unauthorised delivery of bills payable to bearer gives a *bonâ fide* holder a claim on the other parties. *Miller v. Race*, 1 Burr. 452. *Lawson v. Weston*, 4 Esp. 56. But in any case, if the transferee knows that the transferor has no right to pass the bills, he can acquire no property in them. Thus, where the plaintiff indorsed bills to A. B., specially in this form, "Pay to A. B., or order, on account of plaintiffs," and A. B. pledged the bills with defendant for his private debt, it was held that defendant took them with sufficient notice that they did not belong to A. B., and that the defendant was liable to plaintiffs in an action of trover. *Truttell v. Barandon*, 8 Taunt. 100; 1 Moore, 513.

If a person sign a bill or note as agent, when, in fact, he had no authority, and his act did not bind his pretended principal, he is liable to an action for the breach of his supposed warrant that he had authority as agent to make the contract. *Polhill v. Walter*, 3 B. & Adol. 114. *Collen v. Wright*, 26 L. J. Q. B. 147; affirmed 28 id. 215.

It has been held in America, that he may be sued on the bill or note as a principal. *Long v. Colborn*, 11 Mass. R. 97; Bayl. 51, Am. ed. But in this country, if a person profess to contract as agent only, he cannot, on the ground of his having had no authority to contract as agent, be held liable on the contract as a principal, whether that which he assumed to do was done in fraud or not. *Lewis v. Nicholson*, 18 Q. B. 503. *Wilson v. Barthrop*, 2 Mee. & W. 863.

[1] The authority which an agent has to draw, accept, and indorse bills (being simple contracts) may be by parol. *Davidson v. Robertson*, 3 Dow, R. 229. *Porthouse v. Parker*, 1 Camp. 82. *Anon.* 12 Mod. 564. *Harrison v. Jackson*, 7 T. R. 209. See *Jenkins v. Morris*, 16 Mee. & W. 877; Bayley, 462.

A factor, without special authority to that effect, cannot accept or indorse bills so as to charge his principal. *Hogg v. Snaith*, 1 Taunt, 347. *Murray v. East India Co.* 5 B. & A. 204.

A resident manager and director of a mine empowered to employ workmen, find implements, &c., pay wages, salaries, and find materials, and transmit accounts monthly to the secretary, provided always that he should not expend or engage the credit of the company for any sum exceeding 50*l.* in one month, was held to have no authority to bind the company by his acceptance of bills. *Brown v. Byers*, 16 Mee. & W. 252.

A. desired B. to get a bill discounted for him, but declared that he would not indorse; it was decided that no representation of B. could bind A. as an indorser, though it was insisted that what B. had done was within the scope of his employment, which was to raise money on the bill, and that a subsequent promise to pay was inoperative. It appeared, however, on a second trial, that A. did not declare that he would not indorse the bill:—It was adjudged that, as he had authorised B. to act for him as executor, does not authorise the attorney to accept bills so as to charge him in his own right, though for debts due from the testator. *Gardner v. Baillie*, 6 T. R. 59. See *Kilgour v. Finlyson*, 1 H. Black. 155. *Howard v. Baillie*, 2 id. 618.

So, a power of attorney to demand and receive all monies due, and to use all means for the recovery thereof, does not include under the latter words a power to indorse a bill for the principal. *Hay v. Goldsmidt*, 2 Smith, 79.

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorising the agent to do all lawful acts concerning all the principal's business and affairs, of what nature or kind soever, does not authorise the agent to indorse bills of exchange in the name of his principal. *Esdaile v. La Nauze*, 1 You. & C. 394.

But where the payee of certain notes gave a power of attorney to agents to "sell, indorse, and assign," and the agents indorsed the money to a banker by way of security for a loan of money to themselves, this was held to be a transaction within the scope of their power. *Bank of Bengal v. M'Leod*, 5 Moore, in App. i.

Usual employ is evidence of a general authority, and a general authority is supposed to continue until its determination is notorious. *Prescott v. Flinn*, 9 Bing. 19; S. C. 2 M. & Scott, 18. See *Smout v. Ilbery*, cited *post*, 414.

But where the steward of the defendant

PRESCOTT v. FLINN, 9 Bing. 19 ; 2 M. & Scott, 18.

The authority of an agent to draw bills does not import an authority to indorse, but is a fact for the consideration of the jury.

The defendants' confidential clerk had been accustomed to draw bills and cheques for them by procuration; and it was proved that, in one instance, he had authority to indorse; and in two other instances, that the defendants had received money obtained by his indorsing in their name. A jury found that the clerk had a general authority to indorse.

Per Cur. It may be admitted, that an authority to draw does not import in itself an authority to indorse bills; but still, the evidence of such authority to draw is not to be withheld from the jury, who are to determine, on the whole of the evidence, whether such authority to indorse exists or not. The jury, although they may require some direct testimony upon the authority of the clerk to indorse, may justly be satisfied with less evidence, where it is proved that the clerk is a confidential clerk, and that he has an undisputed authority to *draw* in the name of the principals. And as well this part of the

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received all monies due on sales of stock, paid the tradesmens' bills by cheques drawn on the plaintiff's bank in his own name, with the knowledge of the defendant, frequently made payments by promissory notes made payable, as the bills in question were, at the plaintiff's bank, and on one occasion at the defendant's private banker's, and was in the habit of receiving for debts due to the defendant bills payable to himself, which he indorsed in his own name, "per procuration," to the defendant's banker, on one occasion to the extent of 1500*l.*; yet, in the absence of any evidence that the defendant knew of these dealings with bills, the court held that there was not sufficient to warrant the inference of authority from the defendant to his steward to accept the bills in question as his agent. *Davidson v. Stanley*, 2 Man. & G. 721.

An authority is often implied from circumstances, as if the agent has formerly been in the habit of drawing, accepting, or indorsing for his principal, and his principal has recognised his acts. Thus, to an action against an acceptor of a bill the defence was, that the drawer had forged the acceptor's signature; in answer to which it was proved that the defendant had previously paid such acceptances, and this was held proof of authority to *drawer*. *Barteer v. Gingell*, 3 Esp. 50. *Llewellyn v. Winckworth*, 13 Mee. & W. 598. *Cash v. Taylor*, Lloyd & Welby's *Mercantile Cases*, 178.

Where a married woman is permitted by her husband to carry on trade on her own account, or to manage his business for him, and she in her own name, or in the name of her husband, draws, accepts, or indorses a bill or note in the course of such business, it is, in the absence of proof of an express authority in the wife, a question for the jury whether the evidence shows an implied authority in her to draw, accept, or indorse in the manner adopted by her in the particular case. *Lindus v. Bardwell*, 5 C. B. 583. *Lord v. Hall*, 8 C. B. 627. *Barlow v. Bishop*, 1 East, 434.

The holder of a bill importing to be, but not being, in fact, accepted by the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact subsequently discovered; namely, that on a former occasion the defendant had given a general authority to the person who accepted in his name to accept bills for him: to make such authority available, the holder must show either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority. *Cash v. Taylor*, 8 L. J. K. B. 262. *Llewellyn v. Winkworth*, 13 Mee. & W. 598. *Furze v. Sharwood*, 2 Q. B. 388.

The secretary of a company has not, in general, any authority as such to accept or negotiate bills for the same. *Nichols v. Diamond*, 9 Ex. 154; 23 L. J. Ex. *Neale v. Turton*, 4 Bing.

If by the resolution of a mining company four directors are essential for the doing of an act to bind the company, and three only execute a power of attorney authorising an agent to draw bills, a member of the company will not be liable for bills drawn by such agent. *Ducarrey v. Gill*, 4 C. & P. 121. *Brown v. Andrew*, 18 L. J. Q. B. 153.

A general authority to an agent is supposed to continue until notice is given of its determination, and, therefore, after the discharge of a clerk or agent usually employed to draw, accept, or indorse bills or notes, the employer will be bound by his signature, made after the determination of his authority, until notice is given of the discharge. *Anon. v. Harrison*, 12 Mod. 346. See *Smout v. Ilbery*, 10 Mee. & W. 1; *Collen v. Wright*, 27 L. J. Q. B. 215.

If A. permit B. to draw bills in his name, he will be liable as drawer to innocent indorsees, although he had no interest nor knew of the particular bills drawn in fraud of him by B.; but he will not be liable to a payee who was cognisant of the fraudulent transaction. *Smith v. Stranger*, Peake, Add. 116. When, therefore, the agent's authority has been determined, and there is an apprehension that he will attempt to circulate bills in the name of his employer, notice should be given, as to strangers by publication in the *Gazette*, and as to customers and correspondents, by express individual communication. See *Newsome v. Coles*, 2 Camp. 617.

evidence, as also the direct evidence of authority to indorse, was left to the jury. When, therefore, the evidence on this subject was left to a special jury of merchants, who have the right to bring their own knowledge of the general course of business in aid of their judgment on the particular occasion, and they have declared themselves satisfied that the defendants have, by their conduct, shown that this clerk had authority to indorse, with what object could we send this cause to a second trial before a jury of a similar description, where the very same question must again be left to the new jury upon the same evidence?"

(*b*) *Special Authorities to Accept or Indorse are construed strictly.*

Attwood v. Munnings, 7 B. & C. 278; 1 M. & R. 78.

Special authorities to accept or indorse are construed strictly.[1]

A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which authority was given for him, and in his name, and to his use, to do certain specific acts (and amongst others, to indorse bills, &c.), and generally to act for him as he might do if he were present; and by the second, authority was given "for him, and on his behalf, to accept bills drawn by him on his agents or correspondents." C. D., one of A. B.'s partners, and who acted as his agent, in order to raise money for the payment of the creditors of the joint concern, drew a bill, which the attorney accepted in A. B.'s name by procuration. In an action against A. B. by the indorsee of the bill,—*Held*, first, that the right of the indorsee depended on the authority given to the attorney; secondly, that the former applied only to A. B.'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that C. D. did not draw the bills in question as agent, but as partner; and lastly, that the general words in the power of attorney were not to be construed at large, but as giving general powers for carrying into effect the special purposes for which they were given.

(B) *Partners.*[2]

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[1] An authority to indorse bills remitted to the principal, gives no power to indorse a bill which the principal could not have indorsed without a fraud, although the bill get into the hands of a *bonâ fide* holder without notice. *Fearn v. Filica*, 14 L. J. C. P. 15; 7 Man. & G. 513. It would have been otherwise had the principal himself indorsed it. (Id.)

Though in one case it was held that a letter of attorney given to A. B., authorising him to transact the affairs of the testator in the name of the executor as executor, and to pay, discharge, and satisfy all debts due from the testator, conveyed to A. B. a sufficient authority to accept a bill of exchange in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, and thereby to make the executor personally liable, on the ground that an authority of this kind necessarily includes all intermediate powers (*Howard v. Baillie*, 2 H. Black. 618); yet, in a subsequent case in the same letter of attorney, the court, after consulting with the judges of the Common Pleas, held that the executor was not personally liable, and that a power of attorney given by an executor to get it discounted, without restraining his authority as to the mode of doing it, he was bound by his acts. *Fenn v. Harrison*, 3 T. R. 757; 4 id. 177.

An authority to draw does not import an authority to indorse bills, but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine on the whole of the evidence whether an authority to indorse existed or not. *Prescott v. Flinn*, 9 Bing. 19: *per Tindal, C. J.* Therefore, the acceptance of a bill drawn by procuration is an admission of the agent's authority to draw, but not of his authority to indorse, though the indorsement was on the bill at the time of acceptance. *Robinson v. Yarrow*, 7 Taunt. 455.

[2] Each partner, by making, drawing, indorsing, or accepting negotiable instruments in the name of the firm, and in the cause of the partnership transactions, binds the firm, whether he sign the name of the firm, or sign by procuration, or accept in his own name a bill drawn on the firm. *Harrison v. Jackson*, 7 T. R. 207. *Pinkney v. Hall*, 1 Salk. 126. *Lane v. Williams*, 2 Vern. 277. *Wells v. Masterman*, 2 Esp. 731. *Swan v. Steele*, 7 East, 210; 3 Smith, 199. *Ridley v. Taylor*, 13 East, 175; Byles, 36; Bayley, 58. "Where a partnership name is pledged, the partnership of whomsoever it may consist, whether the partners are named in the firm or not, and whether they are known as secret partners, will be bound, unless the conduct or title of the person who seeks to charge them can be

South Carolina Bank v. Case, 8 B. & C. 427.

If one partner only signs his name, though for partnership purposes, the firm are liable, if sanctioned by them.

One partner of a firm in England proceeded to a foreign country, for the purpose of establishing a branch concern, to be carried on in his individual name, with strict instructions that the names of the firm should appear as little as possible on paper, and that no greater sum than £ should at any time be risked on partnership speculations: he, however, against those instructions, entered into risks greatly exceeding that sum, and indorsed bills in the course of such dealings in his own name, the firm in England subsequently sanctioning them; and the transaction being for the benefit of the partnership, the court held that such indorsements were to be deemed the indorsements of the firm in the name used by them for the purpose of the foreign business.

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impeached. *Per Bayley, B., Wintle v. Crowther*, 1 C. & J. 316.

But a bill drawn upon a new firm, and accepted in that name by one of the partners, or for an old partnership debt, will not bind a new partner who did not belong to the old firm. *Shirriff v. Wilks*, 1 East, 48.

And if a particular partnership is carried on in the name of one individual only, without the words, "& Co.," and he issue a bill in his name only for his own separate use, his partner will not be liable, because in that case no partnership firm is pledged (*Ex-parte Boletho*, 1 Buck, 100), though, if the bill had been really issued for the benefit of the firm, it would have been otherwise. *South Carolina Bank v. Case, supra.* See *Thicknesse v. Bromilow*, 2 C. & J. 425. *Ex-parte Buckley*, 14 Mee. & W. 469.

The firm is not liable where the partner varies the style of the firm, unless there be some evidence of assent by the firm to the variation, or unless the name used, though inaccurately, yet substantially describe the firm. *Faith v. Richmond*, 11 Ad. & E. 339; 3 Per. & D. 187. *Williamson v. Johnson*, 1 B. & C. 146; 2 D. & R. 281.

A firm consisted of John Blurton and Charles Habershon, and carried on business under the firm of John Blurton;—It was held that the firm was not bound by an indorsement by one partner who had written "John Blurton & Co." *Kirk v. Blurton*, 9 Mee. & W. 284.

As the drawing or accepting of bills is not in general necessary in a farming or mining concern, bills accepted by one of the partners in such a concern, without express authority, do not bind the firm. *Greenslade v. Dower*, 7 B. & C. 635; 1 M. & R. 640. *Dickinson v. Valpy*, 10 B. & C. 128; 5 M. & R. 126; Bayley, 59.

Partners not in trade cannot bind each other by bills; therefore, one attorney who is partner with another has not, from that circumstance alone, power to bind his copartner by his bill or note. *Hedley v. Bainbridge*, 3 Q. B. 316. So of a partnership between commission agents, no inference of authority to draw bills is raised by the mere fact of partnership. *Yates v. Dalton*, 28 L. J. Ex. 69. In such a case, if the partner who was not a party to the bill put a plea to that effect on the record, the plaintiff must prove an authority from him to the other partners to issue the bill before he can recover against him. *Levy v. Pyne*, Car. & M. 453: *per Alderson, B.* See *Jenkins v. Morris*, 16 Mee. & W. 877. *Grant v. Enthoven*, 1 Ex. 382. *Jones v. Corbett*, 2 Q. B. 828.

Even if a partner exceed his authority, and pledge the partnership credit on a negotiable security for his own private advantage, his co-partners are liable. So, if one partner assume to relieve an acceptor of his responsibility, the firm lose their action. *Richmond v. Heapy*, 1 Stark. 202.

If the party taking a bill or note of the firm knew at the time that it was given without the consent of the other partners, he cannot charge them. And proof that the holder at the time he received the instrument knew that the partner had no right to pledge the credit of the firm in that transaction, and that he was attempting to negotiate the same for his own individual benefit, or for the accommodation of a third person, without the concurrence of his partner, would preclude such holder from enforcing payment from the latter. *Ex-parte Bonbonus*, 8 Ves. 540. *Wells v. Masterman*, 2 Esp. 731. *Green v. Deakin*, 2 Stark. 347. *Ex-parte Gouldney*, 2 Glyn & J. 118. *Gordon v. Ellis*, 7 Man. & G. 607.

The proper mode of raising the defence of an unauthorised and fraudulent acceptance is by a traverse of the acceptance. *Jones v. Corbett*, 2 Q. B. 828.

If a man be at one time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both firms, it has been held that the indorsee may charge either firm at his election. *Baker v. Charlton*, Peake's N. P. C. 80. *M'Nair v. Fleming*, Mont. 32. *Swan v. Steele*, 7 East, 210. But see *Ex-parte Buckley*, 14 Mee. & W. 469.

Where the circumstances were such that a partner had not power to bind the firm by a bill, subsequent recognition of the act will be equivalent to previous authority. *Duncan v. Lowndes*, 3 Camp. 478. See *Vere v. Ashby*, 10 B. & C. 288.

Where a defendant had written an acceptance on a bill at the desire of his father, in the name of A. & Son, the bill being drawn in that name, and the goods for which it was given having also been invoiced in the same way, although they were supplied in fact only to the father, who carried on

(*a*) *Dormant Partner.*[1]

LLOYD v. ASHBY, 2 B. & Adol. 23; 2 C. & P. 138.

A bill accepted by the firm, binds a recently admitted secret partner, if for partnership purposes.[1]

The payee of a bill, who had previously dealt with A., R., and O., carrying on business under the style of A. & Co. after the retirement of O. and introduction of S. (but whose name, by agreement, was not to appear), into the partnership, received a bill addressed to A. & Co., and which was accepted by the partnership in the name of A. and R., under which the new firm was carried on. The court held that S. being at the time interested in the partnership, and no fraud found, the acceptance was binding on all, notwithstanding the variance in the name of the firm to whom addressed, and in which the bill was accepted.

(*b*) *Effect of Dissolution of Partnership.*[2] *See post*, Partnership.

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business alone, and in his own name, and there was no partnership in fact, the court held, that as there was some evidence, though slight, that the son had so conducted himself as to lead the plaintiff to believe that he was a partner, the question in an action against father and son on the bill ought to be left to the jury. *Gurney v. Evans*, 27 L. J. Ex. 166.

A. and B. having agreed with C. to take a farm, and to pay for the stock, &c. at a valuation, by bills at three months, and C. becoming subsequently unable to attend to the business, A. and C., without the knowledge or consent of B., entered into a new agreement to pay part in cash, and the remainder by bills at six and twelve months, which A. accepted for himself and B. The court held that B. having never ratified the giving such bills by A., the mere joint-occupation of the farm by himself and A. could not operate by relation so as to render the bills binding on him, contrary to the terms of the original contract, and without his assent. *Grenslade v. Dower*, 7 B. & C. 635; 1 M. & R. 460. *Dickinson v. Valpy*, 10 B. & C. 128; 5 M. & R. 126.

A partner may act for the whole firm by procuration, and draw, accept, or indorse a bill for it in this manner. *Williamson v. Johnson*, 1 B. & C. 146.

Where one of five trustees for the erection of a public hall, who had authority from the others to accept a bill of exchange on their behalf, did accept it with that intention, by merely signing his own name, but the bill was directed to him "and others," such acceptance was held to be binding on the rest. *Jenkins v. Morris*, 16 Mee. & W. 877.

In many deeds and agreements of partnership there is a stipulation that one partner shall not draw, indorse, or accept bills without the consent of his co-partner; the consequence of a violation of this stipulation is, as between the partners, to create a right of action at the suit of the injured partner against the partner violating it, and to protect the former against bills improperly drawn and in the hands of a holder with notice.

[1] Whether the bill were accepted for partnership purposes or not, the partner will be bound if the holder were ignorant of the circumstances.

The defendant, by an agreement for a partnership with A. and B., on the 24th June agreed that he was considered co-partner from the 18th May previously, but that his name should not appear; and he continued a partner until the 21st September following. The plaintiffs, who before and after the agreement had been the bankers of the firm, discounted one bill for them on the 21st May, and two others on the 13th July, and placed the amount to the partnership account, but were ignorant of the defendant being a partner until the winding up of the account.

Per Cur. "The general rule is, that where the partnership name is pledged to a creditor, every actual partner is liable to have his individual credit pledged thereby; and a party making an advance on the credit of the partnership name is entitled to sue all the parties, unless he be privy to a misapplication of the advance by the one who receives it as for private purposes. There is here no suggestion of fraud against the plaintiffs. *Vere v. Ashby*, 10 B. & C. 288. See *Battley v. Lewis*, 1 Man. & G. 155; 1 Scott, N. R. 143. *Wilson v. Tummon*, 6 Man. & G. 236.

A dormant partner may join and sue on a bill (*Cothay v. Fennell*, 10 B. & C. 671. *Skinner v. Stocks*, 4 B. & A. 437), or the ostensible partner may sue alone. *Leveck v. Shaflo*, 2 Esp. 468. *Lloyd v. Archbowle*, 2 Taunt. 324. See *Mawman v. Gillett*, 2 id. 325 n. *Kell v. Nainby*, 10 B. & C. 20.

[2] After a dissolution of partnership, and due notice given, one of the late partners, though empowered to wind up the partnership affairs, cannot draw, accept, or indorse bills in the name of the firm, so as to bind his former co-partners. *Kilgour v. Finlyson*, 1 H. Black. 155. *Wright v. Fulham*, 2 Chit. 121. Neither can one indorse in the name of the firm a bill which belonged to the firm, but all must join. "I even doubt much," said *Lord Kenyon*, "if an indorsement were actually made on the bill or note before dissolution, but the bill or note was not sent into the world till afterwards, whe-

(c) *Partner cannot sue Firm on Partnership Bill.*

TEAGUE v. HUBBARD, 8 B. & C. 345 ; 2 M. & R. 369.

If plaintiff be interested jointly with the defendant he cannot sue on the bill.[1]

An agent and member of the company employed to sell goods for the company, drew in his own name, and payable to his own order, a bill on a purchaser of the goods ; he then indorsed it to the actuary of the company, who indorsed it to another member and creditor of the company:—It was held that the last indorsee could not sue the drawer on the bill.

Per Cur. "Both the defendants were members of the company. If, therefore, the plaintiff could recover on this bill, it would be a recovery by one joint-contractor against another, and then the defendants would have a right to call on the plaintiffs for contribution. It is clear, therefore, that no action can be maintained upon the bill."

(C) *Married Women.*

COTES v. DAVIS, 1 Camp. 484.

Where the maker of a promissory note, after it is due promises to pay, it is no defence to show that the payee is a married woman, for the court will presume she had authority from her husband.[2]

Action by the indorsee against the maker of a note, made payable to a married woman, who indorsed it in her own name. Defence, that the payee was a

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ther such indorsement would be valid. *Abel v. Sutton*, 3 Esp. 108 ; but see *Lewis v. Reilly*, 1 Q. B. 349.

But a retired partner may give authority to a continuing partner to indorse bills in the old partnership name ; and a statement by the ex-partner that he had left the assets and securities in the hands of the continuing partner, and that he had no objection to his using the partnership name, is evidence from which a jury may infer an authority to indorse (*Smith v. Winter*, 4 Mee. & W. 454) : both ex-partners ought, therefore, to indorse, and that is the proper mode of indorsing by persons who are not partners (*Carvick v. Vickery*, 2 Dougl. 653, n.); but if the outgoing partner suffer his name to appear as partner, new customers, notwithstanding notice in the *Gazette*, may charge him. *Williams v. Keats*, 2 Stark. 290.

[1] M. sued on a note, and the defendants pleaded that the note was made by M., the plaintiff, and others, jointly with the defendant. The plea was held a good plea in bar. *Moffat v. Van Millingen*, 2 B. & P. 124, n. *Worrall v. Grayson*, 1 Mee. & W. 166.

So where a note was made by E. in favour of the firm of which he was a member, namely, C., P. & E., and by them indorsed to A., B. & C., who, as indorsees, brought an action against D., and D. pleaded, not in abatement but in bar, that C., one of the plaintiffs, was also liable as an indorser, together with D., the defendant, the plea was held good. *Mainwaring v. Newman*, 2 B. & P. 120. *See* 10 Mee. & W. 131; 9 B. & C. 356.

A partner in a banking-house, for his own accommodation, drew bills upon the defendant, and caused the defendant to accept them, he, the partner, undertaking to provide for them ; and afterwards, being indebted to the firm of which he was a member, he indorsed them, for a valuable consideration, to the firm. The court held, that an action on the bill could not be maintained by the firm, of which that partner was one, because the facts of the case are such that one of several plaintiffs could not recover against the defendant. If the cause of action were considered as accruing to him alone, he cannot sue in conjunction with the plaintiffs, although they may not have been parties to the facts, which would prevent the plaintiff from suing alone. *Sparrow v. Chisman*, 9 B. & C. 241 ; 4 M. & R. 206.

The plaintiff, a shareholder in a joint-stock company, drew two bills on the directors for the goods supplied for the use of the company, which bills were accepted by the secretary, per procuration of the directors. On proof that the secretary had directions to accept bills drawn by the plaintiff's brother, the court held that the plaintiff could not recover as against the directors, on the ground that the secretary had no authority to accept the bills drawn by the plaintiff; and that, as he was a shareholder, he must be considered as a partner in the concern, and, as such, could not sue his co-partners. *Neale v. Turton*, 4 Bing. 149.

Where a holder of a bill is also liable upon it, the technical difficulty may be removed by indorsement. *Morley v. Culverwell*, 7 Mee. & W. 174. *Steele v. Harmer*, 15 L. J. Ex. 219; 14 Mee. & W. 831. *See* 28 L. J. Ex. 201.

But if one partner draw on the other partners by name, or on one or more of them, and the drawees individually accept, such drawer may recover against them, because, by such an acceptance, a separate right is acknowledged to exist. *Neale v. Sir T. Turton*, 4 Bing. 149 : *per Best, C. J.* See *Cross v. Cheshire*, 7 Ex. 43.

[2] The contracts of a married woman are void in law. Without authority from her husband, therefore, she cannot, at law, charge either him or herself by making, drawing, accepting, or indorsing negotiable instruments — not even if she live apart from him and have a separate maintenance secured by deed (*Marshall v. Rutton*, 8 T. R. 545); where, however, there is a *judicial separation* between husband and wife, the

feme covert; proof, that the defendant promised to pay when the note was presented for payment.

Lord Ellenborough, C. J., said, he would presume, after the promise to pay by the defendant, that she had authority from her husband to indorse bills as his agent.

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wife, whilst so separate, is considered as a *feme sole* for the purposes of contract, and suing and being sued, in any civil proceeding (20 & 21 Vic. c. 85, s. 26); and where, being deserted, she has obtained an order for the protection of her property, she is to be deemed, during its continuance, "in the like position, in all respects with regard to property and contracts, and suing and being sued, as she would be if she obtained a decree of judicial separation" (20 & 21 Vic. c. 85, s. 21); in case of dissolution of the marriage, the marriage is annulled to all purposes.

Even if a married woman be a sole trader in London, by the custom of the city she is not liable at all in the superior courts; and in the city courts her husband must be joined for conformity, though execution will lie against the wife alone. *Beard v. Webb*, 2 B. & P. 93.

But if a married woman have a separate estate, and make a promissory note, or accept a bill of exchange, she is liable in equity (*Beelpin v. Clarke*, 17 Ves. 366. *Hulme v. Tenant*, 1 Bro. C. C. 16. *Stewart v. Kirkwall*, 3 Madd. 387); and if, while she has a separate estate, she gives a security for money lent, and after her husband's death promise to repay it, such promise is binding in law on herself and her executors (*Lee v. Muggeridge*, 5 Taunt. 36); but if, at the time the note was given, she had not a separate estate, no such promise after the death of her husband will be valid. *Lloyd v. Lee*, 1 Stra. 94. *Littlefield v. Shee*, 2 B. & Adol. 811.

And a *feme covert* has rights in respect of her separate estate, which will be protected in equity against the acts of her husband. A married woman, who was the payee of a bill accepted by the Bank of Australia, which her husband took, with his wife's name indorsed on it, to a bill-discounter, the husband, having put his own name also on the back of the bill, received the money for it, and in due time the bill-discounter sued the bank on their acceptance. The wife filed a bill in equity, alleging the forgery of her name on the bill by her husband, and the court granted a perpetual injunction against the bill-discounter, because there was sufficient notice on the face of the instrument that it belonged to the separate estate of the payee, and the bank was ordered to pay the amount to the wife. *Dawson v. Prince*, 26 L. J. Ch. 849.

If the husband is transported, and has not returned to the kingdom, whether or not the term of his transportation has expired (*Carrol v. Blencow*, 4 Esp. 27); or if he is an alien enemy (*Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147); or, being an alien and abroad, the wife has traded in this country as a *feme sole* (*De Gaillon v. L'Aigle*, 1 B. & P. 358): in any of these cases she may make contracts, and incur personal liability thereon at law. So, where a husband has been abroad and not heard of for seven years, it will be presumed that he is dead, and the wife will be held liable on her contracts as a *feme sole*, unless the presumption be rebutted by evidence to the contrary. *Hopewill v. De Pinna*, 2 Camp. 113. *Rush v. Baker*, 8 Sim. 443. But the law does not make a woman liable as a *feme sole* merely because her husband is an alien, and has never been in this country. *Barden v. Keversberg*, 2 Mee. & W. 64: *per Parke, B.* And in the case of an alien who has once resided in this country, but who has since departed the realm, leaving his wife behind him, and entered the service of a foreign state, the *animus revertendi* is, it seems, to be presumed, unless the contrary appear. *Kay v. De Pinna*, 2 Camp. 123; but *see* 2 Esp. 554.

Where the husband was transported for fourteen years, but instead of going abroad was confined in the hulks at Portsmouth, it was held that his wife, carrying on business in her own name for the benefit of the family, might be made bankrupt, and that a bill accepted by her under such circumstances constituted a good petitioning creditor's debt. *Ex-parte Franks*, 7 Bing. 762.

Where a bill or note is given to a single woman, and she marries, the property vests in her husband, and he alone can indorse it (*Connor v. Martin*, 3 Wils. 5; 1 Stra. 516), and husband and wife must join in the action upon it. Com. Dig., Baron and Feme, N. *Sherrington v. Yates*, 12 Mee. & W. 855. But if payable to order, marriage may operate as an indorsement, so as to enable the husband to sue alone. *MacNeilage v. Holloway*, 1 B. & A. 218. See *Hart v. Stevens*, 14 L. J. Q. B. 149. If not recovered upon, or reduced into possession, during their joint lives, it reverts to the woman if she survives, or goes to the husband as her administrator if he survive. *Coppin v.* ——, 2 P. Wms. 497. *Day v. Pargrave*, 2 M. & S. 396. Whether any act on the part of the husband, short of recovering judgment on the instrument, would have the effect of reducing it into possession, is still a point which is undetermined. See *Scarpellini v. Atcheson*, 7 Q. B. 864. *Allday v. Fletcher*, 26 L. J. Ch. 519. The receipt of interest on the note by the husband during his lifetime (*Hart v. Stephens*, 6 Q. B. 937), or the receipt of part payment of the principal and of interest on the remainder, has been held not to be a sufficient bar to the right of the wife as sur-

(D) *Infants.*[1]

Hunt v. Massey, 3 Nev. & M. 109.

A ratification of a bill made by an infant after he comes of age is binding.

The defendant accepted a bill when under age. The defendant became of age 19th June, 1832, and the bill fell due on the 4th July, 1832. The plaintiff produced a letter in the handwriting of the defendant, which was dated on the 22d June, 1832, addressed to a third person, requesting him to pay the plaintiff 101*l.* out of a sum left to the defendant by his grandfather. It was objected to, on the part of the defendant, that the declaration did not contain any special count founded on the promise to pay, made after the defendant became of age.

Per Cur. "The new promise need not be declared on specially."

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vivor. *Nash v. Nash*, 2 Madd. 133. If the husband have brought an action in his own name, that would, it has been said, amount to an election to take it himself, and to an expression of dissent on his part to his wife having any interest in it. See *per Parke, B.*, in *Gaters v Madeley*, 6 Mee. & W. 423. But if the wife be joined in the action, he must recover judgment, and levy execution, in order to evince his election; for were he to die in the course of the action, or even after judgment signed, the action would survive to the wife. *Gaters v. Madeley*, *supra.*

If it be proved that a wife has been in the habit of drawing, accepting, or indorsing bills or notes for her husband with his authority, this would raise a presumption that a bill accepted in her handwriting had been accepted by his authority. *Lord v. Hall*, 8 C. B. 627.

An overdue bill, addressed to the husband as drawee, was accepted by the wife in her own name. The bill was presented to the husband, and he said that he knew all about it; that it was a milliner's bill, and he would pay it shortly:—*Held*, that the husband had ratified, if not authorised, the act of the wife, and was, therefore, liable as acceptor. *Lindus v. Bardwell*, 5 C. B. 583.

So a married woman, with the consent of her husband, may indorse a bill in her own name. Thus, in *Prestwick v. Marshall* (7 Bing. 565; S. C. 5 M. & P. 13; 4 C. & P. 594). an action on a bill of exchange, it appeared that the wife, by her husband's authority, signed and indorsed the bill in her own name.

Per Bosanquet, J. "I am of opinion that the wife's indorsement, if approved by her husband, is binding upon him: it is positively proved, in this case, that the husband assented to the act of the wife." And on the case coming before the court, they concurred with him.

But the mere fact of the money being applied in discharge of the husband's debts is not evidence of an authority. Thus, in *Goldstone v. Tovey* (6 Bing. N. S. 98; 8 Scott, 394), an action against the defendant, as acceptor of a bill of exchange, accepted, as supposed, by his wife, but no evidence was given in whose handwriting the acceptance was written, the court held, that the circumstance of the bill having been paid by the drawer, and the amount of it obtained on discount by the defendant's wife having been applied by her in discharge of the defendant's debts, was not sufficient to prove that the defendant had approved the acceptance.

And although a married woman cannot, except as agent for her husband, indorse a negotiable instrument so as to pass the interest in it, yet, if the defendant have accepted a bill drawn by a married woman and payable to her order, or have made a promissory note payable to a married woman, he will be estopped from denying her capacity to indorse it. *Smith v. Marrack*, 6 C. B. 486. See *Baker v. Bank of Australasia*, 26 L. J. C. P. 93. *Guyard v. Sutton*, 3 C. B. 153. And though a note given by a wife to her husband is void, yet if it is indorsed over by the husband between him and the indorsee, it is certainly good. *Hale v. Lane*, 2 Atk. 182. And a promissory note given by a husband to his wife, for money advanced by her to him out of separate estate, constitutes a sufficient declaration of trust in favour of the wife. *Murray v. Glasse*, 23 L. J. Ch. 126.

If a married woman make a note in her own name falsely, adding the word "widow," she is not estopped from pleading her coverture in bar of an action on the note. *Cannam v. Farmer*, 3 Ex. 698. *Neve v. Holland*, 21 L. J. Q. B. 289. The representatives of an infant or a married woman cannot remove the legal incapacity of either; and it seems that they do not operate as an estoppel. *Fairhurst v. Liverpool Adelphi Loan Association.* But see *Vaughan v. Vanderstegen*, 2 Drew, 165. *Hobday v. Peters*, 29 L. J. Ch. 780.

[1] An infant can make a binding contract for necessaries only; and he may give a simple bill (which is a bond without a penalty) for the exact sum due for necessaries, but not a bond with a penalty or carrying interest. Co. Litt. 172 a. n. 2. *Russell v. Lee*, 1 Lewin, 86. *Trueman v. Hurst*, 1 T. R. 41. But see *Williamson v. Watts*, 1 Camp. 552; Selw. N. P. 324. Bills of exchange given in the course of trade are clearly not binding upon them. *Williams v. Harrison*, 3 Salk. 197. *Williamson v. Watts*, 1 Camp. 552. *Harrison v. Cotgreave*, 4 C. B. 562. *Roberts v. Bethell*, 12 id. 772.

(E) *Corporations.*[1]

(F) *Joint-Stock Companies.*[2]

A person is liable as acceptor of a bill drawn upon him whilst he was an infant, but accepted after he came of age. *Stevens v. Jackson*, 4 Camp. 164. *Harrison v. Clifton*, 17 L. J. Ex. 232; 16 id. C. P. 198; Bay. 47.

It is not yet settled whether an infant can in all cases by his indorsement of a bill of exchange convey a valid title as against any of the prior parties. But the indorsee of an infant payee has been allowed to recover as against the acceptor by way of estoppel (*Taylor v. Croker*, 4 Esp. 187. *Jones v. Darch*, 4 Price, 300. See *Jeune v. Ward*, 2 Stark. 330); for the acceptance is an admission of the capacity of the payee to indorse (see *Daylon v. Dale*, 2 B. & C. 299); especially if such payee be also the drawer. *Pitt v. Chappelon*, 8 Mee. & W. 616. *Braithwaite v. Gardener*, 8 Q. B. 473. For the same reason it has been held that the drawer of a bill cannot set up the infancy of the payee and indorser as a defence to an action against himself as drawer. *Gray v. Cowper*, 3 Dougl. 65; Bayley, 46.

If one of two partners who accept a bill be an infant, and has set up his infancy as a defence, the holder may declare on it against the adult as accepted by him only, and if he plead in abatement the non-joinder of his partner the plaintiff may reply his infancy, and it will be no departure. *Burgess v. Merrill*, 4 Taunt. 468. See *Glossop v. Coleman*, 1 Stark. 25. *Gibbs v. Merrill*, 3 Taunt. 307.

What are to be considered necessaries depend on the rank and circumstances of the infant in the particular case. See *Chappell v. Cooper*, 13 Mee. & W. 252.

As the contract of an infant is only voidable and not absolutely void, he may by a promise to pay the bill made after he attains twenty-one and before action (*Thornton v. Illingworth*, 2 B. & C. 824), render it as effectual against him as if he had been of age at the time it was made. *Harris v. Wall*, 1 Ex. 122. *Hunt v. Massey*, 5 B. & Adol. 902. Such a promise, however, must be express (*Mawson v. Blane*, 10 Ex. 206); and a bare acknowledgment of the debt is not a sufficient confirmation, nor will a promise to pay a part, or an actual payment of part, enure as a confirmation. *Dilk v. Keighley*, 2 Esp. 481. *Thupp v. Fielder*, id. 628. So he may after full age ratify an account stated by him during infancy (*Williams v. Moore*, 11 Mee. & W. 256); and if the instrument of ratification be such as in the case of an adult would amount to the adoption of the act of an agent, it will in the case of an infant after full age amount to a ratification. *Harris v. Wall, supra.* See *Hartley v. Wharton*, 11 Ad. & E. 984. But such ratification must now be in writing, or signed by the party himself, signature by an agent not being sufficient. 9 Geo. 4, c. 14, s. 5. *Hyde v. Johnson*, 3 Scott, 289.

The ratification by an adult of his contract made in infancy must be executed with full knowledge and information of the circumstances under which he is acting, and if he is induced by misrepresentations to ratify his contract or give further security, a court of equity will set aside such security without condition, and declare the ratification void. *Kay v. Smith*, 21 Beav. 522. Affirmed by H. L. 1859.

In the case of a continuing contract, voidable only by an infant on his coming of age, he is presumed to ratify and confirm it if he do not, within a reasonable time after he has attained his full age, disaffirm or otherwise reject the contract, unless the other party dispense with such disaffirmance. *Dublin and Wicklow Railway Co. v. Black*, 8 Ex. 181. *Holmes v. Blogg*, 8 Taunt. 35. *North-Western Railway Co. v. Michael*, 5 Ex. 114. *Good v. Harrison*, 5 B. & A. 147.

An infant may sue on a bill which is drawn in his favour. *Warwick v. Bruce*, 2 M. & S. 205. *Teed v. Elworth*, 14 East, 210; 6 Taunt. 118. *Holliday v. Atkinson*, 5 B. & C. 501.

[1] Whether corporations can bind themselves by being parties to bills of exchange very much depends on the provisions of the charter or the particular act by which they are incorporated. At common law such bodies are incapable of making a valid contract, except by deed under their common seal (*Lamprell v. the Billericay Union*, 3 Ex. 283. *Paine v. Guardians of Strand Union*, 8 Q. B. 326); though in matters of trifling moment and frequent recurrence, and on the ground of convenience almost amounting to necessity, the courts have been long disposed to relax the rule. *Church v. Imperial Gas-Light Co.* 6 Ad. & E. 864. In the case of corporations constituted for the purpose of carrying on trading speculations they have gone further. For "where the nature of their trading constitution has been such as to render the drawing bills or the constant making of any particular sort of contract necessary for the purposes of the corporation, there the courts have held that they would imply in those who are according to the provisions of the charter or act of parliament carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist." *Mayor of Ludlow v. Charlton*, 6 Mee. & W. 815: *per Rolfe, B.* But it has been held that the directors of a cemetery company, though empowered by the act of incorporation to make contracts and bargains touching the undertaking, and to do and transact all other matters and things requisite to be done for the management of the company's affairs, had no authority thereunder to accept or indorse bills of exchange. *Harmer v. Steele*, 4 Ex. 1. *See* Grant on Corporations, 61, 276.

[2] Joint-stock companies registered under the stat. 7 & 8 Vic. c. 110 (which is repealed except as to companies then and continuing

(F) *Joint-Stock Companies—(continued).*

Joint-stock companies liable on bills or notes made, accepted, or indorsed by their agent.

By the Joint-Stock Companies' Act, 1856 (19 & 20 Vic. c. 47, s. 43), "a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company registered under this act, if made, accepted, or indorsed in the name of the company by any person acting under the express or implied authority of the company."[1]

(G) *Banks and Banking Companies.* *See ante*, p. 369.

(H) *Executors and Administrators.*[2]

registered under it by the 19 & 20 Vic. c. 47) might be made parties to a bill or note, if authority for that purpose were given either by the deed of settlement or by a by-law. See *Thompson v. the Universal Salvage Company*, 1 Ex. 694. Under the 45th section of that statute, a bill or note to be binding on the company must be accepted or made by and in the names of two directors, and expressed to be on behalf of the company, and must be countersigned by the secretary. See *Halford v. Cameron's Colebrook Co.* 16 Q. B. 442. *Edwards v. the same*, 6 Ex. 269. *Aggs v. Nicholson*, 1 H. & N. 165. When indorsed it must be in the name of the company, by an officer authorised by the deed of settlement or a by-law to make such indorsement. But a proviso in the deed of settlement limiting the liability of individual shareholders was held repugnant to a general authority to bind the company by bills and void as against strangers. *Gordon v. Sea, Fire, and Life Assurance Society*, 26 L. J. Ex. 202.

If the authority to bind the company by bills be pursued in substance, the courts will not confine the directors very strictly to the letter. Where they had authority to secure a debt of a specified amount by one bill or note, and they issued several bills amounting together to the sum mentioned with its legal accretions, they were held to have acted within the authority of the deed. *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849.

In an action against directors of a joint-stock company for a false representation, that they had authority to bind the company by the acceptance of a bill of exchange drawn on the company, it is incumbent on the plaintiff to show that he has sustained damage; and an action is not, therefore, maintainable by the indorsee of such a bill unless he show that he gave value for it, or was otherwise damnified. *Eastwood v. Baine*, 28 L. J. Ex. 74; 7 W. R. 90.

Where directors of a joint-stock company under the 7 & 8 Vic. c. 110 are authorised by its deed of settlement to draw or accept bills of exchange, a proviso in the deed that such bills shall be so made or accepted, &c. as to be binding on the company and the shareholders, to the extent of the respective shares held by them in the capital stock of the company, and no further, is repugnant and void, and bills drawn or accepted by the directors in conformity with the provisions of the act bind the company. In an action by the payee, it was not proved that he had notice of the provisions of the deed. *Held*, that he was entitled to recover against the company. *Gordon v. Sea, Fire, and Life Assurance Society*, 26 L. J. Ex. 202. *Peddell v. Gwyn*, id. 199.

A promissory note in this form, "Three months after date we jointly promise to pay F. S. or order 600*l.* for value received in stock on account of the London and Birmingham Iron and Hardware Company Limited," signed by three directors of the company, was held to be a note made in the name of the company within the Joint-Stock Companies' Act, 19 & 20 Vic. c. 47, s. 43, and therefore binding on the company, and not on the directors individually who signed it. *Lindus v. Melrose*, 2 H. & N. 293; 27 L. J. Ex. 326. See *Healey v. Story*, 3 Ex. 3; 18 L. J. Ex. 8. *See* 28 L. J. Ex. 74; id. C. P. 170.

[1] If the company be "limited," the word must on every occasion form part of the description. It is by the 31st sect. of the 19 & 20 Vic. c. 47, enacted, "that if the officer of any limited company registered signs, or authorises to be signed on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, &c., wherein its name is not mentioned in manner aforesaid" (*i. e.* with the word "limited" after the name of the company), "he shall be liable to a penalty of 50*l.*, and shall further be personally liable to the holder of the bill of exchange, &c. for the amount thereof, unless the same is duly paid by the company." It has been held, that where a bill of exchange was addressed to a joint-stock company, duly registered under the statute, with limited liability, but, although addressed to them as drawees by their name, it omitted the word "limited;" and the secretary to the company having authority to accept bills for the company, accepted the bill in his own name, adding "secretary to the said company;" the court held that the acceptance was intended as the acceptance of the company, and the defendant was therefore personally liable to the holder of the bill under the 31st section of the act, by reason of the omission of the word "limited." *Penrose v. Martyn*, 28 L. J. Q. B. 28.

[2] On the death of the holder of a bill or note, his executors or administrators may indorse, and such an indorsement is for all purposes as effectual as an indorsement by the deceased. *Watkins v. Maule*, 2 J. & W. 243. *Rawlinson v. Stone*, 2 Wils. 12; 2 Stra. 1260. Presentment notice of dishonour and payment should be made by

CHILDS v. MONINS, 5 Moore, 282; S. C. 2 B. & B. 460.

If executors give a promissory note payable *with interest* on demand, they are liable, though they make it expressly "*as executors.*"[1]

To an action on a promissory note, the defendants pleaded that they were executors of T. T. deceased, and as such had made the note in question, as follows:—"As executors to the late T. T., of, &c., we severally and jointly promise to pay to Mr. N. C., the plaintiff, the sum of, &c. on demand, together with lawful interest for the same. Signed, J. M., P. B., executors."

Demurrer, that the terms of the note expressed its consideration to be a debt due from the defendants, and not from T. T., and that the defendants had admitted the possession of assets, and that the defendants had therefore rendered themselves personally liable. Joinder in demurrer.

Per Cur. "If this case were to be determined on the exclusive expression "as executors," the defendants would be discharged from their individual responsibility; but we must collect the sense of the instrument from its terms as a whole. The defendants might have promised payment "out of the estate of T. T.," whereas they have not only promised jointly and severally, which executors do not usually do, but also to pay with interest. We think that this latter circumstance clearly imposes on the defendants a personal liability, as the interest could not be charged to the testator's estate; and as we cannot separate the tenor of one part of the bill from that of another. Beside these considerations, great fraud might be a consequence of an executor being suffered to give bills or notes of a date exceeding the appropriation of a testator's assets." Judgment for plaintiff.

(I) *Aliens.*[2] *See* vol. i. p. 285.

(J) *Intoxicated or Imbecile Persons.*[3]

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and to the executor or administrator, in the same manner as by or to the deceased. Molloy, 2, 10; Byles, 45; Bay. 286.

[1] An executor is personally liable on making, drawing, indorsing, or accepting negotiable instruments, though he describe himself as "executor," unless he expressly confine his stipulation to pay out of the assets. *Serle v. Waterworth*, 4 Mee. & W. 9; 6 Dowl. 684.

[2] In general, contracts with an alien enemy are void, unless he came into this country *sub salvo conductu*, or live here by the Queen's license. *See* vol. i. p. 292. Therefore, where a bill was drawn by an alien enemy on a British subject resident in this country, and indorsed to a British-born subject voluntarily resident in the hostile country, it was held that it could not be enforced by the latter, even after peace restored. *Willison v. Patteson*, 7 Taunt. 439. But where two British subjects were detained prisoners in France, and one of them drew a bill in favour of the other on a British subject in England, and the latter indorsed the same in France to an alien enemy, it was held that the alien's right of action was only suspended during the war, and that on the return of peace he could recover the same of the acceptor. *Antoine v. Moreshead*, 6 Taunt. 237. *Daubuz v. Moreshead*, id. 332. So it is no objection to an action on such a bill that it is brought as to part in trust for an alien enemy. *Daubuz v. Moreshead, supra.* So a promise after the return of peace to pay such a bill will be valid. *Duhammel v. Pickering*, 2 Stark. 90. And an action may be maintained here by a neutral on a promissory note given to him by a British subject in an enemy's country for goods sold there. *Hounet v. Morris*, 2 Camp. 303.

[3] If a person of imbecile mind, known to be so at the time, be induced to sign a bill or note, such bill or note is bad, even in the hands of an indorsee for value, if there be anything suspicious or *unusual on the face thereof. Sentance v. Poole*, 3 C. & P. 1. *Harrison v. Richardson*, 1 M. & Rob. 504. See *Alcock v. Alcock*, 3 Man. & G. 268; 2 C. & P. 178; 3 Camp. 33. So if a note be signed by a person in a complete state of intoxication, it will be void in the hands of the party obtaining it (*Gore v. Gibson*, 13 Mee. & W. 623. *Pitt v. Smith*, 3 Camp. 33. See *Fenlon v. Holloway*, 1 Stark. 126. *Gregory v. Frazer*, 3 Camp. 454. *Yates v. Boen*, 2 Stra. 1104, n. 1; Bull. N. P. 172); but not, it would seem, in the hands of an innocent indorsee for value. *Northam v. Latouche*, 4 C. & P. 145. *Johnson v. Medlicot*, 3 P. Wms. 130.

Mere weakness, of intellect where there has been no fraud in the transaction, will not afford any defence to an action against a party to a bill or note. *Molton v. Camroux*, 2 Ex. 487; in error, 4 Ex. 17. *Campbell v. Hooper*, 24 L. J. Ch. 644. *Baxter v. Earl of Portsmouth*, 5 B. & C. 170. *Faulder v. Silk*, 3 Camp. 126. And the courts will not vacate the contracts on the ground of fraud, especially where the parties cannot be restored to their original position. *Beavan v. M'Donnell*, 9 Ex. 309. See *Harrison v. Guest*, 25 L. J. Ch. 544.

It has been said, however, that total

III. Stamps on Bills, Notes, and Cheques.[1]

(A) *Penalty for Making, Accepting, or Paying, not duly Stamped.*

Making, accepting, or paying bills not duly stamped, subjects the party to a penalty of 50*l.*[1]

By the 55 Geo. 3, c. 184, s. 11, it is enacted, "that if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the duties imposed by that act, without the same being duly stamped for denoting the duty thereby charged thereon, he, she, or they shall, for every such bill, draft, order, or note, forfeit the sum of 50*l.*"

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drunkenness, producing a complete, though temporary suspension of reason, is a defence to an action on a bill or note. "It is just the same," said *Alderson, B.*, "as if the defendant had written his name on the bill in his sleep, or in a state of somnambulism." *Gore v. Gibson*, 13 Mee. & W. 623.

[1] The stamp is an essential part of every inland bill and note. If unstamped, it is a nullity, and cannot be given in evidence as an admission of a debt from one of the parties therein mentioned to the other. *Wilson v. Vyser*, 4 Taunt. 228. *Jardine v. Payne*, 1 B. & Adol. 670. *Cundy v. Marriott*, id. 696.

The paper on which a bill or note is written must have the stamp previously impressed upon it, for if that be neglected it cannot afterwards be stamped (see *Wright v. Riley*, Peake, 173. *Roderick v. Horil*, 3 Camp. 103. *Rapp v. Alnutt*, id. 106. *Green v. Davies*, 4 B. and C. 235. *Abrahams v. Skinner*, 12 Ad. & E. 763); except in the single case of its having been impressed with a stamp of equal or higher value, but of a wrong denomination (1 Anne, stat. 2, c. 23, ss. 2, 3; stat. 22 Geo. 3, c. 25, s. 19; stat. 37 Geo. 3, c. 136, s. 5. See *Bradley v. Bardsley*, 14 Mee. & W. 873. *Chamberlain v. Porter*, 1 N. R. 30); or in the case of a bill drawn abroad, or purporting to be drawn abroad, as to which an adhesive stamp must be affixed before it is presented for payment, or indorsed, transferred, or otherwise negotiated within the United Kingdom. 17 & 18 Vic. c. 83, ss. 3–5; 23 Vic. c. 15, s. 13; *post*, p. 426. However, it will be sufficient if it be impressed with a stamp of adequate or greater amount, though of an improper denomination, unless such stamp be specially appropriated to some other instrument by having its name on the face of it. 55 Geo. 3, c. 104, s. 10. Where stamp-duty is payable, its amount will not be increased by the circumstance of interest being reserved from the date of the bill or note (*Pluessing v. Ing*, 4 B. & A. 204); or even from a day prior to the date. *Rolles v. Root*, 4 Tyr. 726.

If a bill or note be made in any part of her Majesty's dominions where, by the local revenue-law of such place, a stamp is required, such instrument cannot be recovered on in any court here, unless properly stamped according to the law of the place where the same was made (*Alves v. Hodgson*, 7 T. R. 241. *Clegg v. Levy*, 3 Camp. 166); but the party objecting to the want of a stamp in such case must prove that, by the law of that part of the British dominions, a stamp was necessary. *Buchanan v. Rucker*, 1 Camp. 63. *Le Cheminant v. Pearson*, 4 Taunt. 367. *Miller v. Heinrich*, 4 Camp. 155. Our courts do not regard the revenue laws of a foreign independent state. *Roach v. Edie*, 6 T. R. 425. *Holman v. Johnson*, Cowp. 343. *Clugas v. Penaluna*, 4 T. R. 467. *Ogden v. Folliott*, 3 id. 735. *James v. Catherwood*, 3 D. & R. 190.

There is a proviso in stat. 9 Geo. 4, c. 14, usually called "Lord Tenterden's Act," s. 8, which enacts "that no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the dates of stamps." Under this proviso, however, an unstamped note cannot be given in evidence for the purpose of avoiding the statute (*Jones v. Ryder*, 4 Mee. & W. 32), though an unstamped agreement may. *Morris v. Dixon*, 4 Ad. & E. 84.

There are some instruments which though not, properly speaking, bills or notes, because payable at an uncertain time, or out of an uncertain fund, yet require stamps by the words of the schedule of 55 Geo. 3, c. 184. See *Hutchinson v. Heyworth*, 9 Ad. & E. 375. *Jones v. Simpson*, 2 B. & C. 318. *Emily v. Collins*, 6 M. & S. 144. *Lord Braybrooke v. Meredith*, 13 Sim. 271. *Firbank v. Bell*, 1 B. & A. 30. *Bretts v. Swan*, 2 B. & B. 78.

Before the 33 Geo. 3, bills and notes were written on a plain piece of paper unstamped. By a statute made in that year, certain duties were imposed on every piece of vellum, parchment, or paper, on which bills and notes, falling under certain descriptions, should be written, engrossed, or printed. By a subsequent act, 55 Geo. 3, c. 184, s. 1, all the former duties are repealed, and others imposed in their stead. The duties imposed by this statute have been amended by the 17 & 18 Vic. c. 83, and the 23 & 24 Vic. c. 15, c. 111. By the 16 & 17 Vic. c. 59, a stamp-duty was imposed on bankers' cheques. The following tables of stamp-duty are compiled from the schedules to these statutes, the material sections to which will be found in the text.

Inland Bill of Exchange, draft, or order, for the payment to the bearer, or to

order, at any time otherwise than on demand of any sum of money.

		£ 5	£0	0	1
Exceeding	£ 5	10	0	0	2
„	10	25	0	0	3
„	25	50	0	0	6
„	50	75	0	0	9
„	75	100	0	1	0
„	100	200	0	2	0
„	200	300	0	3	0
„	300	400	0	4	0
„	400	500	0	5	6
„	500	750	0	7	0
„	750	1000	0	10	0
„	1000	1500	0	15	0
„	1500	2000	1	0	0
„	2000	3000	1	10	0
„	3000	4000	2	0	0

And not exceeding

„ 4000 and upwards for every 1000*l.* or part of the 1000*l.* of the money thereby made payable, 10*s.* 6*d.* (23 Vic. c. 15, sch.)

Inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf,—

The same duty as on a bill of exchange for the like sum payable to bearer or order.

Inland bill, draft, order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, or shall be indefinite,—

The same duty as on a bill payable to bearer or order on demand for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite,—

The same duty as on a bill payable to bearer or order on demand.

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders for the payment of money, within the intent and meaning of the Stamp Acts, viz. all drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf.

Foreign Bills of Exchange drawn in but payable out of the United Kingdom.

If drawn singly, or otherwise than in a set of three or more, the same duty as on an inland bill of the same amount and tenor.

If drawn in sets of three or more, for every bill of each set,—

Where the sum payable thereby shall not exceed		£ 25	£0	0	1
Exceeding	£ 5	50	0	0	2
„	50	75	0	0	3
„	75	100	0	0	4
„	100	200	0	0	8
„	200	300	0	1	0
„	300	400	0	1	4
„	400	500	0	1	8
„	500	750	0	2	6
„	750	1000	0	3	4
„	1000	1500	0	5	0
„	1500	2000	0	6	8
„	2000	3000	0	10	0
„	3000	4000	0	13	4

And not exceeding

(17 & 18 Vic. c. 83.)

Bill of Exchange (foreign) drawn in a set of three or more for the payment of money exceeding 4000*l.*, where every bill of the set is now chargeable with the stamp-duty of fifteen shillings,—

Every bill of the set for every 1000*l.* or part of 1000*l.* of the money thereby made payable (23 Vic. c. 15), 3*s.* 4*d.*

Bill of Exchange, Draft, or Order (foreign), drawn or indorsed out of the United Kingdom for the payment of money on demand (23 Vic. c. 15),—

The same duty as on an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable.

Foreign Bill of Exchange drawn out of the United Kingdom and payable within the United Kingdom, the same duty as on an inland bill of the same amount and tenor.

Foreign Bill of Exchange drawn out of the United Kingdom and payable out of the United Kingdom, but indorsed or negotiated within the United Kingdom, the same duty as on a foreign bill drawn within the United Kingdom and payable out of the United Kingdom.

Promissory Note for the payment in any other manner than to the bearer on demand of any sum of money not exceeding

		£ 5	£0	0	1
Exceeding	£ 5	10	0	0	2
„	10	25	0	0	3
„	25	50	0	0	6
„	70	75	0	0	9
„	75	100	0	1	0
„	100				

And not exceeding

Promissory Note for the payment either to the bearer on demand, or in any other

(B) *Bills drawn out of United Kingdom liable to Stamp, if negotiated or paid within it.*[1]

Bills drawn out of United Kingdom to be stamped, if negotiated or paid within it.

By 17 & 18 Vic. c. 83, s. 3, "the duties by this act granted in respect of a bill of exchange drawn out of the United Kingdom, shall attach and be payable in respect of all such bills as shall be paid, indorsed, transferred, or otherwise negotiated, within the United Kingdom, wheresoever the same may be payable; and the said duties shall be denoted by adhesive stamps, to be provided by the Commissioners of Inland Revenue for that purpose, and to be affixed to such bills as hereinafter directed."

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manner than to the bearer on demand, of any sum of money,—

Exceeding	£100			£	200	£0	2	0
„	200				300	0	3	0
„	300				400	0	4	0
„	400				500	0	5	0
„	500		And not exceeding		750	0	7	6
„	750				1000	0	10	0
„	1000				1500	0	15	0
„	1500				2000	1	0	0
„	2000				3000	1	10	0
„	3000				4000	2	0	0

(17 & 18 Vic. c. 84.)

Promissory Note made in the United Kingdom for the payment of any sum of money exceeding 4000*l.*,—

For every 1000*l.* or part of 1000*l.* of the money thereby made payable (23 & 24 Vic. c. 111), 10*s.*

Promissory Note for the payment to the bearer on demand of any sum of money,—

					£1	1	0	£0	0	5
	£1	1	0		2	2	0	0	0	10
Exceeding	2	2	0	Not exceeding	5	5	0	0	1	3
	5	5	0		10	0	0	0	1	9
	10	0	0		20	0	0	0	2	0
	20	0	0		30	0	0	0	3	0
	30	0	0		50	0	0	0	5	0
	50	0	0		100	0	0	0	8	0

Which said notes may be reissued after payment thereof, as often as shall be thought fit.

The issue of any such note for a less sum than 5*l.* is prohibited (7 Geo. 4, c. 6); and these other notes can only be issued by a licensed banker. *See ante*, Bank-Notes, p. 133.

Foreign Promissory Note made or purporting to be made out of the United Kingdom for the payment within the United Kingdom of any sum of money (23 & 24 Vic. c. 111),—

The same duty as on an inland bill of exchange for the payment otherwise than on demand of money of the same amount.

And the following instruments shall be deemed and taken to be promissory notes within the intent and meaning of this schedule, viz.:—

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to 20*l.*

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

Exemptions from the preceding, and all other Stamp Duties.

All promissory notes or bills, for the payment of money, issued by the Governor and Company of the Bank of England, Commissioners of the Navy, Commissioners for Victualling the Navy, or Commissioners for the Transport Service.

As to drafts on bankers, *see supra*, in text; and *ante*, p. 123.

As to exception of Bank of England notes, *see ante*, p. 137.

It has been held, that a promissory note to pay W., or bearer, the sum of 40*l.*, with interest (without saying on demand, or at sight, or after date), is, in law, a note payable on demand, and requires to be stamped as such (*Whitlock v. Underwood*, 4 B. & Adol. 837); but a promissory note payable to A. B. generally, was held not to be a note payable to bearer on demand, and that was reissuable. *Cheetham v. Butler*, 5 B. & Adol. 837; and see *Dixon v. Chambers*, 1 C., M. & R. 845. Under the statutory provisions qualifying the right to reissue bills after payment, it has been determined, that a bill payable to the drawer's order, which has been paid by him, may be afterwards indorsed by the drawer to a new party, who may sue the acceptor in his own name. *Callow v. Lawrence*, 3 M. & S. 95. See *Williams v. James*, 15 Q. B. 498. *Jones v. Broadhurst*, 9 C. B. 173. *Belshaw v. Bush*, 11 id. 191. *Lazarus v. Cowie*, 13 id. 201. *Jewell v. Parr*, 16 id. 684.

The stamp-duty is no longer regulated by any distinction as to the period for which bills or notes have to run; but a bill or note payable at sight is not payable on demand, because the party is entitled to days of grace. *I'Anson v. Thomas*, 3 Dougl. 421.

[1] The 17 & 18 Vic. c. 83, does not render it necessary that the stamp should be affixed on a bill drawn abroad, upon a person in this country, previous to presentation by the agent of the drawer. The act requires only that a stamp should be affixed. Where there is a contract in this country, if the bill were indorsed in England, or presented for payment in England, a stamp would be necessary. *Sharples v. Richard*, 2 H. & N. 57.

(C) *The Stamp on Foreign Bills is adhesive.*

The stamp on foreign bills is adhesive.

By 23 Vic. c. 15, s. 13, "the duties by this act granted upon, or in respect of, bills of exchange, drafts, or orders, drawn out of the United Kingdom, shall be denoted by adhesive stamps, in like manner as the duties now payable on bills of exchange drawn out of the United Kingdom; and all the clauses, provisions, directions, penalties, and forfeitures, contained in the act 17 & 18 Vic. c. 83, relating to adhesive stamps on bills of exchange, drawn out of the United Kingdom, as well as in this act (so far as the same are applicable), shall be applied and put in force, in respect of the stamp-duties on bills of exchange by this act granted, as fully and effectually as if the same were herein repeated and re-enacted."

(D) *And the Holder of a Foreign Bill affixing Stamp must cancel it.*

And the holder of a foreign bill affixing stamp must cancel it.

By 17 & 18 Vic. c. 83, s. 5, "the holder of any bill of exchange drawn out of the United Kingdom, not having a proper adhesive stamp affixed thereon, as herein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp, for denoting the duty by this act charged on such bill; and the person who shall indorse, transfer, or negotiate such bill, shall, before he shall deliver the same out of his hand, custody, or power, cancel the stamp so affixed, by writing thereon his name or the name of his firm,[1] and the date of the day and year on which he shall so write the same, to the end that the same may not be again used for any other purpose; and if any person shall present for payment, or shall pay, or indorse, transfer, or negotiate any such bill as aforesaid, whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought, as directed by this act, to cancel such stamp in manner aforesaid, shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of 50*l.*; and no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless, at the time when he shall so take or receive such bill, there shall be such stamp as aforesaid affixed thereon, and cancelled in the manner hereby directed."

(E) *Bill purporting to be drawn within United Kingdom, payable out in Sets, must be so drawn, and the Sets Stamped.*[2]

Bill purporting to be drawn within United Kingdom, payable out in sets, must be so drawn, and the sets stamped.

By 17 & 18 Vic. c. 83, s. 6, "if any person shall, within the United Kingdom, draw and issue any bill of exchange, payable out of the United Kingdom, purporting to be drawn in a set, and shall not draw and issue on paper, duly stamped as required by law, the whole number of bills which such bill purports the set to consist of, every such person so offending in any of such cases shall forfeit the sum of 100*l.*; and if any person shall take or receive, in the United Kingdom, any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, without having transferred or delivered to him, duly stamped as aforesaid, the whole number of bills which such bill purports the set to consist of, he shall not be entitled to recover on any such bill, or to make the same available for any purpose whatever."

(F) *Effect of not being Stamped.*

Sweeting v. Halse, 9 B. & C. 365.

A renewal of an old bill

In an action by the drawer against the acceptor of the original bill, it

[1] See *Siordet v. Kuczinski*, 17 C. B. 251.

[2] By the 17 & 18 Vic. c. 83, s. 4, "every bill of exchange, which shall purport to be drawn at any place out of the United Kingdom, shall, for all the purposes of this act, be deemed to be a foreign bill of exchange drawn out of the United Kingdom, and shall be chargeable with stamp-duty accordingly, notwithstanding the same may have been drawn within the United Kingdom."

written on its back without a fresh stamp, cannot be received in evidence.[1]

appeared that, when the original bill became due, it was agreed to be renewed, and a similar instrument was written on the back of the first, and accepted by the defendant; but there was no fresh stamp, and the name of the acceptor was erased from the first bill.

The court held, that, to show the cancellation to have been with the assent of the drawer, the substituted instrument ought not to have been submitted to the inspection of the jury to enable them to draw a conclusion from an unstamped instrument.

(G) *The Ruling of Judge on Question of Stamp is Final.*

Ruling of judge on stamp is final.[2]

By the 17 & 18 Vic. c. 125, s. 31, "no new trial shall be granted by reason

[1] The 31 Geo. 3, c. 25, s. 19, provides that a bill or note, not duly stamped, unless it bear a stamp of a greater value, shall not be pleaded or given in evidence in any court, or admitted to be good, useful, or available, in any court of law or equity. Where a promissory note for 100*l.*, payable with int rest on demand, was not properly stamped, and it was proved that the defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some, it was held, that although this was an admission that something was due, still, as it did not appear what the nature of the principal debt was, or that it was due to the plaintiff, or that it was one for which *assumpsit* would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 B. & C. 235.

In *Jardine v. Payne*, 1 B. & Adol. 663, *Lord Tenterden* said,—"We are of opinion that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. Such an instrument may be looked at by the court for the purpose of seeing whether it requires a stamp, or is properly stamped; it may be looked at by the jury also for a collateral object, as was done in the case of *Gregory v. Frazer*, 3 Camp. 454, where the defence was, that the maker of a note was drunk at the time the money was advanced, and was imposed on by the plaintiff, and the handwriting of the note was vouched as proof of that fact. But that such an instrument cannot be read in evidence as a security, is clear from the words of the 31 Geo. 3, c. 25, s. 19 (incorporated into the subsequent Stamp Acts), and which expressly provides that no bill liable to the duties by that act imposed shall be pleaded, or given in evidence, in any court, or admitted in any court to be good, useful, or available in law or equity, unless duly stamped."

A promissory note, unless duly stamped, cannot be given in evidence to take a case out of the Statute of Limitations. *Jones v. Ryder*, 4 Mee. & W. 32.

A bill of exchange, expressing the terms of an agreement between a landlord and an in-coming tenant, cannot be received in evidence without an agreement stamp. *Nicholson v. Smith*, 2 Stark. R. 128.

It is provided by the 17 & 18 Vic. c. 83, s. 27, "that an unstamped instrument shall be admissible as evidence in any criminal proceeding." It had previously been so held in cases for forgery (*Rex v. Hawkeswood*, 1 Leach, 257. *Rex v. Teague*, 2 East, P. C. 979); but exceptions were made in cases of larceny. See *Reculish's case*, 2 Leach, 706. *Rex v. Yates*, 1 R. & M. 170.

When a bill of exchange or promissory note is not properly stamped, it has been held that a neglect to present it for acceptance for payment, or to give notice of dishonour, will not discharge the drawer or indorser from liability to pay the original debt in respect of which it was indorsed or delivered to the holder, although it could be proved that but for such laches the bill would have been paid. *Cundy v. Marriott*, 1 B. & Adol. 696. *Wilson v. Vyser*, 4 Taunt. 288. *Ruff v. Webb*, 1 Esp. 129. But see *Swears v. Wells*, 1 Esp. 317. If, however, there be a subsisting original debt between the holder and such drawer or indorser, the holder, although he cannot recover upon the instrument, may nevertheless maintain his action for the original debt. *Brown v. Watts*, 1 Taunt. 353. *Alves v. Hodgson*, 7 T. R. 243. *Tyte v. Jones*, 1 East, 58, n. *Puckford v. Maxwell*, 6 T. R. 52. *White v. Wilson*, 2 B. & P. 118. *Wilson v. Kennedy*, 1 Esp. 245. *Wade v. Beazley*, 4 id. 7. But where there is no privity between the plaintiff and the defendant, as in the case of a remote indorsee and the acceptor, the former has no remedy against the latter under such circumstances, and can neither sue on the bill nor prove for it under a commission. *Ex-parte Manners, in re Voss*, 1 Rose, 68. *Toulmin v. Price*, 5 Ves. 240. He can only have a right to recover the consideration for the bill as between himself and the party from whom he received it. *Burchfield v. Moore*, 23 L. J. Q. B. 261.

Where, however, a party had entered into an express agreement to give a valid note, and had given one upon an improper stamp, a court of equity enforced the delivery of a valid note (*Aylett v. Bennett*, 1 Anst. 45; 2 Bridgm. 538), and where a creditor holds two bills, one duly stamped and the other not, and obtains money generally on account, he may apply it in satisfaction of the unstamped bill. *Biggs v. Dwight*, M. & R. 308.

[2] If the judge at Nisi Prius overrule the objection, and decide that the instrument is

of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

(H) *Cheques on Bankers subject to Duty.*

Cheques on bankers are subject to a penny stamp-duty.[1]

By 21 Vic. c. 20, s. 1, "from and after the 24th of May, 1858, all drafts or orders for the payment to the bearer of any sum of money on demand, which being drawn upon any banker, or any person or persons acting as a banker, and residing or transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are now exempt from stamp-duty, shall be chargeable with the stamp-duty of 1*d.* for every such draft or order."

(*a*) *Cheque presented by Drawer, directing Payment at Future Time, not liable to higher Duty than One Penny.*

Cheque presented by drawer, directing payment at future time, not liable to higher duty than 1*d.*

By 23 & 24 Vic. c. 111, s. 17, "no draft or order, writing or document, for the payment, or for entitling any person to the payment, by or through any banker, or person acting as a banker, of any sum of money, such draft, order, writing, or document, being sent or delivered by the person making or giving the same to the banker, or person acting as a banker, by or through whom the payment is to be made, and not to the person to whom such payment is to be made, or to any person on his behalf, shall be chargeable, or be deemed

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admissible, the stamp being sufficient, his decision is final: and he ought not to reserve the question for the court (*Siordet v. Kuczinski*, 17 C. B. 257. *Kaiser v. Grant*, 29 L. J. Ex. 20); but if he reject the document on an objection to the stamp, his ruling will be subject to review. *Sharples v. Rickard*, 2 H. & N. 57.

[1] All bills, drafts, or orders for the payment by any banker, or person acting as a banker, of any sum of money, though not made payable to the bearer or to order, and whether delivered to the payee or not, and all writings or documents entitling or intended to entitle any person whatever to the payment from or by any banker, or person acting as a banker, of any sum of money, whether the person to whom payment is to be made shall be named or designated therein or not, or whether the same shall be delivered to him or not, shall respectively be deemed to be bills, drafts, or orders for the payment of money chargeable with stamp-duty, as if the same had been made payable to bearer or to order: Provided always that any one document or writing, although directing the payment of several sums of money to different persons, shall be chargeable with stamp-duty as one order only. (23 Vic. c. 15.)

Exemptions.

Any draft or order drawn by any banker upon any other banker not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

Any letter written by a banker to any other banker, directing the payment of any sum of money, the same not being payable to bearer or to order, such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf; and all warrants or orders for the payment of any annuity granted by the Commissioners for the Reduction of the National Debt, or for the payment of any dividend, or interest on any share in the government or parliamentary stocks or funds; and all drafts and orders drawn by the Accountant-General of the Court of Chancery of England or Ireland, shall be exempt from all stamp-duty. (23 Vic. c. 15.)

By the 55 Geo. 3, c. 184, schedule, the following instruments are to be deemed and taken to be drafts or orders for the payment of money within the intent and meaning of the Stamp Acts. All documents or writings usually termed letters of credit, or whereby any person to whom such document is or is intended to be delivered or sent shall be entitled, or be intended to be entitled to have credit with, or an account with, or draw upon any other person for, or to receive from such other person, any sum of money therein mentioned.

And the same act contains the following exemption from the duties on drafts or orders; namely, all letters of credit, whether in sets or not, sent by persons in the United Kingdom to persons abroad, authorising drafts on the United Kingdom.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within fifteen miles of the place where such drafts or orders shall be issued: provided such place shall be specified in such drafts or orders, and provided the same do not direct the payment to be made by bills or promissory notes. This exemption, of course, does not apply to cheques drawn after 24th May, 1858: *supra.*

to be chargeable, with any higher stamp-duty than 1*d.*, notwithstanding the said payment shall be, or shall be thereby directed to be made at any time after the date thereof, which duty of 1*d.* may be denoted by an adhesive stamp, to be cancelled as in the case of a draft or order on demand."

This clause varies the law from what is stated *ante*, p. 124, n.

(*b*) *If Cheque circulated beyond Fifteen Miles from Banker's Residence, it must be Stamped as a Draft or Order.*

If cheque circulated beyond fifteen miles from banker's residence, it must be stamped as a draft or order.

The stat. 17 & 18 Vic. c. 83, s. 7, after reciting that under and by virtue of certain acts relating to stamp-duties certain drafts or orders for the payment of any sum of money to the bearer on demand, drawn upon any banker or person acting as a banker, residing or transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are exempt from all stamp-duty, and it is expedient to prevent the negotiating or circulating of such drafts or orders unstamped at places beyond the distance of fifteen miles from the place where the same are made payable, enacts: "That no such draft or order as aforesaid shall, unless the same be duly stamped as a draft or order, be remitted or sent to any place beyond the distance of fifteen miles, in a direct line, from the bank or place at which the same is made payable, or be received in payment or as a security, or be otherwise negotiated or circulated, at any place beyond the said distance; and if any person shall remit or send any draft or order not duly stamped as aforesaid to any place beyond the distance aforesaid, or shall receive the same in payment, or as a security, or in any manner negotiate or circulate the same at any such last-mentioned place, he shall forfeit the sum of 50*l.*"

Sect. 8. "Provided always, that it shall be lawful for any person who shall receive any such draft or order as aforesaid, at any place within the said distance of fifteen miles from the bank or place at which the same is made payable, which draft or order shall have been lawfully issued unstamped, to affix thereto a proper adhesive stamp, and to cancel such stamp by writing thereon his name, or the initial letters of his name, and thereupon such draft or order may lawfully be received and negotiated at any place beyond the distance aforesaid, anything herein contained notwithstanding."

(*c*) *Payee may affix Stamp on Banker's Cheque.*

Payee may affix stamp on banker's cheque.

By 23 & 24 Vic. c. 111, s. 18, "where any draft or order for the payment of money by any banker, or person acting as a banker, chargeable with the stamp-duty of one penny, shall come to the hands of such person unstamped, it shall be lawful for him to affix thereto the necessary adhesive stamp, and to cancel the same in manner by law required, and upon so doing to make the payment thereby directed, and to charge the duty in account against the person who ought to have paid the same, or to deduct such duty from the sum so directed to be paid; and such draft or order shall, so far as relates to the stamp-duty chargeable thereon, be good and valid: but this shall not relieve any person from liability to the penalty he may have incurred by issuing the said draft or order unstamped."

(I) *The Person paying must cancel Stamp.*

The person paying must cancel stamp.

By the 23 Vic. c. 15, s. 12, "whenever any bill of exchange, draft, or order, having thereon an adhesive stamp, shall be presented for payment, the person to whom the same shall be presented shall, upon paying the same, write or impress, or cause to be written or impressed, upon every stamp affixed to the bill, the word 'Paid,' to the end that the stamp may be more effectually cancelled, and made incapable of being used again; and in default of so doing he shall forfeit the penalty of 20*l.*"

(J) *Stamp-Duty on Receipts of Bills.*

Stamp-duty on receipts of bills.

The 17 & 18 Vic. c. 83, s. 13, after reciting that under and by virtue of certain acts relating to stamp-duties, letters by the General Post Office acknowledging the safe arrival of any bills of exchange, promissory notes, or other securities for money, are exempted from the stamp-duty granted or imposed on receipts or discharges given for or upon the payment of money, enacts, "that the same exemption shall be, and the same is, hereby repealed." *See post*, Payment; Receipts.

IV. Of the Consideration.

(A) *There is a Presumption of Consideration.*[1]

(B) *Consideration, what sufficient.*[2]

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[1] If a man seek to enforce a simple contract he must, in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills and notes are an exception. It is never necessary to aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant if the plaintiff recover. In the case of other simple contracts, the law presumes that there was no consideration till a consideration appear; in the case of contracts on bills or notes, a consideration is presumed till the contrary appear, or at least appear probable. Byles on Bills, 87. It is, consequently, incumbent on the defendant, who means to impeach the plaintiff's title on this ground, to plead and prove that there has been no consideration to him, or any of the intermediate parties, between him and the plaintiff. *Whitaker v. Edmunds*, 1 Ad. & E. 638. For the defendant is not permitted to put the plaintiff on proof of the consideration which he gave for the bill, unless the defendant can make out a *primâ facie* case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud or force, or that it was lost, or that it was originally infected with illegality. Where this is shown, there is a presumption of law that there was no consideration, and this presumption must be rebutted, on the part of the holder, by proof that he gave value for the bill. *Fitch v. Jones*, 1 Jur. N. S. 854. *Harvey v. Towers*, 6 Ex. 655: *per Eyre, C. J.*, in *Collins v. Martin*, 1 B. & P. 651; and *per Parke, B.*, in *Heath v. Sansom*, 2 B. & Adol. 297. Bayley, 471; Chitty, 302.

[2] The same general rules as apply to the nature of the consideration for other simple contracts are also applicable to the various contracts on a bill or note. *See post*, Contract.

If a man give his acceptance to another, that will be a good consideration for a promise, or for another bill or acceptance, though such first acceptance is, ultimately, unpaid. *Rose v. Sims*, 1 B. & Adol. 521. And, therefore, cross-acceptances for mutual accommodation are respectively considerations for each other. *Cowly v. Dunlop*, 7 T. R. 565. *Rose v. Sims*, 1 B. & Adol. 521. *Buckler v. Buttivant*, 3 East, 72.

A previous debt due to the holder of a negotiable instrument is a good consideration. *Porrier v. Morris*, 22 L. J. Q. B. 313. And it should seem, at least where the bill is payable at a future time, places the holder in the same situation as if he had made fresh advances on the bill; for the remedy for the previous debt is suspended till the maturity of the bill. *Perceval v. Frampton*, 2 C., M. & R. 180; 3 Dowl. 748. *Foster v. Pearson*, 1 C., M. & R. 849; 5 Tyr. 255. But see *De la Chaumette v. Bank of England*, 9 B. & C. 208. *Vallance v. Siddell*, 6 Ad. & E. 932; 2 Nev. & P. 78.

A debt barred by the Statute of Limitations is a good consideration for a bill or note. *Hyelings v. Hastings*, 1 Ld. Raym. 389. *Dean v. Crane*, 6 Mod. 309. *Quanlock v. England*, 5 Burr. 2630. So is a debt incurred during infancy, in case the bill be accepted after full age (*Stevens v. Jackson*, 6 Taunt. 106. *Harrison v. Clifton*, 17 L. J. Ex. 233. *Harrison v. Cotgreave*, 4 C. B. 562. *Roberts v. Bethell*, 12 C. B. 778; *sed vide Eastwood v. Kenyon*, *post*, 432); and in the full knowledge and information at the time of the circumstances under which the acceptor is acting. *Kay v. Smith*, 21 Beav. 522.

The debt of a third person is a good consideration in the case of a bill or note payable at a future day (*Popplewell v. Wilson*, 1 Stra. 264. See *Balfour v. The Sea, Fire, and Life Assurance Company*, 27 L. J. C. P. 17. *Wilders v. Stevens*, 15 Mee. & W. 208); or of a third person and the acceptor (*Heywood v. Watson*, 4 Bing. 496). Forbearance of a judgment debt to the acceptor (*Baker v. Walker*, 14 Mee. & W. 465. See *Perceval v. Frampton*, 2 C., M. & R. 180); or to the representative of a third person (*Ridout v. Bristow*, 1 C. & J. 231); or an exchange of securities, as of cross-acceptances, where each acceptor engages to pay his own acceptance, will be a sufficient consideration for a bill or note. *Rolfe v. Caslon*, 2 H. Black. 571. *Kent v. Sorden*, 1 Camp. 179, n. *Hornblower v. Froud*, 2 B. & A. 327. *Spooner v. Gardner*, R. & M. 84. *Burton v. Benton*, 9 Q. B. 843. *Rose v. Sims*, 1 B. & Adol. 521. But if a bill or

ATTWOOD v. CROWDIE, 1 Stark. 483.

Where bills or notes are deposited as a security for the balance of an account current, the successive balances form a consideration for the bill.[1]

A. and Co., bankers in the country, being pressed by the plaintiffs, B. and Co., bankers in town, to whom they were indebted, to send in any bills that they can procure, transmit for account an accommodation bill accepted by the defendant; when the bill becomes due the balance is in favour of A. and Co.; but the bill is not withdrawn, and afterwards the balance between the houses turns considerably in favour of B. and Co., the plaintiffs, and is so when A. and Co. became bankrupts. B. and Co. are entitled to recover against the defendant, the accommodation acceptor.

(C) *Accommodation Bill.*[2]

note be payable on demand, the pre-existing debt of a third person is not of itself a sufficient consideration to support it. *Crofts v. Beale*, 11 C. B. 172.

It would seem that an executory contract may form a valid consideration for a bill or note. *Hulse v. Hulse*, 17 C. B. 711.

It has been said that a mere moral obligation is not sufficient as between the original parties to the instrument. *Eastwood v. Kenyon*, 11 Ad. & E. 438; overruling *Lee v. Muggeridge*, 5 Taunt. 36, and that class of cases which recognised a subsequent promise as binding in law, if it were supported by a prior moral obligation; and see *Holliday v. Atkinson*, 5 B. & C. 501.

And after considerable doubt it appears to be now settled that a bill or note delivered to the payee as a gift cannot be enforced against the donor or his personal representative, inasmuch as it is a mere voluntary promise. *Easton v. Prutchett*, 1 C., M. & R. 798. *Holliday v. Atkinson*, 5 B. & C. 501. *Milnes v. Dawson*, 5 Ex. 948. See *Tate v. Hilbert*, 2 Ves. jun. 911. *Crofts v. Beale*, 11 C. B. 172. *Seton v. Seton*, 2 Bro. C. C. 610. *Disher v. Disher*, 1 P. Wms. 204. But this will not affect the bill in the hands of a *bonâ fide* holder for value. Chit. on Bills, 53, 10th ed.

[1] See *Woodroffe v. Hayne*, 1 C. & P. 600. A fluctuating balance may form a consideration for a bill. *Pease v. Hirst*, 10 B. & C. 122; 5 Mee. & W. 89. *Collingridge v. Farquharson*, 1 Stark. 259. *Richards v. Macey*, 14 Mee. & W. 484. Where a banker's acceptances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker as a collateral security, it was held that, when the acceptances exceeded the cash balance, the bankers held the collateral bills for value. *B sanquet v. Dudman*, 1 Stark. 1; and see *Bolland v. Bygrave*, 1 R. & M. 271.

[2] An accommodation bill is a bill to which the acceptor, drawer, or indorser, as the case may be, has put his name without consideration, for the purpose of benefiting or accommodating some other party who is to provide for the bill when due. (Byles on Bills, 94.) A party, who requests and procures another to lend his acceptance, thereby engages to take up the bill at maturity, and to indemnify the acceptor against the consequences of nonpayment. *Reynolds v. Doyle*, 1 Man. & G. 753; 2 Scott, N. R. 45. A person who has voluntarily put his name to a bill, whether as drawer, indorser, or acceptor, for the accommodation of another, is bound, if the instrument gets into the hands of another, to pay him to the extent of the consideration agreed for it, although the latter, at the time he received it, knew that the bill was founded on an accommodation transaction. *Collins v. Martin*, 1 B. & P. 651. *Bank of England v. Beresford*, 6 Dowl. 237. *Fentum v. Pocock*, 5 Taunt. 193. *Smith v. Knox*, 3 Esp. 46. But if bills or notes were accepted or made for a special or particular purpose, then no third person, *aware of that fact*, can, by obtaining the instruments or their proceeds, apply the same to a different purpose. *Evans v. Rymer*, 1 B. & Adol. 529. *Delauney v. Mitchell*, 1 Stark. R. 439. *Roberts v. Eden*, 1 B. & P. 398. *Treuttel v. Barandon*, 8 Taunt. 180. *Buchannan v. Findlay*, 9 B. & C. 738. *Kay v. Flint*, 8 Taunt. 21. *Ex-parte Flint*, 1 Swanst. 30. *Ex-parte Frere*, 1 Mont. & Mac. 263. See *Edwards v. Jones*, 2 Mee. & W. 414. Or if a bill has been accepted for the accommodation of the drawer, and any circumstance has since arisen which would render it unjust to use it for that purpose, no person, aware of the fact, can, by obtaining the bill, render it available against the acceptor. Therefore, where an accommodator absconded, and his creditor pursued him, and obtained the bill from him, it was held that he could not recover against the acceptor. *Smith v. De Witts*, 6 D. & R. 120. And where the plaintiff accepted a bill for the accommodation of one H., who deposited it with the defendant as a security for goods bought of him, and H. afterwards paid for the goods, but he, being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and recovered the amount with costs; it was held, that the plaintiff might sue the defendant for the amount of the bill, as for money paid to his use. *Bleaden v. Charles*, 7 Bing. 246.

In an action between the immediate parties, if the bill has been accepted, drawn, or indorsed, for the accommodation of the plaintiff, and without consideration, that is

(a) The Liability of a Surety is discharged by the giving of Time to his Principal.

POOLEY v. HARRADINE, 7 E. & B. 431; 26 L. J. Q. B. 156.

The liability of a surety on a promissory note will be discharged by time given to the principal without his consent, notwithstanding it does not appear on the note that he was surety, provided the creditor knew he was.[1]

This was an action by the payee against the maker of two promissory notes. The defendant pleaded by way of equitable defence that the notes were made by him jointly with J. Harradine and T. Harradine, and that he made them at the request and for the accommodation of J. Harradine, as the surety only of J. Harradine, and to secure a debt due from J. Harradine solely to the plaintiff, and without value or consideration; that the notes were delivered to the plaintiff, and accepted by him from the defendant, upon an express agreement between them that the defendant should be liable thereon as surety only for the said J. Harradine, and that the plaintiff at the time the notes were made had notice and knowledge of the same having been so made by him as such surety. The plea then stated that the plaintiff, whilst holder of the notes, without the knowledge or consent of the defendant, for a good and valuable consideration, agreed to give, and did give, the said J. Harradine time for the

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a good defence. *Crofts v. Beale*, 11 C. B. 172. *Thomas v. Fenton*, 2 B. C. R. 68. *Kearns v. Durrell*, 6 C. B. 596. But if the action is between remote parties, *e. g.* by a second or third indorsee against the acceptor, it is no defence that the defendant accepted the bill for the accommodation of the drawer, nor will it put the plaintiff to prove that he gave consideration for it. *Mills v. Barber*, 1 Mee. & W. 425; 5 Dowl. 77; 2 Gale, 5. *Whitaker v. Edmunds*, 1 M. & R. 366; 1 Ad. & E. 638. *Perceval v. Frampton*, 2 C., M. & R. 180; 3 Dowl. 748. *Jacob v. Horngate*, 1 M. & R. 445. *Sturtevant v. Forde*, 4 Man. & G. 101. Nor will it suffice to prove that no consideration passed from the plaintiff to the defendant for the indorsement of the bill, unless it be also shown that the defendant himself did not accept for value. *Whitaker v. Edmunds*, 1 Ad. & E. 638. So the plaintiff may hold the bill for part value, and yet recover the whole amount thereof, if any of the intermediate parties have given full value; and when the plaintiff in such a case has recovered, he becomes a trustee for such intermediate party for the surplus over what he, the plaintiff, gave for the bill. *Wiffen v. Roberts*, 1 Esp. 261: *per Lord Kenyon. Johnson v. Kennion*, 2 Wils. 262. And see *Reid v. Furnival*, 1 C. & M. 538; 5 C. & P. 499.

It is a good defence to an action, brought by several plaintiffs, partners in a firm, as indorsees of a bill drawn by one of them, that it was accepted to accommodate one of the partners. *Sparrow v. Chesman*, 9 B. & C. 241; and see *Jacaud v. French*, 12 East, 323. *Anon. v. Adams*, 1 Younge, 117.

If the plaintiff have given only part value for the bill, and none of those through whom he derives title has given more, there is a want of consideration to the extent of the surplus, and he shall recover only so much as he gave. *Darnell v. Williams*, 2 Stark. 166. *Barber v. Backhouse*, Peake, 61. *Wiffen v. Roberts*, 1 Esp. 261. *Jones v. Hibbert*, 2 Stark. 304. *Clark v. Lazarus*, 2 Man. & G. 167. *Reid v. Furnival*, 1 C. & M. 538. Thus, in an action by the payee against the acceptor of a bill for 19*l.* 12*s.* the defendant proved that he had had value only for 10*l.*; and *Lord Ellenborough* said, "though this as to third persons is a bill for 19*l.* 10*s.*, as between these parties the acceptance is for 10*l.* only. *Darnell v. Williams, supra.* So where the second indorsee sued the acceptor on a bill for 98*l.* 5*s.* 3*d.*, which had been accepted, and once indorsed, without consideration, and the plaintiff could prove a debt of no more than 20*l.* 18*s.* to be due to him from his immediate indorser, he recovered only that amount, although he also gave evidence of a debt of 57*l.* due to him from the first indorser. *Simpson v. Clarke*, 2 C., M. & R. 342. And if a bill or note for a certain amount be obtained by the plaintiff from the defendant, on a false representation by the former that such amount was due to him, when, in fact, a less sum was due, this will be a good defence *pro tanto*, although the representation was not fraudulent. *Forman v. Wright*, 11 C. B. 481.

A person, who gives another a bill payable at a future day for the debt of a third party due to that other, cannot, in an action against him on the bill, set up want of consideration as a defence. *Balfour v. The Sea, Fire, and Life Assurance Company*, 27 L. J. C. P. 17.

As between principal and surety, in the absence of any express contract, the law implies a contract to indemnify. If one, who is surety on a joint and several note signed by the principal, pay the amount, though without any request or compulsion of the creditor, he may recover it of the principal. *Pitt v. Punsford*, 8 Mee. & W. 538.

[1] So in *Taylor v. Burgess* (29 L. J. Ex. 7; 5 H. & N. 1; 23 Jur. 1317), an action on a joint and several promissory note, the defendant pleaded, as an equitable defence, that he made the note only as surety for one B., and to secure a debt due to the plaintiff solely from B.; that it was given and taken on an express agreement between the plaintiff and the defendant that the defendant should be liable thereon solely as

payment of the notes, and that he forbore to enforce them, and that he could and might, had he not given such time, have obtained payment from the said J. Harradine. The plaintiff demurred to the plea; and, after time taken to consider, the judgment of the court was delivered by—

Coleridge, J. "It is important for the consideration of this case to consider whether, in equity, the doctrine of the discharge of the surety by time given to the principal debtor is confined to cases where the relation of suretyship appears on the original contract between the creditor, the principal, and the alleged surety, or whether an equity does not arise from the relation of the co-obligors or co-promisers, *inter se*, and on the knowledge of the creditor of the existence of that relation. It seems to us that the rule, as laid down by *Lord Cottenham* in the House of Lords (*Hollier v. Eyre*, 9 Clark & Fin. 45), may be inferred to be that equities, such as that we are discussing, may arise *dehors* the written agreement from the relation of the principal and surety *inter se*, if known to the creditor, and that such knowledge may be proved either from what appears on the face of the written instrument or from evidence *aliunde* . . . We give our judgment for the defendant on the present plea, on the ground that it appears to us sufficiently to state that the relation of principal and surety existed between the defendant and the principal debtor *inter se*, and that the plaintiff had knowledge of that fact when the notes were made and received by him, and when he entered into a binding agreement to give time to the principal debtor."

(D) *Entire Failure of Consideration.*[1]

surety, and that the plaintiff, without the knowledge of the defendant, gave B., for valuable consideration, time for payment of the note whereby the defendant had been damnified. It was proved that the note had been given as alleged; and that, before it was due, the plaintiff, for a certain sum, agreed (without the knowledge of the defendant) with B., who was then able to pay, to give him further time for payment: during which further time B. became insolvent. The court held that the plea was supported, and was an answer to the action. And in *Greenough v. M'Clelland*, 30 L. J. Q. B. 15, it was held that, if the payee knew that one of two makers of a promissory note was surety for the other maker, the surety was discharged by time given to the principal, notwithstanding he had never agreed to treat him otherwise than as a principal party liable on the note, for an equity arises from the relation of principal and surety, and notice thereof to the payee. *See* 28 L. J. Ex. 132.

The surety, on paying the debt, has always a right to require the debtor to sue or allow him to sue the principal in his, the creditor's, name. "If the creditor," said Mr. *Justice Williams*, "has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety. He has, on this supposition, knowingly and wrongfully interfered with the position and rights of the surety." *Strong v. Foster*, 17 C. B. 201; 25 L. J. C. P. 106. *See* also *Rayner v. Fussey*, 28 L. J. Ex. 132; and *see post*, Principal and Surety.

But an agreement by the holder with a stranger, no party to the bill, to give time to the acceptor, is no defence to an action by the holder against the drawer of the bill. *Frazer v. Jordan*, 8 E. & B. 303.

Where the plaintiffs lent money to A. on the security of his furniture, and of the promissory note of himself and the defendant, as his surety, the court held that it was a good ground of defence on equitable grounds that, by the negligence of the plaintiffs, the security of the goods became lost to them. *Mutual Loan Fund Association v. Sudland*, 28 L. J. C. P. 108.

[1] The entire failure of the consideration has the same effect as its original and total absence. Byles, 110. Therefore, where A. appointed B. his executor, and gave him a promissory note payable on demand for 100*l.*, in consideration of the trouble he would have in the execution of the office of executor after A.'s death: B., however, died first; but his executors brought an action on the note against A.:—It was held that, as the consideration for the note had totally failed, the action was not maintainable. *Solly v. Hinde*, 2 C. & M. 516; 6 C. & P. 316. *Wells v. Hopkins*, 5 Mee. & W. 7. So, where A. gave B. his promissory note for 3000*l.*, not only as a gift for past gratuitous services, but as a remuneration for future services to be rendered so long as A. should require them, it was held that, inasmuch as there was no contract binding B. to render such future services, he could not recover on the note. *Hulse v. Hulse*, 17 C. B. 711. See *Gompertz v. Bartlett*, 2 E. & B. 849. *Gurney v. Wormsley*, 4 E. & B. 139.

Between immediate parties, that is, between the drawer and acceptor, between the payee and drawer, between the payee and maker of a note, between the indorser and indorsee, the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this

(E) *Partial Failure of Consideration.*[1]

is a good defence to the action. Thus, where a bill was drawn in the regular course of trade, and delivered to the payee's agent before the consideration was given, and the payee's agent, who was to have paid the consideration, failed, the payee could not recover against the drawer. *Puget de Bras v. Forbes*, 1 Esp. 117. *Jeffries v. Austen*, 1 Stra. 674. *Jackson v. Warwick*, 7 T. R.; 121 L. J. Ex. 161. But between remote parties—for example, between payee and acceptor, between indorsee and acceptor, between indorsee and remote indorser—two distinct considerations at least must come in question: first, that which the defendant received for his liability; and secondly, that which the plaintiff gave for his title. An action between remote parties will not fail unless there be an absence or failure of both these considerations. *Robinson v. Reynolds*, 2 Q. B. 196. And if any intermediate holder between the plaintiff and the defendant gave value for the bill, that intervening consideration will sustain the plaintiff's title. (Byles on Bills, 92.) Thus, it is no defence to an action by an indorsee for value against the acceptor, that the acceptor received no value. Nor, on the other hand, that though the acceptor received value, the indorsee gave none. On the same principle, if the acceptance were without consideration, and the plaintiff, the indorsee, knew it, he can recover no more than he gave for the bill (*Wiffen v. Roberts*, 1 Esp. 261); for, suppose the bill to be for 100*l.*, and that the indorsee gave 60*l.* for it, if he could recover 100*l.* from the accommodation acceptor, the acceptor having recovered that sum of the drawer, the drawer might recover back 40*l.* from the indorsee, as money received to the drawer's use. *Jones v. Hibbert*, 2 Stark. 304.

It is a good defence to an action on a bill by the drawer against the acceptor that the consideration was payable *in futuro*, and before the maturity of the bill, and that it has not been paid. *Puget de Bras v. Forbes*, *supra*. Thus, in *Astley v. Johnston* (5 H. & N. 137; 29 L. J. Ex. 161; 8 W. R. 218), to an action on a bill of exchange, drawn by E. Johnston & Co. at Rio Janeiro, upon the defendants in England, at ninety days' sight, and accepted, the following plea was held to be good:—"That the plaintiffs and one W. Wilson carried on business under the firm of Astley, Wilson & Co., and that the consideration for the said bill was a certain sum of money agreed to be paid by the plaintiffs and the said W. Wilson to the drawers of the said bill at Rio de Janeiro, as the price for the purchase of the said bill, which said price was at the time the said bill was drawn agreed to be paid by the plaintiffs and W. Wilson to the said drawers of the said bill at Rio de Janeiro, at the end of the month in which such bill was drawn. That the plaintiffs and the said W. Wilson did not, at the end of the month in which the said bill was drawn, pay to the drawers of the said bill the price of the said bill, or any part thereof, and then wholly neglected and refused to pay the same, and never have paid them the price of the said bill, or any part thereof; and that the defendants accepted the said bill after the said month, as the agents of, and on account of the drawers of the said bill, and without notice that the price of the said bill had not been paid; and that neither the drawers of the said bill nor the defendants ever have received any consideration whatever, except as aforesaid, for the drawing or accepting of the said bill." "The first sentence of Mr. Mallish's argument," said *Pollock, C. B.*, "affords a solution of the question. He said, if A., for the price of goods to be delivered in a month, gives his bill at three months, and the goods are not delivered, A. has a good answer to an action on the bill by the proposed seller of the goods. I do not wish to pursue the matter further, or inquire into what causes of action such a state of things might give rise to. It is sufficient to say, that in an action upon a bill at the suit of several, if any one of the plaintiffs is incapacitated from suing by reason of an infirmity connected with the consideration, or indeed arising from any other cause, that infirmity attaches to all, and incapacitates all; so that it cannot be got rid of by omitting him to whom it primarily attaches: although, like other defects, it may be got rid of by indorsement for value to a *bonâ fide* holder."

[1] A partial failure of consideration will constitute no defence to an action on a bill or note if the *quantum* to be deducted on that account be unliquidated, and not in the nature of a certain debt. The money, as to which the consideration fails, must be of a specific ascertained amount, for the jury cannot, in an action on a bill or note, assess by way of set-off the damages arising on a breach of contract, but the defendant must be left to his cross-action. Thus, where the action was by the drawer against the acceptor of a bill, the plaintiff agreed to let a house to the defendant for twenty-one years, and in consideration of 500*l.*, to be paid by three bills, to be drawn by the plaintiff and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted accordingly, and the defendant was immediately let in possession, but the plaintiff refused to execute the lease. It was argued, therefore, that the consideration had failed. But the court held that it was no defence to the action, that the defendant was bound to pay the bills, and might have his remedy on the agreement for non-execution of the lease. *Moggeridge v. Jones*, 14 East, 486; 3 Camp. 38. *Spiller v. Westlake*, 2 B. & Adol. 155. *Mann v. Lent*, 10 B. & C. 877; *Grant v. Welchman*, 16 East, 207. *Cuff v. Brown*, 5

(F) *Effect of Illegality or Fraud.*[1]

Price, 297. So, where work had been done by the plaintiff for the defendant, for which the plaintiff charged the defendant 63*l.*, and the defendant paid the plaintiff 45*l.* in money, and gave him a bill for the remaining 20*l.*, it was held to be no defence to an action by the plaintiff against the defendant on the bill that the work done was not worth 43*l.* *Trickey v. Larne*, 6 Mee. & W. 278. So, if a bill has been given for the price of goods, it has been held to be no ground of defence that the price of the goods was exorbitant (*Solomans v. Turner*, 1 Stark. 51); or that they, having been retained, have turned out unsound. *Morgan v. Richardson*, 7 East, 482. *Fleming v. Simpson*, 1 Camp. 40. *Gully v. Frean*, 10 Ex. 535. See *Tye v. Gwynne*, 2 Camp. 346. So, in an action by the drawer against the acceptor of bills of exchange, given for goods supplied, which were to be of "good quality and moderate price," and were estimated at about 400*l.*, and the bills were given for that amount; it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor had paid more than the real value of the goods on the bills. *Obbard v. Betham*, M. & M. 483. So, if a note be given in consideration of the plaintiff's disclosing to the defendant an improvement in certain machinery, which proves to be less beneficial than was anticipated by the parties, it is no answer to an action on the note. *Day v. Nix*, 9 Moore, 159. And where the consideration for the acceptance was goods sold, and the vendor forcibly took possession, the consideration was held not to have failed. *Stephens v. Wilkinson*, 2 B. & Adol. 320.

So, it is no answer to an action on a bill or note that it was for an apprentice fee, which ought to have been paid in the first instance, and that the apprenticeship had been put an end to on account of the subsequent misconduct of the master; though, if the apprentice had been discharged, and it had been originally agreed that the fee should be returned in that event, it might be otherwise. *Grant v. Welchman*, 16 East, 207.

Where the amount for which the consideration fails is unliquidated, a bill in equity for an injunction to restrain an action on the bill of exchange, and for an account, cannot be maintained. *Glennie v. Imri*, 3 You. & C. 436.

But if fraud can be shown it is otherwise as between the parties, for there is then no contract. Thus, in *Solomans v. Turner*, 1 Stark. 51, the defendant gave plaintiff a promissory note for some pictures. It was proposed to show that the sum for which the note was given infinitely exceeded the value of the pictures. *Lord Ellenborough* said:—"I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value; but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff, so as to show that there was no contract at all, the evidence will be admissible: if it fall short of that it will be unavailing. So, if a horse is warranted, a cheque is given, and the horse turns out unsound, the breach of the warranty is no answer to an action on the cheque; but if the seller knew of the unsoundness there is fraud. There was no contract, and no action lies on the cheque." *Lewis v. Cosgrave*, 2 Taunt. 2; Byles, 113; Bay. 503, 506.

[1] The consideration or contract on a bill or note must not be in fraud either of the defendant or third persons; for fraud totally avoids all contracts, both in law and equity. Thus, if a man sell goods, warranting them, and take a bill or note in payment, and the warranty turn out false, and it be proved that he knew it at the time of the sale, he cannot recover on the instrument. *Lewis v. Cosgrave*, 2 Taunt. 2. *Harvey v. Towers*, 6 Ex. 656. So, if by fraudulent representations a man induce another to give him for a business more than it is worth, and take a bill in payment, he cannot recover on the bill. *Archer v. Bamford*, 3 Stark. 175. But where the defendant insists on fraud as a defence, he must altogether repudiate the contract and retain no benefit under it. *Gully v. Frean*, 10 Ex. 535. *Trickey v. Larne*, 6 Mee. & W. 278. *Solomans v. Turner*, 1 Stark. 51. *Spiller v. Westlake*, 2 B. & Adol. 155.

The instrument cannot be enforced if it were given in fraud of third parties. On this ground secret stipulations with bankrupts or insolvents in fraud of creditors are illegal. As, where an insolvent proposed to compound with his creditors, but the plaintiffs being creditors refused to execute the deed of composition unless the defendant gave them a promissory note for the residue of his debt to them. He accordingly did so, without the knowledge of the other creditors, and the plaintiff and the rest of the creditors then signed the composition deed. The note was held void, as a fraud on the other creditors. *Cockshott v. Bennett*, 2 T. R. 763. *Knight v. Hunt*, 5 Bing. 432: 3 M. & P. 18. *Bryant v. Christie*, 1 Stark. 329; and see *Took v. Tuck*, 4 Bing. 224; 13 Moore, 435. *Higgins v. Potts*, 4 Ex. 312. And if the insolvent pay the bill or note when due to the holder, he may recover back from the creditor the money so paid. *Atkinson v. Denby*, 9 W. R. 539, Ex. *Turner v. Foole*, 1 D. & R. 27. *Contrà, Wilson v. Wray*, 10 Ad. & E. 82. And the note is equally void if given, not by the insolvent, but by a third person. So, the note being given with a fraudulent intention, would have been void though the composition had never been effected. *Wells v. Girling*, 1 B. & B. 447; 3 Moore, 79. And any better security than the other creditors have, though for the same amount, if taken without their knowledge, is void, as a fraud on them. *Leicester v. Rose*, 4 East, 372; overruling *Ferse v. Randall*, 6 T. R. 146. A compounding

(*a*) *It is a good Defence that the Instrument was obtained by Fraud.*

GREW v. BEVAN, 3 Stark. 134.

The plaintiff had distrained goods of the defendant on the premises of the plaintiff's tenant, and the defendant, to get rid of the distress, accepted a bill of exchange. In an action on the bill it appeared that there was not rent due at the time of the distress.

It invalidates the instrument.

creditor cannot. Hence, where the creditor of an insolvent held two bills of exchange drawn by him, and executed a composition-deed containing a general release to the latter, in which he scheduled only one of the bills, that he could not sue upon the other; there *Best, C. J.*, said, "I put this case on the ground of fraud: I do not mean moral fraud, but fraud in law; and in practice of this sort there is great tendency to encourage moral fraud. Without the authority of cases the principle is clear, that upon a composition-deed all the parties are supposed to stand in the same situation, and if there is any one of them who refuses to do so, he must announce it at the time." *Britten v. Hughes*, 5 Bing. 460; 3 M. & P. 77. But see *Payler v. Homersham*, 4 M. & S. 423. *Holmer v. Viner*, 1 Esp. 132. *Cecil v. Plaistow*, 1 Anst. 202. If an agreement of composition contain a stipulation that all securities shall be given up, if the compounding creditor holds bills drawn by the defendant and accepted by a third person, and he afterwards receives the amount of these bills from the acceptor, he must refund the money to the insolvent. *Stock v. Mawson*, 1 B. & P. 286. But he may retain money so received if the agreement of composition contained no stipulation for the surrender of securities. *Thomas v. Courtney*, 1 B. & A. 1. Wilfully to understate the amount of a particular debt, or, what is the same thing, to keep back one or more of several demands, is an attempt at fraud on the part of the creditor. *Hawley v. Beverley*, 6 Man. & G. 221; but see *Fisher v. Bridges*, 3 E. & B. 642. *Gibson v. Bruce*, 5 Man. & G. 399. Forsyth on Composition with Creditors, 52. *See post*, Composition with Creditors.

Where a debtor had proposed to compound with his creditors, and at the time owed to A. 165*l.* 7*s.* 1*d.*, of which 100*l.* was due on a promissory note, and A. stated himself to be a creditor only to the amount of 65*l.* 7*s.* 1*d.*, on which he received a dividend, and signed an agreement to execute a release to the debtor, but afterwards refused to do so, and brought an action on the promissory note, he was non-suited by Lord Denman, C. J. *Sanger v. Billington*, 5 C. & P. 456; and see *Margetson v. Aitkens*, 3 id. 338.

The plaintiff, being insolvent, proposed to his creditors to pay them a composition of 10*s.* in the pound, to be secured by his acceptances. All the creditors agreed to the arrangement except the defendant, who refused to execute the agreement unless he were paid an additional 2*s.* in the pound on his debt. A cheque to that amount was accordingly given him by a relation of the plaintiff, without the plaintiff's knowledge, and he then signed the agreement, and received from the plaintiff his acceptances for the 10*s.* composition. *Semble*, that under these circumstances the plaintiff, if he were compelled to pay the bills at maturity to *bonâ fide* indorsees, to whom they had been transferred by the defendant, might recover from the defendant the excess received by him beyond the amount of the composition. *Bradshaw v. Bradshaw*, 9 Mee. & W. 29.

Action upon three several promissory notes:—*Plea*, that defendants were indebted to plaintiff in 989*l.* 7*s.*, and had accepted four bills of exchange for the amount, drawn by plaintiff, and payable to his order; that defendants compounded with their creditors, and that plaintiff agreed to the composition, receiving a preference beyond the other creditors, and executed a release of his debt; that it was his duty to take up the four bills of exchange, but that he neglected to do so, and the holders of the bills threatened to sue defendants, who, in order to induce plaintiff to take them up, gave him the promissory notes, and that there was no other consideration for the giving of the notes:—*Held*, that the fraudulent preference of plaintiff did not make the composition void as against him; consequently, that there was no sufficient consideration for giving the notes, as the plaintiff ought to have indemnified the defendants from responsibility upon the bills. *Mallileu v. Hodgin*, 16 Q. B. 68.

Considerations are illegal that infringe the rules of religion or morality or the provisions of a statute, or are bad at common law. Hence bills or notes given for considerations *contra bonos mores*, or in contravention of the policy of the law or of acts of parliament, are invalid. *Post*, p. 515. Thus, a bill or note given in consideration of future illicit cohabitation is void, but past cohabitation is not an illegal consideration so as to avoid a deed, though it is not sufficient to support a promise. *Binnington v. Wallis*, 4 B. & A. 651. *Gibson v. Dickie*, 3 M. & S. 463. *Nye v. Moseley*, 6 B. & C. 133; 9 D. & R. 165. *Beaumont v. Reeve*, 15 L. J. Q. B. 141. *Smyth v. Griffin*, 14 L. J. Ch. 28. *Benyon v. Nettlefold*, 17 Sim. 1. So, the rent of lodgings knowingly let for the purpose of prostitution is an illegal consideration. *Girardy v. Richardson*, 1 Esp. 13. *Howard v. Hodges*, Selw. N. P. 68; Add. *Cont.* 93. A wager as to the sex of a third person is illegal, as it tends to indecent evidence, to injure the feelings of the individual, and

Best, J., left it to the jury to say whether the plaintiff had not falsely represented to the defendant that the rent was due in order to induce him to give his acceptance, and that if so, the acceptance was fraudulently obtained, and the defendant was entitled to a verdict.

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disturb the peace of society. *De Costa v. Jones*, Cowp. 729. So is a wager as to whether an unmarried woman had borne or would have a child. *Ditchburne v. Goldsmith*, 4 Camp. 152. The price of publications of an immoral or libellous character (*Poplett v. Stockdale*, R. & M. 337); and pictures or prints of an indecent description, cannot form the subject of a legal bill or note. Any bill or note founded upon such considerations is invalid in the hands of the original parties. *Fores v. Johnes*, 4 Esp. 917; Add. *Cont.* 94. Illegality must be pleaded specially. Reg. Gen. Pl. H. T. 1853, r. 8; 2 C., M. & R. 719; 1 Mee. & W. 65; 1 Q. B. 349. *Post*, Bond, p. 516.

Bills or notes are illegal at common law that contravene public policy; but to render them thus void it must be an unequivocal contravention of public duty. *Richardson v. Mellish*, 2 Bing. 229; 9 Moore, 435. Hence a bill or note in pursuance of a contract in general restraint of trade, as not to carry on a particular business anywhere in England, is void; but if limited to a specific distance, or a particular district, or not with certain customers, is good. Co. Lit. 206, b. n. 1. *Hilton v. Eckersley*, 6 E. & B. 47. *Tallis v. Tallis*, 1 id. 391. *Hunlock v. Blacklowe*, 2 Saund. 156, n. 1. *Mitchell v. Reynolds*, 1 P. Wms. 181; 10 Mod. 130. *Ward v. Byrne*, 5 Mee. & W. 548. *Green v. Price*, 13 id. 695. A bill or note founded on a contract in general restraint of marriage is void. *Lowe v. Peers*, 4 Burr. 2225. *Baker v. White*, 2 Vern. 215; 30 L. J. C. P. 145; Add. *Cont.* 102. And it makes no difference that the restriction is only for a limited period. Byles, 117. *Hartley v. Rice*, 10 East, 22. A bill or note for the procuring a marriage between two parties is void. *Hall v. Potter*, 3 P. Wms. 66; Com. Dig. Chancery, 3, L. 8. So is a bill given to induce a prosecutor to drop a criminal information, and not to give evidence upon it (*Collins v. Blanterne*, 2 Wils. 341, 347; see *Beeley v. Wingfield*, 11 East, 46). So where the acceptance was given for the price of smuggled goods (*Guichard v. Roberts, supra*). So for money lost at play (*Henderson v. Benson*, 8 Price, 281. *Boulton v. Coghlan*, 1 Bing. N. C. 640; and see *Read v. Gamble*, 10 Ad. & E. 597, n. *Law v. Chapman*, 11 id. 996). So to induce a creditor to sign a bankrupt's certificate. So for engraving plates on which French assignats were to be forged, the fraudulent intention being known to the drawer (*Strongitharm v. Lukeyn*, 1 Esp. 389). So to induce a petitioning creditor not to prosecute a fiat in bankruptcy (*Davis v. Holding*, 1 Mee. & W. 159; see *Gooderich v. Armour*, 12 L. J. Q. B. 56); or for the amount of an apothecary's bill, where the drawer was not qualified to practise. *Blogg v. Parker*, 1 R. & M. 25. *Wallace v. Hardacre*, 1 Camp. 45. Bills or notes for the purchase of public offices are void. *See ante*, p. 242, n. *Richardson v. Mellish*, 2 Bing. 229; 9 Moore, 435. So, a note given to parish officers for a sum certain to defray the expense of a bastard child is illegal. *Cole v. Gower*, 6 East, 110. A bill drawn by an alien-enemy on his debtor here and indorsed to the plaintiff, a British subject resident in the hostile country, cannot be recovered on, though the plaintiff do not sue till the return of peace, and though he were resident at the time of taking the bill in the hostile country. *Willison v. Patteson*, 7 Taunt. 440. But where a British prisoner in France drew a bill on an English subject and indorsed it to the plaintiff, then an alien-enemy, it was held that after the return of peace the plaintiff might recover. *Antoine v. Moreshead*, 6 Taunt. 237; 1 Marsh. 558. And a bill drawn by a British prisoner in favour of an alien-enemy cannot be enforced by the payee. Byles on Bills, 100; Bay. 84, 85.

Statutory illegalities are:—

Gaming.— Stat. 8 & 9 Vic. c. 109, s. 18, enacts that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." A colourable contract for the purchase and sale of railway shares, where the parties intend merely to pay differences according to the rise or fall of the market, is gaming within this section of the act. *Grizewood v. Blane*, 11 C.B. 538. See *Knight v. Fitch*, 15 id. 566.

The above act, in repealing the former Gaming Acts, the 16 Car. 2, c. 7, and 9 Anne, c. 14, excepts by s. 15 so much of the statute of Anne as was altered by the 5 & 6 Wm. 4, c. 41, which enacted that bills, notes, and mortgages within the operation of the 9th Anne, instead of being void, should be taken to have been made, drawn, accepted, given, or executed for an illegal consideration. The effect appears to be, that bills and notes founded on any such consideration as would have brought them within the statute of Anne, instead of being void, as they were before, in any hands whatever, are now valid in the hands of a *bonâ fide* holder against all parties. *Hay v. Ayling*, 15 Q. B. 423. *Fitch v. Jones*, 5 E. & B. 238. But the illegality of the consideration is still a good defence to an action on the instrument by the drawer or his agent; and it matters not that the bill has been renewed with the addition of other good considerations, such as a valid debt, or the giving of further time. *Hay v. Ayling*, *supra*. And if the acceptor or indorser for such illegal consideration is obliged to pay the amount to a *bonâ fide* holder, he may recover the same from the party to whom he originally gave it on such

(*b*) *Illegality of Consideration makes it necessary for an Indorsee to show that he gave Value.*

FITCH v. JONES, 5 E. & B. 244; 24 L. J. Q. B. 293.

In order to cast the *onus* of proving that he gave value upon an indorsee, on the ground of illegality of consideration, an illegal and not merely a void contract must be shown.

To an action by the indorsee against the maker of a promissory note, the defendant pleaded that the note was made to secure the payment of a sum of money due from the defendant to the payee under a wagering contract (upon the amount of hop-duty payable in 1854), made after the 8 & 9 Vic. c. 109; and that the plaintiff had notice of the premises when it was indorsed to him; and that there was no consideration for the indorsement to him; and that the note was overdue when indorsed to the plaintiff. It was proved that the note had been given to the payee for a balance due in respect of bets made between them in respect to the amount of hop-duty payable in 1854. This raised the question whether it lay on the plaintiff or the defendant to give evidence of value.

Lord Campbell, C. J. "This depends upon whether there is a presumption of law that there was no consideration which the plaintiff is bound to rebut. Where fraud or illegality is established there is such a presumption, because in such cases the law supposes that the original party, not being able to sue upon the instrument himself, has handed it over to another to sue upon it for his

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consideration. 5 & 6 Wm. 4, c. 41, s. 2; but see *Oulds v. Harrison*, 10 Ex. 572.

The same provision of the 5 & 6 Wm. 4, c. 41, extends to bills or notes given for the ransoming of captured ships or cargoes, which before the act were void, even in the hands of an innocent indorsee for value. 45 Geo. 3, c. 72, s. 7.

The stat. 8 & 9 Vic. c. 109, does not apply to any subscription, or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner of any lawful game. Sec. 18. Horse-racing, since the repeal of the 13 Geo. 2, c. 19 (3 Vic. c. 5) is now regulated by the 18 Geo. 2, c. 34, and 8 & 9 Vic. c. 109. A trotting-match at 25*l.* a-side along a turnpike is not an illegal race (*Challand v. Bray*, 1 Dowl. N. S. 783); nor a steeple-chase for 50*l.* or upwards (*Evans v. Pratt*, 4 Scott, N. R. 378); nor a horse-race for 50*l.* *Bentinck v. Connop*, 5 Q. B. 693. See *Applegarth v. Colley*, 10 Mee. & W. 723. A foot-race is a legal pastime. *Bulley v. Marriott*, 5 C. B. 818.

Stock-jobbing.—The 7 Geo. 2, c. 8, is repealed by the 23 Vic. c. 28; but contracts by way of wager on the public stocks and funds are void by virtue of the 8 & 9 Vic. c. 109. See *Grizewood v. Blane*, 11 C. B. 538. *Ex-parte Bulmer*, 13 Ves. 313; and see *post*, Consideration; Stock-jobbing.

A simoniacal contract (31 Eliz. c. 6); a stipulation with a sheriff to induce a breach of duty (23 Hen. 6, c. 94. *Alston v. Atley*, 6 Nev. & M. 686. *Greenwood v. Woodham*, 2 M. & Rob. 363); a bill or note in contravention of the spirit of the bankruptcy law, are, we have seen, illegal. *Taylor v. Wilson*, 5 Ex. 251); and any such security to revive a debt from which the bankrupt is discharged by his certificate (12 & 13 Vic. c. 106, s. 204) is void.

A bill or note may be illegal without being absolutely void. In some instances the bill is void in the hands of parties to the illegal transaction, or cognisant thereof; but not in the hands of a *bonâ fide* indorsee for value, before the bill is due without notice of the illegality. *Wyatt v. Bulmer*, 2 Esp. 538. The 24 Geo. 2, c. 40, prevents a person recovering a debt incurred by the sale of spirituous liquors in less quantities than of the value of 20*s.*; and therefore, if the consideration for a bill was for spirituous liquors and part for money lent, it was held wholly void in the hands of the payee. *Scott v. Gilmore*, 3 Taunt. 226. *Crookshank v. Rose*, 5 C. & P. 19. But see *Spencer v. Smith*, 3 Camp. 9; and *Bunyeat v. Hutchinson*, 5 B. & A. 241.

So, a bill of exchange accepted to secure money received by carrying on unlicensed occupations is void in the hands of a payee who knew the illegality. *De Begnis v. Armistead*, 10 Bing. 107; 3 M. & P. 511. But a note given for the amount of an attorney's bill, not delivered pursuant to 6 & 7 Vic. c. 73, is good. *Jeffreys v. Evans*, 14 Mee. & W. 210. Byles on Bills, 123, 124.

If a bill or note be in part upon a consideration which the law has made illegal, and in part upon a good consideration, it has been held that the illegality will taint the whole bill or note, and that the holder, if barred at all by such illegality, will be barred *in toto* as to his claim on the bill or note. *Scott v. Gilmore*, *supra*. *Robinson v. Bland*, 2 Burr. 1077.

With respect to a bill substituted in lieu of one given on an illegal consideration, it will in general be open to the same objections as the original bill or note (*Chapman v. Black*, 2 B. & A. 588. *Preston v. Jackson*, 2 Stark. 287; and see *Scott v. Chappelow*, 11 L. J. 293); but if the new bill is given for a consideration excluding what made it originally illegal and all other illegal considerations, it will be good. *Chapman v. Black*, *supra*.

benefit. The presumption so raised by the law must be rebutted by the holder, showing affirmatively that he gave value. It is not quite correct to say that the *onus* of proving value is cast upon the plaintiff; but the plaintiff being presumed to stand in the shoes of the party from whom he took the instrument, and to be his agent for the purpose of carrying out the fraudulent or illegal intention, is bound to get rid of that presumption.[1] But when there is a mere absence of consideration, no such presumption arises, and therefore there is no occasion for the plaintiff to rebut it. We have, therefore, to say, whether in this case there is anything beyond a want of consideration, and I am of opinion that there is not. The note is given for a wager on the hop-duty, which is not within the statute of Anne, or any of the other statutes which prohibit wagers. It is only a promise which the law will not enforce. This was so decided independently of the statute. But there was no penalty imposed for such a wager, and therefore, as between the maker and the payee, there was no illegality or violation of the law, but it was a mere *nudum pactum;* therefore the defendant was bound to prove his plea by showing that the plaintiff did not give value for the note."

V. Of the Transfer of Bills and Notes.[2]

(A) *What are Transferable.*[3]

The illegality will not affect a judgment recovered by default, unless the defendant can fix the plaintiff with knowledge of the fact; but the court has permitted him to try that in an issue. *George v. Stanly*, 4 Taunt. 683. *Davison v. Franklin*, 1 B. & Adol. 142.

[1] In general, the circumstance of a bill or note having been obtained without adequate consideration, or even by duress, or fraud, or feloniously, or having been put into circulation contrary to agreement, affords no defence when the instrument has come into the hands of a *bonâ fide* holder for value; or of a person who, although he had notice of the fraud, yet derives his title from an innocent party. *Masters v. Ibberson*, 8 C. B. 100. The question in such a case is, whether the negotiable instrument was taken in good faith, not whether there was due care, or whether there were circumstances that ought to have awakened suspicion. *Carlon v. Ireland*, 5 E. & B. 771: *per Lord Campbell, C. J.* Therefore, although the original parties to the bill or note agreed that payment should not be enforced except upon certain terms (*Edwards v. Jones*, 2 Mee. & W. 414. *Fairclough v. Pavia*, 9 Ex. 690. See *Flight v. Gray*, 27 L. J. C. P. 13), or although the note have been stolen or improperly appropriated by an agent to his own use (*Goodman v. Harvey*, 4 Ad. & E. 870. *Carlon v. Ireland*, 5 E. & B. 765); or a bill of lading, which formed the consideration for the bill of exchange, has been forged (*Robinson v. Reynolds*, 2 Q. B. 196); or there has been an undertaking not to negotiate the bill (*Ex-parte Gardner*, 2 Dowl. 520): these circumstances will not affect the bill in the hands of a subsequent *bonâ fide* holder for value; and it is said that the best evidence of such holder's *bona fides* is his having given full value for the note.

Illegality of consideration vitiates a bill or note in the hands of the original parties, and also in the hands of third persons, who have either taken the instrument with notice (*Harvey v. Towers*, 6 Ex. 656), or after it has become due; for in the latter case they take the instrument subject to all its equities. *Sturtevant v. Ford*, 4 Man. & G. 101. But illegality is no defence to an action on the instrument by a holder who, although he has taken it with notice, derives his title from an innocent indorsee for value. *Masters v. Ibberson, supra. Chalmers v. Lanion*, 1 Camp. 383. Yet by proof that the instrument is founded on illegality, the presumption of law as to consideration is rebutted, and the plaintiff will be required to show that he holds it for value. See *Fitch v. Jones, supra* in text. As to what is sufficient evidence of illegality to throw the *onus* of proving consideration on the plaintiff, see *Hall v. Featherstone*, 3 H. & N. 284.

[2] Transferring a bill or note means, so passing it to another holder as to enable him to recover at maturity against the parties to it.

[3] A bill or note is only transferable when it contains a direction to pay to the payee's order or to bearer. If it contain no such direction, it is of no use to any but the original payee.

The payee may be either the drawer or a third person; and therefore a bill when payable to order may either contain the words "Pay to me or my order," or "Pay to C. or his order."

But if the payee indorses a bill not negotiable, he is liable on his indorsement to his indorsee. *Hill v. Lewis*, 1 Salk. 132. *Smallwood v. Vernon*, 1 Stra. 478. *Gurmell v. Herbert*, 5 Ad. & E. 436. *Burmester v. Hogarth*, 11 Mee. & W. 97. *Penny v. Innes*, 1 C., M. & R. 439; 5 Tyr. 107. For each in-

(B) *Mode of Transfer.*[1]

dorser is in the nature of a new drawer. See *Allen v. Walker*, 2 Mee. & W. 317; 5 Dowl. 460. But see *Jewell v. Parr*, 13 C. B. 909.

If the bill, however, were not originally negotiable, it seems that the first drawing exhausts the stamp, and that the indorsee cannot acquire a right without a new one being affixed. *Plimley v. Westly*, 2 Bing. N. C. 249; 2 Scott, 423; 1 Hodges, 324. Where the declaration alleged that the defendant made his bill of exchange, and directed the same to J. B., and required him to pay to the defendant's order 187*l.*, and then indorsed the bill to the plaintiffs, it was held that the declaration was not supported by showing that the defendant had indorsed in blank to the plaintiff a bill drawn by another; because proof that the defendant was the indorser of the bill did not support the averment that he made it; and that, even if an indorser might be treated as a drawer, the indorsement being in blank, was equivalent to the drawing of a new bill, payable to bearer, and the bill was misdescribed as payable to order. *Burmester v. Hogarth*, 11 Mee. & W. 97; Bay. 128; Byles, 126.

A promissory note to the maker's own order, without more, is not negotiable within the 3 & 4 Anne, c. 9; but when it is indorsed in blank it becomes, in effect, a note payable to bearer. *Brown v. De Winton*, 6 C. B. 336. *Absolom v. Marks*, 11 Q. B. 19. *Flight v. Maclean*, 16 Mee. & W. 51. *Hooper v. Williams*, 2 Ex. 13. And the indorsement of a *note* (whether originally negotiable or not) by one to whom it has not been transferred, will not make the indorser liable on his indorsement. *Gwinnell v. Herbert*, 5 Ad. & E. 436; 6 Nev. & M. 723; S. C. But *see* Story on Promissory Notes, s. 138. For though every indorser of a bill may be treated without injustice as a new drawer or maker (for in that character he still requires notice of dishonour), yet an indorser of a note cannot be treated as drawer or maker of the note without altering his situation for the worse, and depriving him of the right to notice of dishonour. Byles on Bills, 127.

A note payable by instalments, subject to a condition that on default in the first instalment the whole shall become immediately payable, is assignable within the statute of Anne; and upon default by the maker in payment of the first instalment, an indorser is liable for the whole amount. *Carlon v. Kenealy*, 12 Mee. & W. 139; 13 L. J. Ex. 64. *Hemp v. Garland*, 4 Q. B. 519. *Oridge v. Sherborne*, 11 Mee. & W. 374; 12 L. J. Ex. 313.

The words "to his order," or "to bearer," if omitted by mistake, may be afterwards inserted, without vitiating the instrument either at common law or under the Stamp Act. *Kershaw v. Cox*, 3 Esp. 246; Byles, 127; Bay. 118. *See* 6 M. & S. 142.

Whether a bill or note be negotiable or not, is a question of law. *Grant v. Vaughan*, 3 Burr. 1516. *Brandao v. Barnett*, 6 Man. & G. 306; 3 C. B. 530; Byles, 127.

[1] *How transferred.*—See *Jenkins v. Tongue*, 29 L. J. Ex. 147. If an agent—a banker, for example—hold a bill transferable by delivery, a direction given to him by the owner to hold it for another is a sufficient transfer by delivery. Byles on Bills, 127.

In case of a note, the payee is usually a person other than the maker; and then, if the note be made payable to order, the promise will be to "pay to C. or his order." But a man *may* make a note payable to himself or order.

If a bill or note be payable to order, it is transferable by indorsement; if to bearer, by delivery; if it be not payable either to order or to bearer, it is only good in the hands of the payee, and is not negotiable.

Bills may be indorsed or transferred by delivery before as well as after acceptance. Byles on Bills, 127.

On a bill or note payable to A. or order, for the use of B., the right of transfer is in A. alone. *Evans v. Cramlington*, Carth. 5; *Cramlington v. Evans*, 2 Vent. 207; Bay. 143. If payable to several persons not in partnership, the right to transfer is in all collectively, not in any individually. Bay. 143.

Indorsements are either in blank or special. No particular form of words is essential to any indorsement. A blank indorsement is made by the payee simply writing his name on the back of the bill or note, and this makes it thenceforth transferable by delivery, though in practice the tranferor is often asked to indorse each time that the instrument changes hands.

A special indorsement is by writing a direction to pay to a particular person, and may be made by A. B. thus: "Pay C. D. or his order.—A. B." The words "or his order," may be omitted in this case, for their omission will not restrict the negotiability of the instrument *See* 2 Ex. R. 527. "An indorsement in blank conveys a joint right of action to as many as agree in suing on the bill" (*Ord v. Portal*, 3 Camp. 239); therefore, where three persons separately indorsed a bill for the accommodation of the drawer, which was afterwards dishonoured and returned to them, and they paid the amount among them, it was held that they might bring a joint action against a previous indorser (*Lowe v. Copestake*, 3 C. & P. 300). So where a bill was delivered to A. for the purpose of getting it discounted, and it was discounted by B. and C. with their joint money, and the bill delivered to them, it was held that B. might sue alone. *Wood v. Connop*, 5 Q. B. 292. But where a bill of exchange was, by the direction of the payee, indorsed in blank and delivered to A., B., & Co., who were bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, *Lord Ellenborough* held, that A. & B., two of the members of the firm, and also trustees, could not, conjointly with another trustee, who was

not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise. *Machell v. Kinnear*, 1 Stark. 499. See *Steele v. Harmer*, 14 Mee. & W. 831; 15 L. J. Ex. 217.

An indorsement in full, besides the signature of the indorser, expresses in whose favour the indorsement is made, and such an indorsement may restrain the negotiability of a bill or note. It is restrictive when there are express words making it so, or it is made in favour of a person who *cannot* make a transfer. Thus, an indorsement in these words, "Pay the contents to A. B. only" (Burr. 1227; 1 Atk. 249; 8 B. & C. 622; 5 Bing. 525); "to C. D. for my use," or, when addressed to the drawee (Dougl. 615), or "the within must be credited to E. F." is restrictive. An indorsement, "Pay the contents to A. B. on my being gazetted ensign in a given time," is restrictive, and will give no subsequent indorsee a right unless he be so gazetted. 4 Taunt. 30. See *Edie v. East India Co.* 2 Burr. 1223: *per Lord Mansfield. Moore v. Manning*, Com. Rep. 311. *Acheson v. Fountain*, 1 Stra. 557; 1 Black. 295. *Cunliffe v. Whitehead*, 3 Bing. N. C. 829; 5 Scott, 31; 6 Dougl. 63; S. C.

As long as the first indorsement continues in blank, the bill or note, as against the payee, the drawer and acceptor, is assignable by mere delivery, notwithstanding it may have upon it subsequent full indorsements (*Smith v. Clarke*, Peake, 225), and therefore as against them any mistake or error in the intermediate indorsements is immaterial. *Leonard v. Wilson*, 2 C. & M. 589. See *Walker v. Macdonald*, 2 Ex. 527; 17 L. J. Ex. 377.

A written transfer may be on the face of the bill. *Yarborough v. Bank of England*, 16 East, 6.

If there be not room to write all the indorsements distinctly on the back of the bill, the supernumerary indorsements may be written on a slip of paper annexed to the bill, called in French an *allonge*. The *allonge* is thenceforth a part of the bill, and requires no additional stamp. Byles on Bills, 128. A misspelling will not necessarily avoid an indorsement. See *Leonard v. Wilson*, 2 C. & M. 589; 4 Tyr. 415.

If two persons, not partners, are payees of a bill or note, both must indorse, unless one has authority to write the other's name; and if they hold themselves out to the world as partners on the bill or note, and they do so by making a note payable to "our order," they will be treated as partners, and an indorsement by one will suffice. *Cawick v. Vickery*, 2 Dougl. 653, n. *See* 1 Deac. C. C. R. 41.

A blank indorsement, as long as it continues blank, makes a bill or note payable to the bearer; but the holder may restrict its negotiability in any way he pleases by writing over it restraining directions (*Peacock v. Rhodes*, Dougl. 6111); and the holder, by writing a restriction over the indorsement, ordering the money to be paid to particular persons, without adding his own name, does not become an indorser. *Vincent v. Horlock*, Camp. 442. *Vincent v. Horlock* was an action against defendants as indorsers of a bill. It appeared that the payee had indorsed it in blank to defendants, and that they had written over the payee's signature, "Pay the contents to Vincent & Co." *Lord Ellenborough* was clearly of opinion that this was not an indorsement by defendants, and plaintiffs were nonsuited. *Clerk v. Pigot*, 12 Mod. 193; 1 Salk. 126, S. C. *See* 3 T. R. 761.

In order to complete the transfer there must be a delivery; and without this, neither indorsement nor acceptance is complete. *Cox v. Troy*, 5 B. & A. 474; 1 D. & R. 38. The delivery, in order to entitle the transferor to sue on the bill or note, should be to the party as indorsee, and not as an agent to deliver to a third person, or for some special purpose, and with intent to pass the property. 29 L. J. C. P. 17. *Adams v. Jones*, 4 Per. & D. 174; 12 Ad. & E. 455. *Brind v. Hampshire*, 1 Mee. & W. 369. Bayley on Bills, 4th ed. 98. From this necessity of delivery it arises that the word "indorse," in the declaration on a bill, imports a delivery and transfer to the indorsee, and under a traverse of the indorsement the defendant may show that the circumstances were such as that the indorsement did not effect a legal delivery of the bill to the indorsee: as, for example, that the bill was delivered for a special purpose not performed. *Marston v. Allen*, 8 Mee. & W. 494; S. C. 1 Dowl. N. S. 442. *Green v. Steer*, 1 Q. B. 707. *See* 15 id. 955; 20 L. J. Q. B.; and *Jacobs v. Tarleton*, 11 Q. B. 421; L. J. Q. B. 194; 29 L. J. C. P. 17; 9 C. B. 46.

In order to transfer a bill drawn in sets, each part should be delivered to the person in whose favour the transfer is made, for, otherwise, the same inconveniences may follow which arose upon a neglect to deliver all of them to the payee; and a recent statute imposes a penalty on any person who shall not transfer the complete set, duly stamped; and disentitles any person receiving less than the complete set so duly stamped, either in payment or as a security, or by purchase or otherwise, from making the same available for any purpose whatever. 17 & 18 Vic. c. 83, s. 6.

An indorsee admitting his indorsement to the holder, is afterwards estopped from denying previous indorsement to himself. *M'Gregor v. Rhodes*, 6 E. & B. 266. *See* 29 L. J. C. P. 17; 96 B. & C.

[1] Every indorser of a bill is in the position of a new drawer, and is liable to every succeeding holder, in case the drawee does not accept, or, having accepted, does not pay at maturity or proper presentment. An indorser of a note is surety for the money, and liable if he does not pay. 1 C., M. & R. 441; 2 Mee. & W. 317. An agent,

(D) *Rights of Indorsee.*[1]

(*a*) *Where the Indorser is a Trustee.*

EVANS v. KYMER, 1 B. & Adol. 528.

If he indorse it over in breach of trust, the indorsee if

The acceptor of a bill, who had received no value, delivered the bill to the drawer, desiring him to hold it for his use, but the drawer indorsed it for value to the defendant, who knew that the drawer had no authority to part with it;

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or any other person who indorses, and does not intend to become personally responsible, should add to his name the words "*sans recourse*," or "without recourse to me." See *Rice v. Stearns*, 3 Mass. Rep. 225. *Mott v. Hicks*, 1 Cowen, 512; Byles, 130.

Another way in which the holder of a bill or note indorsed to him in blank may transfer it without incurring personal liability, is by writing over the indorser's signature the words, "Pay to A. B. or order." *Pike v. Street*, 1 M. & M. 226; and see *Clark v. Pigott*, 1 Salk. 126; 12 Mod. 193. *Gompertz v. Harden*, 7 Taunt. 159; and *Soarez v. Glynn*, 8 Q. B. 24.

An agreement, written or verbal, not to hold the indorser liable, will prevent his immediate indorsee suing him; but a subsequent indorsee, without notice of the agreement, may, of course, do so.

A bill may be indorsed conditionally (*Bluett v. Middleton*, 7 Jur. 561), so as to impose on the drawee who afterwards accepts a liability to pay the bill to the indorsee or his transferree in a particular event only. Therefore, if the payee of a bill annexes a condition to his indorsement before acceptance, the drawee who afterwards accepts it is bound by that condition; and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor, notwithstanding it may have been paid by the acceptor to an indorsee before the condition was satisfied. *Robertson v. Kensington*, 4 Taunt. 30. *Savage v. Aldren*, 2 Stark. 232. But it seems that a bill cannot be indorsed with a condition, that in a certain event the indorsee shall not retain the power of further indorsing over. *Soarez v. Glynn*, 14 L. J. Q. B. 313; 8 Q. B. 24. And it is clear that parol evidence, or evidence of intention, cannot be allowed to engraft such a condition. (Id.)

An indorsement admits the signature and capacity of every prior party. *Lambert v. Oakes*, 1 Ld. Raym. 443; 12 Mod. 244. *Lambert v. Pack*, 1 Salk. 127. *Williams v. Seagrim*, 2 Barn. 82. *Critchlow v. Parry*, 2 Camp. 182. *Free v. Hawkins*, Holt, 550. But see *East India Company v. Tritton*, 3 B. & C. 280; 5 H. & N. 214.

A holder may, in suing a drawer, acceptor, maker, or early indorser, omit to prove the intermediate indorsements, which may be struck out, and the case may be treated as though the bill was indorsed to the plaintiff in the first instance. This may be done at the trial.

An indorsement intentionally struck out by the holder discharges the indorser; but the striking out an indorsement by mistake will not discharge the indorser (*Wilkinson v. Johnson*, 3 B. & C. 428; 5 D. & R. 403); nor the striking out by mistake of the acceptance (*Raper v. Birkbeck*, 15 East, 17. *Novelli v. Rossi*, 2 B. & Adol. 757. *Wayman v. Bend*, 1 Camp. 175): they may be struck out after the plaintiff has finished his case. *Magee v. Jadis*, M. & R. (N. P. C.) 247. So in an action against an indorser, the plaintiff may state in his declaration that the payee indorsed to the defendant, notwithstanding there are several intervening indorsements. *Chaters v. Bell*, 4 Esp. 218; Selw. 9th ed. 360, S. C. It was formerly usual in an action on a bill, where there were several indorsements, to insert two counts, one setting out the indorsements, to avoid the necessity of striking them out, the other omitting them, so as to prevent a nonsuit if they could not be proved.

It seems doubtful whether the plaintiff can avail himself of the title of an indorser whose name he has struck out. *Davies v. Dodd*, 1 Wils. 110; Price, 176; and see *Bartlett v. Benson*, 15 L. J. Ex. 231; Byles, 131.

Although in general there is not any implied warranty on the part of one who assigns his property in a chattel that it shall turn out to be productive, yet an indorsement not only passes the interest in a bill or note to the indorsee, but it also amounts to an undertaking that the bill or note shall be duly honoured; and that if it is not, and the indorser has due notice of the dishonour, he will pay the amount to the indorsee. *Gibbs v. Fremont*, 9 Ex. 25. And this engagement is implied from merely writing the name on the back of the bill, and handing it over to the indorsee; whereas a mere warranty that a bill or note shall be paid would be void, unless made on some adequate consideration.

[1] A transfer by indorsement vests in the indorsee a right of action against all the parties whose names are on the bill, in case of default of acceptance or payment.

If a bill which either requires indorsing, or was intended by the parties to be indorsed, be delivered without indorsement, the transferee has a right of action against the transferor for not indorsing, and perhaps now a *mandamus* will lie to compel indorsement; at all events, a bill in Chancery may, where it is worth while, be filed for this purpose, and the costs would have to be paid by the person refusing to indorse. The personal

affected with notice takes it subject to the trust.[1]

the defendant (the indorser) was held liable to the acceptor in trover. "The drawer," says *Lord Tenterden*, "having put the bill into the defendant's hands, when the defendant knew that the drawer had no authority so to do, the defendant's title is no better than the drawer's. But then it is said, allowing that the plaintiff had a property in the bill, the defendant had a right to hold it, because he may sue the drawer. I think the defendant had no right to hold it as against the acceptor (the plaintiff), because the defendant took the bill with the knowledge that the person from whom he took it had no title to it as against the plaintiff."

(E) *A Bill may be Indorsed to avoid a Plea of Set-Off.*[2]

representatives of the deceased transferor may also be compelled to indorse. See *Rosse v. Sims*, 1 B. & Adol. 521. *Watkins v. Maule*, 2 J. & W. 242. *Smith v. Pickering*, Peake, 50. *Ex-parte Rhodes*, 3 Mont. & Ayr. 217.

The rule prohibiting circuity of action operates to prevent any action being maintained against subsequent indorsers, where the bill has been re-indorsed to a previous indorser, for the result of the actions would be to place the parties in precisely the same situation as before any action at all. *Bishop v. Hayward*, 4 T. R. 470. *Britten v. Webb*, 2 B. & C. 483; 3 D. & R. 650. But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser. *Wilders v. Stevens*, 15 L. J. Ex. 108; Story on Promissory Notes, s. 479. *Bartlett v. Benson*, 15 L. J. Ex. 23. *See* 14 Mee. & W. 733; 3 D. & L. 274.

[1] Where a bill or note is merely indorsed to another, and deposited with him as a trustee, he can only use it in conformity with the stipulations on which he became the depositary of it. If the depositary of the bill indorse it over in breach of trust, the indorser, with notice of the breach of trust, can acquire no title to the bill as against the rightful owner, and can neither sue him on the bill nor hold the bill against him. *Goggerly v. Cuthbert*, 2 N. R. 170. *Evans v. Kymer*, 1 B. & Adol. 528.

The drawer of a bill of exchange deposited it with a creditor, and gave him authority to receive the proceeds, and apply them in a special way, and the drawer afterwards committed an act of bankruptcy on which a commission issued. The creditor after the act of bankruptcy, delivered the original bill to the acceptor, and took in lieu of it another bill:—*Held*, by *Tindal, C. J.*, that the creditor had been guilty of a conversion, and the assignees of the bankrupt might recover against him in trover. *Robson v. Rolls*, M. & R. (N. P. C.), 239. It would have been otherwise if the creditor had merely received the money, for that would not have amounted to a conversion. *Jones v. Fort*, 9 B. & C. 764; 4 M. & R. 547. Where a bill has been indorsed in blank, and the transferee of the depositor takes it without knowledge of the particular and limited purpose for which the bill was deposited with the trustee, the transferee acquires a title. *Bolton v. Puller*, 1 B. & P. 539. *Ramsbotham v. Cator*, 1 Stark. 228. *Collins v. Martin*, 1 B. & P. 648. *Gorgier v. Mieville*, 3 B. & C. 45; 4 D. & R. 641. *Wookey v. Pole*, 4 B. & A. 1. And see *Roberts v. Eden*, 1 B. & P. 398. Byles, 133, 134.

On the making of a bill of exchange it was agreed between the drawer and the acceptors that the latter should deposit with the drawer some canvas, as a collateral security for the payment of the bill, with power to the drawer to sell the canvas and apply the proceeds in discharge of the bill if it was not paid at maturity:—The court held, that this agreement created an equity attaching to the bill in the hands of a party to whom the bill was indorsed when it was overdue; and that as the drawer, after the indorsement, had sold the canvas and retained the proceeds, the indorsee was debarred from recovering on the bill for so much as the canvas realised in the sale. *Holmes v. Kidd*, 28 L. J. Ex. 112.

The transferee's title will not be affected by proving him guilty of negligence, however gross, if there were no fraud. Gross negligence may, however, be evidence of fraud. *Goodman v. Harvey*, 4 Ad. & E. 870; 6 Nev. & M. 372; S. C. *Uther v. Rich*, 10 Ad. & E. 784; 2 Per. & D. 579. *Ante*, p. 139, n. [1].

It has been doubted whether the rule, that a person taking a bill indorsed "per procuration," is bound to take notice of the extent of the authority of the person indorsing, applies to the case of a partner indorsing "per procuration." *Smith v. Johnson*, 3 H. & N. 232.

[2] In *Oulds v. Harrison*, 10 Ex. 572, to an action on a bill of exchange drawn by B. upon, and accepted by, the defendant, and indorsed by B. to the plaintiff, the defendant pleaded, that after the bill was due, and before B. indorsed it to the plaintiff, B. was indebted to the defendant in a sum exceeding the amount of the bill and interest; and B., in order to deprive the defendant of his right of set-off, did, in order to defraud the defendant, and in collusion with the plaintiff, indorse the bill to the plaintiff, in order to enable the plaintiff to sue the defendant on the bill, without any consideration for the indorsement, and that the plaintiff sues merely as the agent for B., and in collusion with him. Demurrer. *Cur. ad. vult.*

(F) *Restrictive Indorsement.*[1]

(*a*) *Indorsement contrary to.*

TREUTTEL v. BARANDON, 8 Taunt. 100; 1 Moore, 543.

If indorsed contrary to, no title acquired against true owner.[2]

A bill was indorsed by the payee in this form:—"Pay De Roure, or order, for the account of Messrs. Treuttel." De Roure pledged it with the defendant, who advanced money upon it to him personally. The court held that the defendant had sufficient notice from the indorsement that De Roure had no authority to raise money on the bill for his own benefit, and therefore could not defend an action of trover for the bill brought by his principal.

Dallas, J. "This is not a simple case of a bill indorsed; but De Roure, the agent of the plaintiffs, being indebted to the defendant, deposits with him these bills, which were, by the indorsement, made payable to him 'for the account' of his principals. The defendant takes from De Roure these bills as a deposit, expressly by way of security, and not by way of discount; and the question is, whether he did not take this deposit with sufficient notice that the bills did not belong to him? I am of opinion that the defendant had sufficient notice that the bills were not his property, and I therefore think that the plaintiffs are entitled to recover."

Parke, B. "The holder is under no legal obligation to allow the debt to be set off against the claim on the bill, unless he had entered into a contract to that effect with the defendant, which contract would create an equity in favour of the defendant attaching to an overdue bill. His power to circulate it is not restrained simply by the existence at the time of a debt of equal value, and his circulating it, therefore, is no infringement of any existing right of the defendant. It is wholly contingent whether the defendant will have a debt due to him from the plaintiff when the bill is sued upon, and if there be, whether the defendant will choose to plead a set-off. Till then, the whole amount of the bill is due to the plaintiff; and if he indorses over the bill, though he must have known that the contingent right of set-off would be defeated, he clearly would give a good title. Does it become a fraud, and defeat the title, if he actually intends to do, by indorsing it, what, under the circumstances, would be the necessary result of that act? and would it become so if he communicates that intention to the indorsee, and the latter agreed to assist him? This, we think, is no fraud, and does not avoid the transaction." Judgment for the plaintiff.

[1] The trust may be expressed on the bill itself by a restrictive indorsement, or a restrictive direction appended to the payee's name, so that into whose hands soever the bill may travel it will carry a trust on the face of it.

The following have been held to be restrictive directions or indorsements: — "The within must be credited to A. B." (*Archer v. Bank of England*, Dougl. 615. *Edie v. East India Co.* 2 Burr. 1227. *Evans v. Cramlington*, Carth. 5. *Cramlington v. Evans*, 2 Vent. 307); "Pay to A. B., or order, for my use;" "Pay to A. B., for my account;" "Pay to A. B. only." *Murrow v. Stuart*, 8 Moore, P. C. C. 267.

[2] A holder who takes a bill, the circulation of which is restricted by a restrictive direction or indorsement, cannot sue the drawer or acceptor upon it, but holds the bill, or the money received by him, as the trustee of the restraining party, and is liable to refund the bill, or money received upon it, to the party making the restrictive indorsement. For such words cannot be intended as a mere private direction to the immediate indorsee, for he is bound to account for the bill without any such direction; not to mention that the most obvious mode of conveying a private direction would be either by oral communication, or by letter. Nor can they be a mere direction to the drawee; for a restrictive indorsement constitutes the restricted indorsee, the indorsee's agent to receive the money, and for its misapplication, when so paid, the drawee is not responsible. As between the restraining indorser and the immediate indorsee, or the drawee, the words "to my use," or the like, are of no effect. But as between the restraining indorser and a subsequent indorser and the drawee, they are a notification that the restricted indorsee has no property in the bill, that he is a mere agent and trustee for his principal, and that he can appoint no sub-agent, except for the purpose of holding the bill or the money upon a similar trust. The subsequent indorsee, therefore, being himself a mere agent, can have no action on the bill, if it is dishonoured, nor hold it, or the money received upon it, against the principal; and if, instead of paying the money to the principal, he chooses to pay it to the intermediate agent, he becomes responsible for its misapplication. Byles, 135.

In *Sigourney v. Lloyd* (8 B. & C. 622; 5 Bing. 525), plaintiff, the holder of a bill for 3164*l.* 11*s.* 8*d.* indorsed in blank, indorsed it

(G) *Liability of Transferor where Bill transferred by Delivery.*

VAN WART v. WOOLEY, 3 B. & C. 445.

Transferor not indorsing is not liable on the instrument.[1]

Abbott, C. J. "If a person deliver a bill to another without indorsing his own name upon it, he does not subject himself to the obligations of the law merchant: he cannot be sued on the bill, either by the person to whom he delivers it or by any other. And as he does not subject himself to the obligations, we think he is not entitled to the advantages. If the owner of a bill sell it without his own indorsement he is, generally speaking, liable to no action in respect of the bill. If he deliver it without his indorsement upon any other consideration, antecedent or concomitant, the nature of the transaction and all circumstances regarding the bill must be inquired into, in order to ascertain whether he is subject to any responsibility. If the bill be delivered and received as an absolute discharge, he will not be liable, if otherwise he may be. The mere fact of receiving such a bill does not show it was received in discharge."

(H) *When Delivery of Bill operates as Payment.*

(*a*) *If given for an Antecedent Debt, such Debt is not Extinguished; but it is otherwise if it be all one Transaction.*

EX-PARTE BLACKBURNE, 10 Ves. 204.

If given for an antecedent debt, such debt is not extinguished; but it is otherwise if it be all one transaction.[2]

Lord Eldon, C. "I take it to be now clearly settled, that if there is an antecedent debt, and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held that if there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonoured there is no demand, for there was no relation between the parties except that transaction, and the circumstance of not taking the name upon the bill is

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to S. Williams in these words: "Pay to Samuel Williams, Esq., of London, or his order, for my use." The day after Williams received it he discounted it with defendants, his bankers, and they applied the produce and other monies of Williams, the same day, to take up Williams's acceptances. Defendants having received the money upon this bill, plaintiff insisted they were bound to pay it over to him, the state of accounts and transactions between plaintiff and Williams not having warranted Williams to part with the bill, and the indorsement being restrictive. The court thought it clear that the indorsement was restrictive, that the defendants discounted it at their peril.

If the person be not what the law considers a *bonâ fide* holder, as if, at the time he received the instrument, he knew that circumstances existed which rendered it improper that payment should be enforced, he will not acquire any better interest in the same than the party had who transferred it to him. *Hatch v. Searles*, 24 L. J. Ch. 22.

[1] A transferee by delivery cannot be liable in any case to a subsequent transferee, either on the instrument or the consideration. And therefore it has been held that such subsequent transferee cannot prove for the value in the event of the first transferee's bankruptcy. *In re Barrington*, 2 Sch. & Lef. 112.

The transferee is not even, it seems, liable on the consideration, if the bill or note so transferred by delivery without indorsement turn out to be of no value, by reason of the failure of the other parties to it. For the sending to market of a bill or note payable to bearer without indorsing it, is *primâ facie* a sale of the bill, and there is no implied guarantee of the solvency of the maker or any other party. *See* the observations of *Littledale, J.*, in *Camidge v. Allenby*, 6 B. & C. 373; and *Rogers v. Langford*, 1 C. & M. 637. Bay. 246.

In America it has been repeatedly held that payment of bank-notes after the bank has failed is good, and the loss falls on the receiver. *Bayard v. Shunk*, 1 Watts, & Serg. Rep. 92. *Yonge v. Adams*, 6 Mass. Rep. 182, 185. *Scraigs v. Gass*, 8 Yerger, 175. *Lowry v. Murrell*, 2 Porter, 282. The contrary, however, has been also held. *Lightbody v. Ontario Bank*, 11 Wend. Rep. 1; affirmed in error in 13 Wend. Rep. 107. *Harley v. Thornton*, 2 Hill, 509. *Fogg v. Sawyer*, 9 New Hamp. Rep. 365. *See* Story on Promissory Notes, 125.

[2] If a banker's note be given on account of a pre-existing debt, the note is not to be considered as sold. But if the banker fail, and if the note be duly presented, and due notice be given of the dishonour, the remedy for the antecedent debt revives. "I agree," says *Holt, C. J.*, "in the difference taken my brother *Darnell*, that the taking a note

evidence of a purchase of the bill. In a sale of goods the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance it would be extremely difficult to persuade a jury, under the direction of a judge, to say that an agreement to pay by bills was satisfied by giving bills, whether good or bad. The bills were only a mode of paying the debt of 3000*l.* If they are not paid, the original debt arising out of the contract for goods sold and delivered remains. It is clear the creditor still holding the bills cannot resort to that original contract. In general cases where the bill is not paid, if there is no bankruptcy, the creditor must come immediately upon the bill being disho-

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for goods sold is a payment, because it was a part of the original contract; but paper is no payment where there is a precedent debt. For where such a note is given in payment it is always taken to be given under this condition, to be payment if the money be paid thereon in convenient time. *Ward v. Evans*, 2 Ld. Raym. 928. *Camidge v. Allenby*, 6 B. & C. 373. So held also by *Pratt, C. J.*, in *Moore v. Warren*, 1 Stra. 415; and by *King, C. J.*, in *Holmes v. Barry*, 1 id. 415. But if A. take a bill or note payable to bearer on demand for a pre-existing debt, and instead of putting it into circulation, or presenting it for payment in a reasonable time, keep it by him, and such bill or note be afterwards dishonoured, the debt will be considered as extinct, and the loss will fall upon A. *Camidge v. Allenby, supra.*

But if a bill or note, made or become payable to bearer, be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, or for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction is held to be a sale of the bill by the party transferring it, and a purchase of the instrument with all risks by the transferee. For if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill. *Fenn v. Harrison*, 3 T. R. 759, *per Lord Kenyon;* and see *Evans v. Whyte*, 5 Bing. 405; 3 M. & P. 130. *Ex-parte Shuttleworth*, 3 Ves. 368. And if a party discounts bills with a banker, and receives in part of the discount other bills, but not indorsed by the banker, which bills turn out to be bad, the banker is not liable. For, having taken them without indorsement, he has taken the risk on himself. The bankers were the holders of the bills, and by not indorsing them have refused to pledge their credit to their validity, and the transferee must be taken to have received them on their own credit only. *Fydell v. Clark*, 1 Esp. 447. *Bank of England v. Newman*, 1 Ld. Raym. 442; 12 Mod. 241; Com. 57. *Emly v. Lye*, 15 East, 7. But in *Ex-parte Blackburne* (10 Ves. 204) the Chancellor seemed to think that if goods are purchased and paid for at the time by bills not indorsed, the vendor is liable if the bills turn out bad. See *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157. *Owenson v. Morse*, 7 T. R. 64. So, where in the morning A. sold B. a quantity of corn, and at three in the afternoon of the same day B. delivered to A. in payment several promissory notes of the bank of C., which had then stopped payment, but which circumstance was not at the time known to either party, *Bayley, J.*, said, "If the notes had been given to A. at the time when the corn was sold, he could have had no remedy upon them against B. A. might have insisted on payment in money, but if he consented to receive the notes as money, they would have been taken by him at his peril. *Camidge v. Allenby*, 6 B. & C. 373; 9 D. & R. 391; and see *Ward v. Evans*, 2 Ld. Raym. 928; and *Rogers v. Langford*, 1 C. & M. 637. In this case, an interval of a few hours in the same day between the purchase and the payment was held to convert the delivery of the notes into a pre-existing debt. Byles, 138. Bay. 246.

A transferor by delivery, though he does not in general warrant the solvency of the maker of a promissory note or bill of exchange, does warrant that the bill or note is not forged or fictitious. *Gurney v. Womersley*, 4 E. & B. 133. *Jones v. Ryde*, 5 Taunt. 489; 1 Marsh. 157, S. C. *Bruce v. Bruce*, 1 Marsh. 165; 5 Taunt. 495. *Fuller v. Smith*, R. & M. 49. Accordingly where, by representing the acceptance of a bill to be that of a respectable firm, the defendants induced the plaintiffs to discount the bill, and the acceptance turned out to be a forgery, the plaintiff was held entitled to recover the money as on a failure of consideration; for although the defendant, by not indorsing the bill, preserved himself from warranting the solvency of any of the parties, yet he did undertake that the instrument was what it purported to be. And where, previous to 17 & 18 Vic. c. 3, s. 4, the bill purporting to be a foreign bill was unstamped, but it turned out to have been drawn in London, the transferee was held entitled to recover the amount he gave for it from the transferor. *Gompertz v. Bartlett*, 2 E. & B. 849. So it has been repeatedly held in America. *Ellis v. Wild*, 6 Mass. Rep. 321. *Young v. Adams*, id. 182. *Markle v. Hatfield*, 2 John. R. 455. *Eagle Bank of Newhaven v. Smith*, 5 Con. R. 71. Mr. Justice Story lays it down that there is also a warranty of the title of the transferee. (Treatise on Promissory Notes, s. 116.) But Mr. Justice Byles conceives

noured, saying he cannot procure payment, and desiring to have payment; and then he might maintain an action for goods sold and delivered. There may be cases in which he may have received part of the money without involving the difficulty from giving time as to the rest of it; as, if part were paid before it was due: in that case, if no time were given for payment of the residue, an action for goods sold and delivered would lie for the residue."

(I) *Rights of Transferee by Delivery.*[1]

(*a*) *Entitled to Recover, notwithstanding Note may have been Lost or Stolen, if not affected with Fraud.*

RAPHAEL v. THE BANK OF ENGLAND, 17 C. B. 161; 25 L. J. C. P. 33.

Notwithstanding a negotiable note may have been lost or stolen, a transferee for value is entitled to recover, unless he is affected with fraud.[2]

A money-changer changed a bank-note which had been stolen, and the jury found that he gave full value for it, but that he had the means of knowledge if he had taken proper care of certain notices of the robbery previously delivered to him: — The court held, that the banker was entitled to recover on the note.

Cresswell, J. "I apprehend it was settled law from the time of *Lawson v. Weston*, 4 Esp. 56, down to *Gill v. Cubitt*, 3 B. & C. 466, that a person having received a negotiable instrument in good faith for full value was entitled to recover, and that his right could not be impeached for want of title in the person from whom he took it. Not attending to the notice may be negligence, but that is not enough to affect the title. At one time certainly Lord Tenterden held that want of care in taking the instrument might invalidate the title, but that doctrine has been much disapproved of in Westminster Hall. The jury here are

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that is not so, remarking that an honest transferee by delivery needs no such warranty. Byles, 139.

And if notes or bills are transferred as valid, when the transferee knows they are good for nothing, the suppression of the truth is a fraud, and he is liable. "If," says *Mr. Justice Bayley*, "fraud or knowledge of the maker's insolvency could be shown in the payer, then it would be wholly immaterial whether the notes were taken at the time of sale or afterwards." *Cambridge v. Allenby*, 6 B. & C. 373: 9 D. & R. 391, S. C. *Fenn v. Harrison*, 3 T. R. 759. See *Gurney v. Womersley*, 4 E. & B. 133.

[1] Where the plaintiff, who was a partner and manager of a banking company established under the 7 & 8 Vic. c. 110, received from B., a customer, for value given by the bank, a bill of exchange indorsed in blank, drawn by B. and accepted by the defendant, it was part of the plaintiff's duty, as manager, to receive and keep possession of all bills given to the bank, and by authority of the directors he sued the defendant on this bill: — The court held that it was not necessary for the company to indorse to the plaintiff to entitle him to recover, nor that the other partners should be found in the action. Because, the indorsement being in blank, the bank were at liberty to hand the bill over to any person, and authorise him to sue upon it; and the evidence showed that the plaintiff had authority from the bank. *Law v. Parnell*, 7 C. B. (N. S.) 282; 29 L. J. C. P. 17; 24 Jur. 172.

[2] Bills and notes payable to bearer circulate as money, and are considered as such; and it is absolutely essential to the currency of money that the property and possession should be inseparable. The indorsee of a bill payable *to order*, and not made payable to bearer, by a blank indorsement, has no right to the bill, either so as to retain it against the real owner, or to sue any party upon it, unless the indorser has a right to indorse. *Meed v. Young*, 4 T. R. 28. But if the cheque, bill, or note, be made or have become payable *to bearer*, the title of the holder, both as against a former owner on the one hand, and the maker, acceptor, or indorser on the other, is not affected by any infirmity in the title of the transferor, provided the holder took it *bonâ fide*. Byles, 139.

At one time it was considered that the transferee's title would be affected by want of due caution on his part. Thus, where a banker in a small market-town changed a 500*l.* Bank of England note for a stranger, without any further inquiry than merely asking his name, he was held liable in trover to a party from whom the note had been unlawfully obtained: *Best, C. J.*, observing, "The party's caution should increase with the amount of the note he is called upon to change (*Snow v. Peacock*, 2 C. & P. 221; and see *Gill v. Cubitt*, 3 B. & C. 466; 5 D. & R. 324, S. C. *Egan v. Thutfall*, 5 id. 326). But it is now settled, that if a man takes honestly an instrument made or become payable to bearer he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induce the jury to find fraud. "Gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the

of opinion that this instrument was taken without knowledge and for full value, and therefore there could have been no fraud. I admit there may be cases in which a person may pay full value, and yet take the instrument dishonestly, and that there must be full value and good faith; but that was left to the jury."

(J) *Transfer under peculiar Circumstances.*

(*a*) *Before Bill filled up.*[1]

Russel v. Langstaffe, 2 Dougl. 514. Collis v. Emett, 1 H. Black. 313.

An indorsement written on a blank note will afterwards bind the indorser for any sum and time of payment which the person to whom he entrusts such bill chooses to insert.

The defendant, to accommodate one G., indorsed his name on five copper-plate cheques, made in the form of promissory notes, but in blank, without any sums, dates, or times of payment being mentioned therein, and delivered them to G. G. filled them up as he thought fit, and the plaintiff discounted them: the plaintiff knew the notes were blank at the time of the indorsement. G. not paying them when they became due, the plaintiff brought this action. *Hotham, B.*, before whom the cause was tried, was of opinion, that as the notes were in blank when the defendant indorsed them, they were not then promissory notes, and that no subsequent act of G. could alter the original nature and operation of the defendant's signature, which, when written, was a mere nullity; and he accordingly directed a verdict for the defendant. But upon an application for a new trial, after cause shown, *Lord Mansfield* said that nothing could be so clear: the indorsement on a blank note is a letter of credit for an indefinite sum: the defendant said, Trust G. to any amount, and I will be his security. It does not lie in his mouth to say the indorsements were not regular. A new trial was accordingly granted; and a verdict having been found for the plaintiff in a similar action before *Lord Mansfield*, the defendant submitted in this without going to a second trial.

(*b*) *After Dishonour.*

(1) *If a Bill be Indorsed after Dishonour, and with Notice thereof, the Indorsee has no better Title than his Indorser.*

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bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." *Ante*, p. 139. *Goodman v. Harvey*, 4 Ad. & E. 870: *per Lord Denman C. J.*, 6 Nev. & M. 372. *Raphael v. The Bank of England, supra* in text. S. C. *Uther v. Rich*, 10 Ad. & E. 784; 2 Per. & D. 579. In the case of *Goodman v. Harvey* the bill bore on it, when discounted, the notarial mark of non-acceptance. "The plaintiff received the bill with a death-wound apparent on it." See *Backhouse v. Harrison*, 5 B. & Adol. 1098; 3 Nev. & M. 108. *Crook v. Jadis*, 5 B. & Adol. 909; 3 Nev. & M. 257. S. C. *Foster v. Pearson*, 1 C., M. & R. 855; 5 Tyr. 255. S. C. *Willis v. Bank of England*, 4 Ad. & E. 21.

If the party presenting a bill or note payable to bearer be the mere agent of another, the agent's title is infected with the infirmity of his principal's title, although the principal is in the agent's debt, and the agent, consequently, cannot enforce payment of the maker. *Solomans v. Bank of England*, 13 East, 135; 1 Rose, 99.

It makes no difference that the bill or note is only pledged, and not absolutely transferred; the pawnee acquires a property in it, and is not liable in trover to the real owner, as in the case of goods improperly pledged. Therefore, where bills were indorsed in blank and deposited with bankers to be received when due, and the bankers raised money upon them by pledging the bills with another banker, and afterwards became bankrupt, the person who so deposited the bills could not maintain trover for them. *Collins v. Martin*, 1 B. & P. 648; 2 Esp. 520.

Exchequer bills which are payable to bearer before the blank is filled up. *Wookey v. Pole*, 4 B. & A. 1. *See*, as to dividend warrants, *Camidge v. Bank of England*, 13 L. J. Q. B. 201. *Ante*, p. 136. And *see* further as to Exchequer bills, *Barnett v. Brandon*, 6 Man. & G. 630; bonds of foreign princes and states payable to bearer (*Gorgier v. Mieville*, 3 B. & C. 45; 4 D. & R. 641, S. C.), and East India bonds (51 Geo. 3, c. 64), resemble money and bills of exchange payable to bearer, in the necessary union of possession and property. Honest acquisition confers title.

[1] A bill may be indorsed before the day of its date. *Montague v. Perkins*, 22 L. J. C. P. 187. *Temple v. Pullen*, 8 Ex. 389. *Armfield v Allport*, 27 L. J. Ex. 42. *Pasmore v. North*, 13 East, 517. And see *Snaith v. Mingay*, 1 M. & S. 87. *Cruchley v. Clarence*, 2 id. 90. *Schultz v. Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 1 Hodges, 525.

O'Keeffe v. Dunn, 1 Marsh. 613; 6 Taunt. 305. Affirmed in Error, 5 M. & S. 282.

If a bill be indorsed after dishonour, and with notice thereof, the indorsee has no better title than his indorser.[1]

This was an action by the indorsee of a bill against the drawer. The payee had presented it for acceptance, which was refused; but no notice of such dishonour was given to the drawer, and the payee afterwards indorsed over the bill without notice to the plaintiff of such refusal to accept, and the latter again presented the bill for acceptance, which was again refused.

Per Cur. (*Chambre, J. dissent.*) "He who takes a bill after it has arrived at maturity, takes it subject to all the defences which could have been made by any previous holder, for the bill being unpaid, its date is notice sufficient to put him on inquiry; but if he takes the bill before it is due, he takes it not subject to the same infirmity of title, because he then takes it without notice of any suspicious circumstances that may break in upon his remedy against any former holder. This is the general law; but there may be circumstances that may make it otherwise. A holder is not bound to present a bill for acceptance; there is nothing, therefore, on the face of an unaccepted bill to awaken a suspicion that it has been presented for acceptance and refused. But it is said, the general law is, that where notice is requisite, if notice be not given, the drawer, and all persons claiming to be entitled to have notice of the dishonour, are discharged. We think that is a begging of the question; for if a holder be informed that the drawee will not accept, or will not pay the bill when it becomes due, and omits to give notice, he shall never sue the drawer, because his neglect prevents the drawer from using diligence in withdrawing from the drawee the effects which were destined to satisfy the bill. But we are of opinion, that if the bill is passed for a valuable consideration, without notice of that defect of title, he who so innocently takes the bill is not guilty of any breach of duty towards the drawer, and is therefore not affected by the prior holder's omission. *Roscoe v. Hardy*, 12 East, 434, is mainly distinguishable from the present case in respect that the bill there continued up to the time of its maturity in the hands of a holder, who had neglected to give that notice at the time when the bill was first refused acceptance; and the holder, we agree, had thereby, as to his *own claim*, discharged the drawer. We are of opinion, that the circumstance of the bill continuing in the same hand materially distinguishes that case from the present. We therefore think, that

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[1] An indorsement may be made either before or after acceptance. If a bill be indorsed after refusal to accept, and notice thereof to the indorsee, or after it is due, these are circumstances which may reasonably excite suspicions as to the liability or solvency of the antecedent parties. An indorsee, therefore, of a bill dishonoured, or after due, with notice thereof, takes the bill on the credit of his indorser, and has no superior title against the other parties. And accordingly, if a bill or note founded on a smuggling or stock-jobbing transaction be indorsed after the same becomes due to a person ignorant of the illegality, though for full value paid by him, he cannot recover (*Banks v. Colwell*, 3 T. R. 81. *Brown v. Turner*, 7 id. 630); or, if the indorser take the bill with notice of its having been dishonoured, and there was an agreement which would have been a defence, if his indorser sued, it will be a defence also against him. *Crossley v. Ham*, 13 East, 498.

But if the indorsee had no notice of the dishonour he is not prejudiced by it. Payee presented a bill for acceptance, which was refused. He neglected to advise the drawer, and thereby discharged the drawer as between the drawer and himself. He then indorsed the bill, without informing his indorsee of the dishonour:—*Held*, that the discharge to the drawer extended only to an action at the suit of the party guilty of the neglect, and that the indorsee having had no notice of the dishonour, the same defence was not available against him as against his indorser. *O'Keeffe v. Dunn*, *supra* in text. And see *Whitehead et al. v. Walker*, 10 Mee. & W. 696; 11 L. J. Ex. 168. *Bartlett v. Benson*, 14 Mee. & W. 733. Plea to an action on a bill, indorsed by defendant to W. and S., and by them to Benbow, whose assignees plaintiffs were; that W. & S. when the bill was indorsed and still were indebted to defendant on bills to a larger amount; that Benbow had notice of this when he took the bill; and that it had then been refused acceptance and protested. Upon demurrer to the replication, the court held the plea bad; that the true rule was laid down in *Burrough v. Moss*, 10 B. & C. 558, and the circumstance of Benbow's having notice of the set-off made no difference. Judgment for the plaintiffs.

the plaintiff not having had notice that the bill had been presented for acceptance, and dishonoured before he took it, is entitled to recover."

(*c*) *After Due.*

(1) *The Indorsee of an Overdue Bill or Note takes it subject to all the Objections it was liable to in the hands of the Indorser.*

BROWN v. DAVIES, 3 T. R. 80.

The indorsee of an overdue bill or note takes it subject to all the objections it was liable to in the hands of the indorser.[1]

The defendant drew a note, payable to one S., or order; S. indorsed it to one T., and he had it presented and noted for non-payment. Defendant then paid the money to S., and he took up the note from T., but, instead of returning the note to the defendant, indorsed it to the plaintiff, who thereupon brought this action against defendant as maker; and on defendant's offering to prove these facts, *Lord Kenyon*, *C. J.*, who tried the cause, thought they would not amount to a defence, unless it could be proved that plaintiff knew them when he took the note; and he rejected the evidence. But upon motion for a new trial *Lord Kenyon* said, he thought the rule ought to be made absolute, since the

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[1] "After a bill or note is due," says *Lord Ellenborough*, "it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered." *Tinson v. Francis*, 1 Camp. 19. *Sed vide Charles v. Marsden*, 1 Taunt. 224. *Atwood v. Crowdie*, 1 Stark. N. P. 483; Bayley, 501. But an original absence of consideration, such as arises in the case of accommodation acceptances, will not defeat the title of an indorsee for value of an overdue bill or note, although the indorsee had notice of the fact when he took the bill, unless there were an agreement, express or implied, restraining the negotiation of the bill or note after it should become due (*Parr v. Jewell*, 16 C. B. 684. *Sturtevant v. Ford*, 4 Man. & G. 101. *Lazarus v. Cowie*, 3 Q. B. 459. And see *Stein v. Yglesias*, 1 C., M. & R. 565. *Carruthers v. West*, 11 Q. B. 143). And the assignee of an overdue bill or note is not affected by an infirmity in the title of an original or antecedent party, if his immediate assignee could have maintained an action. A bill was accepted in a smuggling transaction, indorsed before it was due to a *bonâ fide* holder for value, and by the latter indorsed, after due, to the plaintiff: — *Held*, that as the indorser might have sustained an action against the acceptor, so could his indorsee. *Chalmers v. Lanion*, 1 Camp. 388.

An indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters. Therefore the indorsee of an overdue note is not liable to a set-off due from the payee to the maker. *Burrows v. Moss*, 10 B. & C. 558; 5 M. & R. 296; S. C. *Stein v. Yglesias*, 1 C., M. & R. 565; 3 Dowl. 252; 1 Gale, 98. And although it has been thought that the indorsee would be affected by the set-off if he had notice of it at the time he takes the bill (*Goodall v. Ray*, 4 Dowl. P. C. 76); yet it is now clear that notice makes no difference (*Whitehead v. Walker*, 11 L. J. Ex. 168; 9 Mee. & W. 696). However, it should seem that when a negotiable instrument is deposited as a security for the balance of accounts, and is afterwards indorsed overdue, in an action by the indorsee against the party originally liable, the state of the account may be gone into. *Collenridge v. Farquharson*, 1 Stark. 259. See *Atwood v. Crowdie*, 1 Stark. 483. And where it was agreed between the drawer and acceptor, upon the original making of a bill, that goods deposited as a security by the acceptor with the drawer should be sold and applied in satisfaction of the bill, in case the bill should not be paid at maturity, the court held that an indorsee, when the bill was overdue, took the bill subject to the equity of having the proceeds of the sale of the goods applied in liquidation of its amount. *Holmes v. Kidd*, 28 L. J. Ex. 112.

This rule also applies to bankers' cheques transferred a long time after they are issued. The owner of a cheque on a banker for 50*l.* having lost it, the cheque was paid five days after its date to a shopkeeper, who received the amount at the bank: — *Held*, that the shopkeeper was liable to refund the money to the owner of the cheque; for, having taken it after due, he acquired no better title than the party from whom he took it, and that it lay on him to show that his assignor had a title. "A cheque," said *Mr. Justice Holroyd*, "is payable immediately. The holder of it keeps it at his peril; and a person taking it after it is due, takes it also at his peril." *Down v. Halling*, 4 B. & C. 330; 6 D. & R. 455; 2 C. & P. 11, S. C.

But though the taking of a cheque six days old is a circumstance from which the jury may infer negligence or fraud, it is not conclusive evidence of either, so as to prevent the party taking the cheque from suing on it or retaining it, or the money received upon it. *Rothschild v. Corney*, 9 B. & C. 388; 4 M. & R. 411; Dowl. & L. 325.

case ought to have been further inquired into, as he did not, at the trial, remember that the bill had been noted, which ought to have excited the suspicion of the plaintiff. And the court said, that the party taking a note after it was due was to be considered as taking it on the credit of the person from whom he received it; and that, whatever would be a defence against the giver would be against the receiver also: "Provided," *Lord Kenyon, C. J.*, said, "if the note appeared on the face of it to have been dishonoured, or if knowledge could be brought home to the indorsee that it had been so, otherwise he could not go that length." Rule absolute.

(*d*) *After Payment.*

(1) *After Payment at Maturity by the Acceptor, the Bill is Extinguished, and cannot be Transferred.*

HARMER v. STEELE, 4 Ex. 1; 19 L. J. Ex. 34.

After payment at maturity by the *acceptor*, the bill is extinguished, and cannot be transferred.[1]

To an action on a bill of exchange, by indorsee against acceptor, the defendants pleaded that while the drawer, Wood, was the holder and payee of the bill, and before it became due, he indorsed and delivered it to Harmer, one of the acceptors, and one of the defendants, for a valuable consideration, who became, and continued, the holder of it until he delivered it to the plaintiff, and that the indorsement to the plaintiff, mentioned in the declaration, consisted

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A note payable on demand is not to be considered as overdue without some evidence of payment having been demanded and refused (*Barough v. White*, 4 B. & C. 327; 6 D. & R. 379; 2 C. & P. 8. See *Goodall v. Ray*, 4 Dowl. 76), although it be several years old, and no interest has been paid on it. *Brooks v. Mitchell*, 9 Mee. & W. 15. *Cripps v. Davis*, 12 id. 165. In *Bartmin v. Caddy*, 9 Ad. & E. 75, *ante*, p. 126. In an action on a note made by Hatherly and Hamlyn, payable to defendant or order on demand, and indorsed by him, he pleaded that Hatherly and Hamlyn, being indebted to one Bartlett, he indorsed it for their accommodation, and Bartlett received it on that account; that Hatherly and Hamlyn afterwards paid Bartlett the debt, and re-delivered it to them; and Hamlyn, two years after its date, delivered it to plaintiff, as a security, without defendant's authority. Upon general demurrer, the court held that the plea was a good answer, inasmuch as it showed that the note had been paid; and 55 Geo. 3, c. 184, s. 19, prohibited the re-issuing of it afterwards. Judgment for defendant. *Lazarus v. Cowie*, *ante*, p. 451.

The fact that a note is overdue must distinctly appear in pleading. *Cripps v. Davis*, 12 Mee. & W. 159.

Though the maker of a bill or note assigned when overdue may resist payment at law, equity has a concurrent jurisdiction, and will order the instrument to be delivered up to be cancelled, and restrain the holder from proceeding at law. *Hodgson v. Murray*, 2 Sim. 515. —— *v. Adams*, Younge, 171.

The law, in the absence of any evidence on the subject, presumes a transfer to have been made before the bill was due. *Parkin v. Moon*, 7 C. & P. 408. *Lewis v. Lady Parker*, 4 Ad. & E. 838; 6 Nev. & M. 294; 2 Har. & W. 46. *Cripps v. Davis*, 12 Mee. & W. 165.

Where a banker on whom a cheque is drawn is also the banker of the bearer, and the cheque is paid in; *primâ facie*, he is taken to have received it as agent of the bearer (*Boyd v. Emerson*, 2 Ad. & E. 104; 4 Nev. & M. 99), and will discharge himself by giving timely notice of nonpayment to the bearer. (Id.) But if, while he keeps the cheque, the drawer pays in money, the banker is bound to appropriate the money to the payment of the cheque, though a large balance is due to him from the drawer. *Kilsby v. Williams*, 5 B. & A. 815; 1 D. & R. 476. See *Woodland v. Fear*, 26 L. J. Q. B. 202; and *ante*, p. 128, n. [1].

Where a man to whom a bill is transferred sends it back as useless, that is an abandonment of his right as transferee, and he cannot, by getting the bill again into his hands, acquire a right to sue without a new transfer. *Cartwright v. Williams*, 2 Stark. N. P. C. 340. The holder cannot transfer after action brought, so as to give his transferee a right of action, provided the latter was aware that the action was commenced. *Marsh v. Newell*, 1 Taunt. 109. *Jones v. Lane*, 3 You. & C. 281. But if the transferee had no notice, the transfer is good. *Columbier v. Slim*, K. B. T. T. 12 Geo. 3, Chit. 9th ed. 217.

If the bill or note be under 5*l.*, no indorsement must be made after the bill is due. Each indorsement must be dated, and the date must be at, or not before, the time of making; must specify the name and place of abode of the indorsee, and be attested by one subscribing witness at least. 17 Geo. 3, c. 30, s. 1.

[1] Nor notes, after payment at maturity by the maker; they are extinguished, and

merely of the delivery, by Harmer to the plaintiff, of the bills so indorsed by Wood, and that the bill was delivered by Harmer to the plaintiff after it became due.

Wilde, C. J., delivering the considered judgment of the Court of Exchequer Chamber, said:—"The substantial answer which it is contended the plea gives to the declaration is, that the bill, at the time it became due, was then in the hands of, and the property of, one of the three acceptors, who were liable to pay it. The present liability to pay, and the present right to receive, the amount of the bill concurring in the same person, operated as a payment and performance of the contract of acceptance, on which, consequently, no action could afterwards be maintained; and we are of opinion that this is a good ground of defence in substance. There is no doubt, that when a bill has been paid at maturity by a sole acceptor to a third person, who is the holder, no action can afterwards be brought on the acceptance; and it is equally certain, that if one of several joint-acceptors pays a bill at maturity to such third person, then the contract of acceptance is performed, and no action can be maintained upon it. It is true, in the latter case, the acceptor, who has paid the bill, may have a right of action

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cannot be transferred (55 Geo. 3, c. 184, s. 19), except promissory notes payable to bearer on demand, reissued by the original maker having taken out a license for that purpose. 55 Geo. 3, c. 184, ss. 14 & 24. Until a bill or note has been paid by the maker or acceptor, or on his behalf, it has not discharged its functions, and does not require a new stamp, though reissued after due, and after it has been paid by an indorser. *Callow v. Lawrence*, 3 M. & S. 95. *Morley v. Culverwell*, 7 Mee. & W. 174.

An accommodation bill, paid by the drawer at maturity, cannot be reissued by him. *Harpur v. Cowie*, 3 Q. B. 464; but see *Jewell v. Parr*, 13 C. B. 909; 22 L. J. C. P. 253, in error; 16 C. B. 684. *Purssord v. Peek*, 9 Mee. & W. 196.

A note payable on demand, which has been paid, cannot be reissued by the maker, although the indorsee have no notice that the note has been paid, or that payment has ever been demanded. *Bartrum v. Caddy*, 9 Ad. & E. 275; 1 Per. & D. 207.

"A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor." *Per Lord Ellenborough*, in *Callow v. Lawrence*, 3 M. & S. 95. See *Robertson v. Eden*, 1 B. & P. 398. *Jewell v. Parr*, 13 C. B. 909; *Patteson, J.*, in *Bartrum v. Caddy*, 9 Ad. & E. 275; 1 Per. & D. 207; and in *Williams v. James*, 15 Q. B. 498. Byles, 147; Bayl. 167.

Pywell drew on defendant, payable to his order, and indorsed to Taylor; defendant accepted the bill but did not pay it. Pywell took it up and indorsed it to the plaintiff:—It was urged that, after Pywell had once paid it he could not indorse it, its negotiability was at an end; but on cause shown, the court were clear that Pywell's payment did not terminate its negotiability, because his indorsement would make no person liable but himself, and defendant had never been exonerated. Rule discharged. *Callow v. Lawrence, supra.* In *Hubbard v. Jackson*, 3 C. & P. 134; 4 Bing. 390; 1 M. & P. 11, the holder had recovered at law against the drawer, and then the drawer, without consideration, indorsed the bill over to the plaintiff; but *Best, C. J.*, held, and the Court of Common Pleas confirmed his judgment, that the plaintiff might recover. But where the bill was drawn payable to a third person, was indorsed by him, dishonoured, and taken up by the drawer, who (the payee's indorsement still remaining) indorsed it to the plaintiff, it was held that the plaintiff could not recover against the acceptor; for, in this case, the drawer had no title to indorse, and the payee could not be rendered liable. *Beck v. Robley*, 1 H. Black. 89, n. See *Groves v. Key*, 3 B. & Adol. 313. Byles, 147.

If a bill or note be paid before its maturity, and nothing done upon it to mark such payment, an indorsement afterwards, before the time it would have become due, will give the indorsee, if he take it *bonâ fide* and for valuable consideration, the same right as if there had been no such payment. Bayl. 167. "A payment before it becomes due, however," *Lord Ellenborough* says, "I think does not extinguish it, any more than if it were merely discounted. A contrary *dictum* would add a new clog to the circulation of bills and notes, for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid; and if they do not, the holders of such securities cannot be affected by any payment made before they are due." *Burbridge v. Manners*, 3 Camp. 193. *Morley v. Culverwell*, 7 Mee. & W. 174. *See* 4 Ex. R. 11; 19 L. J. Q. B. 445. Bay. 167.

"Where a bill has been created according to the custom of merchants, as a real com-

against the other joint-acceptors for contribution, if the state of accounts between them, or the terms on which they have agreed with one another to become joint-acceptors, should afford ground for such an action; but the action would not be on a contract of acceptance, or on a bill, but upon a different contract arising out of the state of accounts between the joint-acceptors, or the terms on which they have agreed together to accept; and the right to bring it would not be capable of being transferred by the act of the parties, by indorsement of the bill or otherwise. If, however, the defendant Harmer, instead of becoming the holder, by giving value for it before it was due, and retaining it until it was due, had acquired it by paying the amount to a third person, being the holder when the bill arrived at maturity, there seems to be no doubt that all right of action upon the acceptance would have been extinguished; and it appears to us, on the authority of the case of *Freakley v. Fox*, 9 B. & C. 130, and on principle, that the fact of the defendant Harmer, one of the acceptors, being, at the time the bill became due, the holder, and entitled to receive as well as liable to pay the amount of the bill, operated, in respect of all the defendants, as a performance of the contract of paying the bill at maturity, and put an end to the contract of acceptance. The case was put in argument: Supposing there were three acceptors, and one, for the accommodation of the other two, purchases the bill during its currency, and retains it until after it is due; may he not indorse it, and give a right of action to his indorsee? We think the answer is, that he cannot give such right of action, but he may sue the other joint-makers for what may be due to him in respect of his having accepted for their accommodation, and protected them from payment of the bill; but he cannot transfer this, or any other right, against the joint-acceptors by indorsing the bill. For these reasons, we think the plea is a substantial answer to the count."

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mercial transaction, it is part of the general circulating medium of the country; and the acceptor after its issue stands, in regard of a re-transfer of it to him, in the same position as any other person. He may, indeed, pay it to discharge it; but discounting it is not paying it; and if he discounts it, he may reissue it. *Per Pollock, C. B.: Atterborough v. Mackenzie*, 25 L. J. Ex. 244.

A release at maturity, like a payment at maturity, operates as a complete extinction of the bill. But a premature release to a party liable on the bill will not discharge the releasee as against an indorsee for value before maturity of the bill, and without notice. *Dod v. Edwards*, 2 C. & P. 602.

After a partial payment at maturity by the drawer or any other party, the holder cannot recover of the acceptor more than the balance. *Bacon v. Searles*, 1 H. Black. 88, overruling *Johnson v. Kennion*, 2 Wils. 262; and see *Pierson v. Dunlop*, Cowp. 571. *Walwyn v. St. Quintin*, 1 B. & P. 654. *Reid v. Furnival*, 1 C. & M. 538; 5 C. & P. 499. For if that were not so, then if a drawer or indorser had paid the holder the whole amount of the bill, the holder might, nevertheless, sue the acceptor for the whole sum for which an action would lie at the suit of the party who had paid him. Bay. 174.

A question sometimes arises whether a bill has been paid or transferred. Though the holder give to a person taking up the bill a general receipt, importing that he has received payment, evidence is admissible to show that such person taking up the bill paid the money, not as agent for the acceptor or drawer, but as indorsee. *Graves v. Key*, 3 B. & Adol. 313. See *Hubbard v. Jackson*, 4 Bing. 390; S. C. 1 M. & P. 11.

An indorsement cannot be made for the transfer of less than the full amount appearing to be due upon the bill or note. Such an indorsement is not warranted by the custom of merchants, and would be attended with this inconvenience to the former parties, that it would subject them to a plurality of actions. *Hawkins v. Cardy*, 1 Ld. Raym. 360. It is conceived that the effect of such indorsement, when attempted, is to give the indorsee a lien on the bill, but not to transfer a right of action except in the indorsee's name. Byles on Bills, 126, 5th ed.; Bay. 138.

But if a bill or note be indorsed or delivered for a part of the sum due on it, and the limitation of the transfer do not appear on the instrument, the transferee is entitled to sue the maker or acceptor for the whole amount of the bill, and is a trustee of the surplus for the transferor. *Reid v. Furnival*, 1 C. & M. 538; S. C. 5 C. & P. 499. *See* 11 Ad. & E. 661; Car. & M. 57. Byles, 148; Bay. 350.

If the bill have been partly paid, either by the acceptor or by the drawer (who for this purpose is the agent of the acceptor) (*Bacon v. Searles*, 1 H. Black. 88), the bill may be specially indorsed for the part remaining due. *Hawkins v. Cardy*, 1 Lord Raym. 360; S. C. Carth. 466; and see *Johnson v. Kennion*, 2 Wils. 262; 12 Mod. 213; 1 Salk. 65.

VI. Of the Presentment for Acceptance.

(A) *When necessary.*

Philpott v. Bryant, 3 C. & P. 244.

Per Park, J. "Where bills are made payable after *date*, it is not necessary that they should be presented for acceptance as well as payment; *secus*, if payable after *sight*. And it is sufficient that the bill is presented at the place where it is made payable, notwithstanding the drawee may die before it becomes due, and his representatives may be ignorant of such bill existing."

Bills payable after date need not be presented for acceptance; *aliter*, when payable at *sight*.[1]

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[1] An immediate presentment for acceptance is not (Molloy, b. 2, c. 19, s. 16) necessary except upon bills payable within a limited time after sight: *per Eyre, C. J.*, and *Heath, J.*, 2 H. Black. 569, 570. No certain time is fixed within which this presentment must be made, but it should (*per Eyre, C. J.*, 2 H. Black. 592) be made within a reasonable time. What shall be deemed a reasonable time must depend upon the particular circumstances of each case. Keeping an inland bill a whole day, exclusive of the day of receiving it, without negotiating it or sending it for acceptance, is not necessarily an unreasonable delay. *Fry v. Hill*, 7 Taunt. 397; Byles, 131; Bayley, 224; Chit. 187, 10th ed.; Poth. 128; Marius, 46.

Presentment for acceptance is necessary if the bill be drawn payable at sight, or at a certain period after sight. Till such presentment there is no right of action against any party; and unless it be made within a reasonable time the holder loses his remedy against the antecedent parties. Byles, 153. *Muilman v. d'Eguino*, 2 H. Black. 565. *Fry v. Hill*, 7 Taunt. 397. *Shute v. Robins*, 1 M. & M. 133; S. C. 3 C. & P. 80. *Mellish v. Rawden*, 9 Bing. 416; S. C. 2 M. & Scott, 570. Although reasonable time in general, and reasonable time for giving notice of dishonour in particular, is clearly a question of law. Byles, 154.

Plaintiff on Friday, the 9th, at Windsor, twenty miles from London, received a bill on London at one month after sight for 100*l*. There was no post on Saturday; it was presented on the Tuesday. The jury thought it was presented within a reasonable time, and the court concurred. *Fry v. Hill*, 7 Taunt. 397. Byles, 154; Bay. 225.

A bill drawn by bankers in the country on their correspondents in London payable after sight, was indorsed to the traveller of the plaintiffs. He transmitted it to the plaintiffs after the interval of a week, and they, two days afterwards, transmitted it for acceptance. Before it was presented to the drawees the drawer had become bankrupt; the drawees consequently refused to accept. Had the bill been sent by the traveller to the plaintiffs, his employers, as soon as he received it, they would have been able to get it accepted before the bankruptcy. "This is," said *Lord Tenterden*, "a mixed question of law and fact, and in expressing my own opinion I do not wish at all to withdraw the case from the jury. Whatever strictness may be required with respect to common bills of exchange payable after sight, it does not seem more reasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them within a moderate time (for indefinite delay, of course, cannot be allowed) as part of the circulating medium of the country."

The jury concurred with his lordship that the delay was not unreasonable. *Shute v. Robins*, 1 M. & M. 133; 3 C. & P. 80. Bay. 224.

Where the purchaser of a bill on Rio Janeiro, at sixty days' sight, the exchange being against him, kept it nearly five months, and the drawee failed before presentment, it was held that the delay was not unreasonable. The jury were directed by *Tindal, C. J.*, to consider whether there had been an unreasonable delay on the part of the plaintiff, and in doing so to regard the situation and interest, not only of the drawer, but also of the holder. The jury found for the plaintiff; and, after argument on a rule for a new trial, and time taken to consider, the court held the direction and verdict to be right, and discharged the rule. *Mellish v. Rawden*, 9 Bing. 416; 2 M. & Scott, 570.

But a bill of exchange, payable after sight, was drawn in duplicate on the 12th August, in Newfoundland, and not presented for acceptance in London till Nov. 16th, and no circumstances were proved to excuse the delay:—It was held unreasonable, the court laying some stress on the fact that the bill was drawn in sets. *Straker v. Graham*, 4 Mee. & W. 721. Byles, 154; Mar. 2d ed. 16; Moll. b. 3, c. 5, s. 1; 1 Ld. Raym. 281.

Presentment should be made during the usual hours of business. Mar. 112; Byles, 155; Bay. 222. *See ante*, Banking-Hours, p. 132.

The holder may have put the bill into circulation without presenting it. "If a bill drawn at three days' sight," said *Mr. Justice Buller*, "be kept out in circulation for a year, I cannot say there would be laches; but if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of laches." *Muilman v. d'Eguino*, 2 H. Black. 565. "But this cannot mean," as said by *Tindal, C. J.*, "that keeping it in hand for any time, however short, would make him guilty of laches. It never can be required of him instantly on receipt of it, under all disadvantages, to put it into circulation. To hold the purchaser bound by such an obligation would impede, if not altogether de-

VII. Of Acceptance.

(A) *What it is, and its Effect.*[1]

(B) *By whom.*

stroy, the market for buying and selling foreign bills, to the great injury, no less than to the inconvenience, of the drawer himself." *Mellish v. Rawden*, 9 Bing. 416; 2 M. & Scott, 570; S.C. Bay. 232; Byles, 155.

The defendant indorsed in London, and remitted to the plaintiff at Paris, certain bills of exchange dated May; and drawn by A. of London, at thirty days' sight, on B. at Lisbon. The plaintiffs indorsed them to C. of Genoa, who also negotiated them; on their presentment for acceptance at Lisbon in August, B. refused to accept them, on the ground that the proper time for acceptance had expired, and that the drawer had become insolvent. The bills were, however, accepted; and on their dishonour, on presentment for payment, were paid by D. for the honour of C.; and the plaintiffs, as indorsers, paid the amount to D. The defendant's counsel contended that the plaintiffs were debarred from their remedy by the laches that had occurred; because, had the bills been sent to Lisbon directly, and not through the circuitous route of Genoa, they would have been accepted before A.'s credit was lost with B.

But *Gibbs, C. J.*, observed, "that it was not possible for the court to prescribe any particular space of time within which a bill, payable at or after sight, ought to be presented for acceptance:" he said, "that it was essential that all such bills should be presented, but that the period of such presentment was a point for the jury to decide; and that one thing absolutely necessary had been complied with in this case, namely, that the bills had been in circulation from the time they left London till their arrival in Lisbon, whereas, had they lain idle, the necessity of immediate presentment would have arisen." A motion for a new trial was therefore refused. *Goupy v. Harden*, 7 Taunt. 160; 2 Marsh. 454; S. C. Bay. 227.

Illness or other reasonable cause not attributable to the misconduct of the holder will excuse; but the holder must present, though the drawer have desired the drawee not to accept. *Hill v. Heap*, D. & R. (N. P. C.) 57.

The presentment must be made personally to the drawee, or to his authorised agent. Hence, to charge the drawer of an unaccepted bill, some actual evidence of a demand to accept on the drawee must be proved. It is not sufficient to call at the residence of the drawee and the acceptance to be refused by a person who was unknown to the person calling. *Cheek v. Roper*, 5 Esp. 175; Byles, 155; Chit. 272.

When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or not. It seems that he may demand twenty-four hours for this purpose (and that the holder will be justified in leaving the bill with him for that period), at least, if the post do not go out in the interim (Marius, 15 Com. Dig. Merch. F. 6. *Bellasis v. Hester*, 1 Ld. Raym. 281; Lutw. 1571; Bayley, 245); or unless in the interim he either accepts or declares his resolution not to accept. Bayley, 186. If more than twenty-four hours be given, the holder ought to inform the antecedent parties of it. *Ingram v. Foster*, 2 Smith, 242; Byles, 156. *Morrison v. Buchanan*, 6 C. & P. 18. *Russell v. Longstaff*, Dougl. 497. *Esdaill v. Sowerby*, 11 East, 116. *See* 1 C. & M. 637; 1 D. & L. 122; 16 L. J. Q. B. 437.

In case the bill is directed to the drawee in a particular place, it is to be considered as dishonoured if the drawee has absconded. *Anon.* 1 Ld. Raym. 743. But if he have merely changed his residence, or if the bill is not directed to him at any particular place, it is incumbent on the holder to use due diligence to find him out; and due diligence is a question of fact for the jury. *Collins v. Butler*, 2 Stra. 1087. *Bateman v. Joseph*, 12 East, 433. *Beveridge v. Burgis*, 3 Camp. 262. But if he has quitted the kingdom, it is sufficient to present the bill at the house. See *Browning v. Kinsen*, Gow. 81. *Phipson v. Kneller*, 4 Camp. 285.

Indorsee against Indorser of a Foreign Bill.—When the indorsement was made, Hynsen (a master of a ship) was in Jamaica, where the bill was drawn, but his residence was at Stepney. The bill was presented for acceptance, dishonoured, and protested, and then sent to Hynsen's house for payment, with notice of non-acceptance. Hynsen was not then in England, but the bill was shown to his wife, and the circumstances stated to her. It was urged, first, that notice should have been sent to Jamaica; and, secondly, that the presentment for acceptance was not sufficient: but *Lord Kenyon, C. J.*, overruled both the objections. Verdict for plaintiff. *Cromwell v. Hynson*, 2 Esp. 511. *Robins v. Gibson*, 3 Camp. 334.

If the drawer be dead the holder should inquire of his personal representative, and, provided he live within a reasonable distance, present the bill to him. Byles, 156; Chit. 192, 10th ed.; Bayl. 241.

[1] Absolute acceptance signifies, according to its tenor, an engagement by the drawee to pay the bill. *Clark v. Cock*, 4 East, 72. See *Reynolds v. Peto*, 11 Ex. 418; Byles, 157; Bay. 186; Kydd, 27; Chit. 199.

Prior to 19 & 20 Vic. c. 97, s. 6, the usual mode of making such acceptance was either by writing the word "accepted" only, or by merely writing the name at the bottom or across the bill. Now, however, it will be seen, *post*, p. 459, it is essential that the acceptance should be signed by the acceptor,

DAVIS v. CLARKE, 6 Q. B. 16.

John Hart drew a bill payable to himself or order, addressed to John Hart. H. J. Clarke wrote across this, "Accepted, H. J. Clarke."

The bill must be accepted by the drawee, or for his honour.[1]

The court held that Clarke could not be sued upon this acceptance, because, according to the mercantile rule, an acceptance can be made only by the party

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or some person duly authorised by him.

In France, the holder cannot legally refuse an acceptance made by any other equivalent words, as "*Je ferai honneur*," "*Je prierai*," "*J'acquitterai*," provided the signature of the drawee be added. Pardessus, 366, 367, 369.

The meaning of the word "inland," as applied to bills or notes, is defined by 19 & 20 Vic. c. 97, s. 7; id. c. 60, s. 12.

As to what is deemed a foreign bill under the stamp law, *see* 17 & 18 Vic. c. 83, ss. 3, 4.

If a banker refuse to pay a bill accepted by a customer, payable at the banker's, when he has sufficient funds in hand, the customer may sue the banker (*Marzetti v. Williams & others*, 1 B. & Adol. 415), at least if he be in the habit of accepting bills payable there. The banker will be liable to the action, though the customer did not pay in the funds until the day when the note or bill was presented, if there was a sufficient interval for the clerks of the establishment to have acquainted themselves with such payment. The sufficiency of such interval is a question for the jury; and if the jury think an interval of one or four hours sufficient, the court will not say it is not. *Marzetti v. Williams & others, supra.* A bill left by the holder with the banker on whom it is drawn, or at whose house it is payable, is in a course of presentment during the whole time it is so left; and if he receive funds a sufficient interval before he returns it unpaid, he will be liable to an action by his customer. *Whittaker v. the Bank of England*, 1 C., M. & R. 744. But the cheque or bill must be presented during the usual banking-hours. (Id.) *See* 6 C. & P. 700; 1 Gale, 54. *Williams v. Everett*, 14 East, 582. *Yates v. Bell*, 3 B. & A. 643. *Wedlake v. Hurley*, 1 C. & J. 83. *De Bernales v. Fuller*, 14 East, 590, n; 2 Camp. 426. *See ante*, Bankers, p. 119.

Although there cannot be two acceptances on the same bill except for honour, yet if such a second acceptance be on the bill, it may amount to a guarantee. *Jackson v. Hudson*, 2 Camp. 447. *Gardner v. Walsh*, 4 E. & B. 83. *See* 2 Taunt. 106; 1 Ex. 78. *Post*, Guarantee.

If the drawee of a foreign bill drawn in sets accepts both sets, and they are afterwards in the hands of two different holders, he may become liable to each. See *Holdsworth v. Hunter*, 10 B. & C. 451. *Perreira v. Jopp*, id.; Bay. 171; Chit. 105. *Parke, B.*, "It is the duty of a person taking one of several parts of a bill to inquire after the others." 7 Bing. 284.

An acceptance admits the (*Porthouse v. Parker & others*, 1 Camp. 82) ability of the drawer to make the bill, and, if made after sight of the bill, his (*Wilkinson v. Lutwidge*, Stra. 648) signature, an indorsement admits the ability and (*Lambert v. Park*, Salk. 127; Ld. Raym. 443; 12 Mod. 244; Holt, 117) signature of every antecedent party.

But an acceptance, though made after sight of an indorsement, does not admit the ability or (*Smith v. Chester*, 1 T. R. 654) signature of the indorser. Nor does it admit the indorsement of the drawer where the bill is payable to the drawer's order (*Robinson v. Yarrow*, 7 Taunt. 455); and if such bill import to be drawn and indorsed by procuration, though the acceptance admit the procuration as to the drawing, it does not as to the indorsement. (Id.) Neither can the acceptor be allowed to defeat the indorsement by setting up the infancy of the payee. *Taylor v. Croker*, 4 Esp. 187. *Jones v. Darch*, 4 Price, 300. *Smith v. Mercer*, 6 Taunt. 76. *Cocks v. Montesnis*, 9 B. & C. 902; Bay. 313; Byles, 170, 171.

The acceptance of a bill, drawn and indorsed in the name of a really existing person, is no admission of the handwriting or capacity of the *indorser* (*Smith v. Chester*, 1 T. R. 655. *Cardwick v. Vickery*, Dougl. 653, n.), unless at the time of the acceptance the drawer knew of the forgery, and intended that the bill should be put into circulation by a forged indorsement. *Beeman v. Duck*, 11 Mee. & W. 251. So, where the drawing is by procuration, the authority of the agent to draw is admitted, but not his authority to indorse. *Robinson v. Yarrow*, 7 Taunt. 455; 1 Moore, 150. But where the bill is drawn in a fictitious name the acceptor undertakes to pay to an indorsement by the same hand. *Cooper v. Meyer*, 10 B. & C. 468; 5 M. & R. 387. *Beeman v. Duck*, 11 Mee. & W. 251. And see *Taylor v. Croker*, 4 Esp. 187. *Bass v. Clive*, 4 M. & S. 13; 4 Camp. 78. It seems that a bill drawn and indorsed in a fictitious or forged name, to the knowledge of the drawer, should be declared on as payable to bearer. See *Beeman v. Duck*, 11 Mee. & W. 251. Byles, 171.

If a party to a bill, on being asked if it be his own handwriting, answer that it is, and will be duly paid; or, if he has paid several other bills accepted in the same handwriting, he cannot afterwards set up as a defence forgery of his name, for he has accredited the bill and induced another to take it. *Leach v. Buchanan*, 4 Esp. 226. *Barber v. Gingell*, 3 id. 60. *Jones v. Ryde*, 1 Marsh. 159, 160. *Price v. Neal*, cited id. See *Pickard v. Sears*, 6 Ad. & E. 469; Chit. 206; and vol. i. p. 128, Acquiescence.

[1] A bill can only be accepted by the drawee, and not by a stranger, except for honour.

addressed, or for his honour. "The last," said *Coleridge, J.*, "is not pretended, and the first cannot be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance; if the same, then the instrument is a promissory note, and not a bill of exchange."

(C) *Before Bill drawn.*[1]

Polhill v. Walter, 3 B. & Adol. 114. Where, indeed, the bill was not addressed to any one, but only indicated the place of payment, the acceptor was held liable, as having admitted himself to be the party pointed out by the place of payment. *Gray v. Milner*, 8 Taunt. 739. But this decision goes to the very verge of law. *See* the observations of *Patteson, J.*, in *Davis v. Clarke, supra* in text.

If the drawee be incompetent to contract—as, for example, by reason of infancy or coverture (Chit. 10th ed. 194)—the bill may be treated as dishonoured.

The act of one partner being considered as the act of his co-partners, acceptance by one for himself and partners, or in the name of the firm, will in general be a compliance with the request of the drawer. *See post*, Partners. See *Stephens v. Reynolds*, 29 L. J. Ex. 278. But if a bill be drawn upon several persons not in partnership, it should be accepted by all, and if not, may be treated as dishonoured. *Dupays v. Shepherd*, Holt's Rep. 297; Mar. 64. Acceptance will, however, be binding upon such as do make it. (Id.) Accordingly, where a bill was drawn upon the Allty Crib Mining Company, and accepted professedly by procuration, by one of several persons who carried on a partnership trade under that name, he was held personally responsible, and rightly described as the acceptor. *Owen v. Van Uster*, 20 L. J. C. P. 61.

Where goods were ordered by E., and were invoiced to "E. & Son," and a bill was drawn for the price on "E. & Son," the bill was accepted in the handwriting of the son, in the name of E. & Son. The son was not a partner, and it was alleged that he accepted the bill only as his father's amanuensis. The court held, that if the son had so conducted himself that the drawer of the bill might reasonably have believed, and did believe, that he was a partner, he was liable on the bill. *Gurney v. Evans*, 3 H. & N. 122.

As to bills of joint-stock companies with limited liability, the 19 & 20 Vic. c. 47, s. 31, enacts, "that if the officer of any limited company, registered, signs, or authorises to be signed, on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, &c., wherein its name is not mentioned in manner aforesaid" (*i.e.* with the word "limited" after the name of the company), "he shall be liable to a penalty of 50*l.*, and shall further be personally liable to the holder of the bill of exchange, &c., for the amount thereof, unless the same is duly paid by the company." Therefore, where a bill of exchange was addressed to a joint-stock company, registered under the 19 & 20 Vic. c. 47, with limited liability, but omitting the word "limited," and the secretary of the company, who had authority to accept bills for the company, accepted the bill in his own name, adding "secretary to the said company," it was held that the acceptance was intended as the acceptance of the company, and the defendant was accordingly personally liable to the holder of the bill, under the 31st section of the act. *Penrose v. Martyn*, 28 L. J. Q. B. 28.

In the case of acceptance by an agent of the drawee, it is incumbent on the agent to produce his authority, if required, to the holder, at the peril, in case of his refusal to produce it, of seeing the bill treated as dishonoured, and immediate proceedings taken accordingly. (Beawes, No. 86.) On the other hand, an acceptance per procuration, for a supposed principal, is notice to the holder of the character in which the party professes to accept, and imposes on him the duty of ascertaining whether this act is within the scope of the agent's authority. *Alexander v. Mackenzie*, 6 C. B. 766. *Owen v. Van Uster*, 10 C. B. 318. *Nicholls v. Diamond*, 9 Ex. 154. *Attwood v. Munnings*, 7 B. & C. 278. See *Mare v. Charles*, 5 E. & B. 978. It is doubtful whether the holder be, in any case, bound to receive an acceptance by an agent, since it increases the burden of proof which he must adduce if he be afterwards compelled to sue upon the bill. *Coore v. Callaway*, 1 Esp. 116. *Richards v. Barton*, id. 268.

There cannot be two or more separate acceptors of the same bill not jointly responsible.

[1] As the existing law is, that the acceptance of bills, both foreign and inland, must be by writing on the bill and signed (19 & 20 Vic. c. 97, s. 6; 1 & 2 Geo. 4, c. 78, s. 2), there may be a valid acceptance before the bill is drawn, by merely writing the signature across a blank bill stamp, and delivering it to another for the purpose of using it (*Montagu v. Perkins*, 22 L. J. C. P. 187. *Temple v. Pullen*, 8 Ex. 389. *Armfield v. Allport*, 27 L. J. Ex. 42); and it is no variance if the declaration on such a bill aver the acceptance to have been made subsequently to the drawing. *Molloy v. Delves*, 4 C. & P. 492. Such a bill may be filled up after bankruptcy and certificate of the acceptor. 22 L. J. Ex. 151.

Even before the more recent cases, and the 1 & 2 Geo. 4, c. 78, it was established that a mere promise by a debtor to his creditor, that if he drew a bill upon him for the amount of his demand he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn. *Johnson v. Collings*, 1 East. 98. *Clark v. Cock*, 4 id. 60. *Wynne v. Raikes*, 5

SCHULTZ v. ASTLEY, 2 Bing. N. S. 544; 2 Scott, 815; 7 C. & P. 99.

An acceptance may be written in blank.

In an action against the defendant as acceptor of several bills of exchange, it appeared that the defendant gave his acceptance in blank to M. H. Two of them afterwards, before they were filled up, and whilst they had no writing upon them, except the defendant's name, were signed and indorsed by a stranger to the defendant; another was filled up by a person named Thomas Wilson Richardson, as drawer and indorser, who, upon this occasion, signed as Thomas Wilson.

The court held, that such modes of drawing and indorsing did not invalidate the bills, and the defendant, by giving his acceptances, sanctioned the former; and, in the latter, the signature of the party, as Thomas Wilson, was not *primâ facie* a forgery.

(D) *After Due.*[1]

(E) *How made.*

(*a*) *Acceptance must be in Writing.*

Acceptance must be in writing.[2]

By 19 & 20 Vic. c. 97, s. 6, "no acceptance of any bill of exchange, whether *inland or foreign*, made after the 31st of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor, or some person duly authorised by him." May be in pencil. 5 B. & C. 234; 7 D. & R. 653.

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id. 514. *Milne v. Prest*, 4 Camp. 393; Holt, N. P. C. 181. *Ex-parte Bollin*, 3 Mont. & Ayr. 367. And it is now settled that there cannot be a verbal acceptance of a non-existing bill. *Johnson v. Collings, supra. Bank of Ireland v. Archer*, 11 Mee. & W. 383), although the bill be discounted by the drawer on the faith of a promise to accept. (Id.) See *Mendizabel v. Mockhado*, 3 Mee. & W. 841. *Smith v. Nixon*, 1 T. R. 269.

It seems, that in America a written promise to accept a nonexisting bill still operates as an acceptance, if a bill be drawn within a reasonable time afterwards. *Coolidge v. Payson*, 2 Wheat. 66. *Weston v. Clement*, 3 Mass. R. 1; Bayl. 105, Am. ed.; Chit. 286.

In France, where acceptances must be in writing, a promise to accept a bill before it is drawn is not binding; but if made while the bill exists, it is an engagement with the drawer upon which he may sue the other, if he have funds or other consideration for his promise. 2 Pardess. No. 362–416.

[1] An acceptance after the bill is drawn may be made even subsequent to the time appointed for its payment. *Jackson v. Pigott*, 1 Ld. Raym. 364; Cocks, 450; 12 Mod. 212. *Mutford v. Walcott*, id. 574; 1 Salk. 129. *Stein v. Yglesias*, 5 Tyr. 172; 1 C., M. & R. 565; 1 Gale, 98. It may also be accepted after a previous refusal to accept. *Wynne v. Raikes*, 5 East, 514; 2 Smith, 89, S. C.; Byles, 161; Bayl. 189; Chit. 387.

[2] So in France, and signed (Pardessus, 390); and in Ireland, by 9 Geo. 4, c. 24. The stat. 3 & 4 Anne, c. 9, s. 5, first enacted, that no acceptance of any inland bill of exchange should be sufficient to charge any person whatsoever, unless it were underwritten or indorsed in writing on the bill. See *Lumley v. Palmer*, 2 Stra. 1000; Rep. T. Hardwicke, 74. *Julian v. Shobrooke*, 2 Wils. 9. *Powell v. Monnier*, 1 Atk. 612. *Pillans v. Van Mierop, supra.* And, to remove all doubt, the 1 & 2 Geo. 4, c. 78, s. 2, was passed, which enacted, that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts. And by the above stat. of 19 & 20 Vic. c. 97, the same is extended to foreign bills; as to both, an acceptance to be valid must now be in writing on the bill and signed. *See* 2 B. & Adol. 478.

We have seen, *ante*, p. 457, the usual and regular mode of making an acceptance on the bill is by writing the word "accepted," and subscribing the drawee's name. Signature was not essential before the 19 & 20 Vic. c. 97, to a written acceptance (*Dufaur v. Oxenden*, 1 M. & R. 90); but it is so since this statute. If the bill be payable after sight, the day when accepted should also be expressed.

Anterior to the above statute it was held, that the drawee's name need not appear, and any words written by him upon the bill not putting a direct negative upon its request, as "accepted" (*Anon.* Comb. 401), "presented," "seen" (id.), the day of the month (1 Atk. 611), or a direction to a third person to pay it, was, *primâ facie*, a complete acceptance. *Reynolds v. Chettle*, 296. *Boddington v. Schleucher*, 4 B. & Adol. 752. *Robson v. Bennett*, 2 Taunt. 388. It is not even now necessary in pleading to aver that the acceptance was in writing. *Chalie v. Belshaw*, 6 Bing. 529; 4 M. & P. 275; Byles, 162.

(F) *Qualified Acceptance.*[1]

(G) *Conditional Acceptance.*

SMITH v. ABBOT, 2 Stra. 1152; S. C. by the name of SMITH v. SCARFFE, 7 Mod. 426.

An acceptance to pay when goods are sold is conditional.[2]

The defendant accepted a bill of exchange, to pay it when the goods consigned to him, and for which the bill was drawn, were sold, and the plaintiff declared on the custom of merchants. After a verdict for the plaintiff, it was moved in arrest of judgment that this acceptance, depending on the contingency of the sale of the goods, was not within the custom of merchants, or negotiable. But the court, on consideration, held it good.

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[1] An acceptance is either absolute or conditional, and either according to or varying from the tenor of the bill. The holder is entitled to require from the drawee an absolute engagement to pay according to its tenor and effect. A general acceptance, without any express words to restrain it, will be such an absolute acceptance.

If the drawer offer a qualified acceptance, the holder may either refuse or accept the offer. If he mean to refuse it, he may note the bill, and should give notice of the dishonour to the antecedent parties. If he intend to acquiesce in it, he must give notice of the nature of the acceptance to the previous parties; and, it should seem, must obtain their consent, or they will be discharged. Chitty on Bills, 201, 10th ed.; Marius, 68, 85; and see the observations of *Bayley, J.*, in *Sebag v. Abibol*, 4 M. & S. 466; 1 Stark. 79. *Fanshawe v. Peet*, 2 H. & N. 1. See *Rowe v. Young*, 2 B. & B. 244; 2 Bligh, R. 391. *Outhwaite v. Luntley*, 4 Camp. 170. But he must not protest or note the bill, or give a general notice of dishonour, for he would thereby preclude himself from recovering against the acceptor. *Sproat v. Matthews*, 1 T. R. 182. *Bentinck v. Dorrien*, 6 East, 200; 2 Smith, 336; S. C. Chit. 301.

Acquiescence in an acceptance at a longer date destroys the remedy against the prior parties, according to the Scotch law. Glen, 2d ed. 115. So it did according to the old French law. Poth. 49. The *Code de Commerce*, art. 124, avoids conditional acceptances, but allows acceptances for part of the sum, and acceptances varying in the place of payment. Art. 123. A varying acceptance, though void as to other parties, would be binding between the contracting parties. *Nougerier des Lettres de Change*, vol. i. p. 234, cited Byles, 165, n.

[2] Whether it be unconditional or not is a question for the court. *Sproat v. Matthews*, 1 T. R. 182. An acceptance "on condition of its being renewed until November 28, 1844, without interest, payable by me at Messrs. Williams & Deacons, bankers, London," was held to be a varying acceptance, binding on the acceptor, and that the bill was properly declared on as payable on the 28th November, 1844. *Russell v. Phillips*, 19 L. J. Q. B. 297; 14 Q. B. 891. Acceptances "to pay as remitted for" (*Bunbury v. Lissett*, 2 Stra. 1211), "to pay in cash for the cargo of the ship Thetis" (*Julian v. Shobrooke*, 2 Wils. 9), "after a navy bill was paid," have respectively been held to be conditional acceptances. So where, on the presentment of bills for acceptances, the drawer said he would have accepted them if he had had certain funds, which he had not been able to obtain from France, but that when he did obtain them he would pay the bill, this was held to amount to a conditional acceptance. *Mendizabal v. Machado*, 6 C. & P. 218; 3 M. & Scott, 841; Byles, 165; Bay. 199; Chit. 302.

Where a bill at sixty days after sight was accepted, with the following condition written after the word accepted, "payable on giving up bill of lading for seventy-six bags of clover-seed per Amazon," and the bill of lading was not delivered up until a day after the expiration of the sixty days, and it was then delivered up and payment demanded, it was held that the acceptor was liable. *Smith v. Vertue*, 30 L. J. C. P. 56; 7 Jur. N. S. 395.

The absolute written engagement cannot be so varied by a contemporaneous verbal agreement, even between the original parties. "This would be," says *Lord Ellenborough*, "incorporating with a written contract an incongruous parol condition, which is contrary to first principles." *Hoare v. Graham*, 3 Camp. 57. *Adams v. Wordley*, 1 Mee. & W. 374; 2 Gale, 29. And though the condition be written on a distinct paper, it cannot be available against an indorsee ignorant of the existence of such a paper. *Bowerbank v. Manteno*, 4 Taunt. 844. See *Webb v. Salmon*, 19 L. J. Q. B. 34; 18 id. 142. *Ford v. Boeck*, 17 id. 114. *Sed vide Brown v. Prance*, 23 L. T. 98.

Though, when the condition is performed, a conditional acceptance becomes absolute, yet in pleading it must be declared on as a conditional acceptance, with an averment that the condition has been fulfilled. *Langston v. Conroy*, 4 Camp. 176; 1 Marsh. 176; D. & R. (N. P. C.) 33. *Ralli v. Sarrell*, 1 D. & R. 33. *Swann v. Cox*, 1 Marsh. 176.

There may be an acceptance varying from the tenor of the bill, as where it engages to pay part of the sum. Hence in *Wegersloffe v. Keene*, 1 Stra. 214, a foreign bill for 127*l.* 18*s.* 4*d.* was drawn on the defendant, and he accepted it to pay 100*l.*, part thereof, he was sued upon this acceptance, and on demurrer to the replication insisted that a partial ac-

(H) *Payable at particular Place.*

(*a*) *An Acceptance payable at a Banker's is general, unless it further expresses that it is payable there, and there only.*

An acceptance payable at a particular place is general, unless it further expresses that it is payable there, and there only.[1]

By 1 & 2 Geo. 4, c. 78, "whereas, according to law as hath been adjudged, where a bill is accepted payable at a banker's, the acceptance thereof is not a general, but a qualified acceptance; and whereas a practice hath very gradually prevailed among merchants and traders so to accept bills, and the same have among such persons been very generally considered as bills generally accepted, and accepted without qualification; and whereas many persons have been, and may be, much prejudiced by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience by giving such notice as hereinafter mentioned, of their intention to make only a qualified acceptance thereof; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of August now next ensuing, if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at the banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place."

(I) *Cancellation of Acceptance.*[2]

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ceptance was not good within the custom of merchants; but the court held otherwise, and judgment was given for the plaintiff. And in *Petit v. Benson*, Comb. 452, a bill was accepted to be paid half in money and half in bills; and the question was, whether there could be a qualification of an acceptance, and it was proved by divers merchants that there might, for he that might refuse the bill might accept it in part, but that the holder was not bound to acquiesce in such acceptance. See *Brown v. Prance*, 22 L. T. 98. *Russell v. Phillips*, 19 L. J. Q. B. 197.

[1] In the celebrated case of *Rowe v. Young* (2 B. & B. 165), it was decided that a bill accepted payable at a particular place was a qualified acceptance. The statute cited in text has now settled that an acceptance payable at a banker's or other particular place is, as against the acceptor, a general acceptance, unless the acceptor express in his acceptance that the bill is payable there only, and not otherwise or elsewhere. An acceptance omitting the word "only," and stating the bill to be payable at a particular place, and not elsewhere, is a special acceptance. *Siggers v. Nichols*, 3 Jur. 34. *Blake v. Beaumont*, 4 Man. & G. 7. *Post*, Presentment for Payment.

[2] An acceptance once completed and issued cannot be revoked. Mar. 20. *Grant v. Hart*, 1 C. & P. 44. *Thornton v. Dick*, 4 Esp. 270 *Trimmer v. Odie*, Bayley, 167. But, although a drawee has written his acceptance on the bill with the intent to accept it, he may, before he has communicated such fact to the holder and parted with the bill, change his mind and obliterate his acceptance, and thereby relieve himself from liability. *Cox v. Troy*, *post*, p. 462; 1 D. & R. 38: *Laurence, J.*, 6 East, 201. "*La raison est*," says Pothier, "*que le concours de volontés qui forme un contrat est un concours de volontés que le parties se sont reciproquement déclarées; sans cela la volonté d'un partie ne peut acquerir de droit à l'autre partie, ni par consequent être irrévocable. Suivant ces principes pour que le contrat entre le propriétaire de la lettre et celui sur qui elle est tirée soit parfait, il ne suffit pas que celui-ci ait en pendant quelque temps la volonté d'accepter la lettre, et qu'il est écrit au bas qu'il l'acceptoit, tant qu'il n'a pas declaré cette volonté le contrat n'est pas parfait, il peut changer de volenté et rayer son acceptation.*" *See* Emerigon, c. 2, s. 4; Bay. 205.

Therefore, where a drawee has written his name on the bill with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or at least before the fact of acceptance is communicated to the holder. *Cox v. Troy*, *post*, p. 462. See *Bentinck v. Dorrien*, 6 East, 194; 2 Smith, 337. *Sproat v. Matthews*, 1 T. R. 182; Marius, 20. *Novelli v. Rossi*, 2 B. & Adol. 757. *Warwick v. Rogers*, 5 Man. & G. 340. A banker cancelling an acceptance without due care is liable to an action at the suit of the holder for the special damage

Cox v. Troy, 5 B. & A. 474; 1 D. & R. 38.

The drawee may cancel his acceptance before parting with the bill.

A bill on defendant and Co. was put into their bill-box for acceptance, the 24th of May, 1820. They wrote an acceptance upon it, and dated it the 24th of May, 1820. The bill was not called for until the 27th of May, and before that time the acceptance was erased by inking it over. When or by whom that was done did not appear. Plaintiff brought an action, on the ground that the writing the acceptance bound the drawee, and that he could not afterwards cancel his acceptance; but on a case reserved, the court were clear the acceptance might be cancelled at any time before it was delivered to the drawer.

(J) *By Waiver of Acceptance.*

(*a*) *The Acceptor may be Discharged from his Liability by Parol.*

Whatley and others v. Tricker and others, 1 Camp. 35.

The acceptor may be discharged from his liability by parol.[1]

Action by indorsee against acceptors of an accommodation bill of exchange. It appeared, at a meeting of the defendant's creditors, the plaintiffs had said, "they looked to the drawer, and should not come upon the acceptors;" in consequence of which the defendants had assigned over their property for the benefit of their creditors. The drawer became insolvent, and the plaintiff sued the defendants. On the question whether they were discharged, *Lord Ellenborough, C. J.*, told the jury to consider whether the renunciation was absolute

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actually sustained by the cancellation. *See Wilkinson v. Johnson*, 3 B. & C. 428.

But a cancellation of the acceptance by mistake made by other parties does not destroy the bill. *Raper v. Birkbeck*, 15 East, 17; but see *Davidson v. Cooper*, 11 Mee. & W. 776; Byles, 168; Chit. 308, 309; Marius, 83; Molloy, 62, c. x. pl. 28; 1 Pard. 401.

[1] We have already seen that a simple contract may before breach be varied or discharged without a deed, and without consideration; but after breach there can be no discharge except by deed, or upon sufficient consideration. *See* vol. i. p. 88, Accord and Satisfaction; Com. Dig. Action on the case in *assumpsit*. *Fitch v. Sutton*, 5 East, 230. To this principle bills and notes form an exception; and the liability of the acceptor or maker, though complete, may be discharged by an express renunciation of his claim on the part of the holder. Byles, 168.

"This law merchant," said *Mr. Baron Parke*, "being introduced into this country, and differing very much from the simplicity of common law, probably at the same time was introduced into it that rule which the plaintiff's counsel quoted from Paillet, that by the laws of foreign countries there may be a release and discharge from the debt by express words, although unaccompanied with satisfaction, or any solemn instrument. That appears to be the law of France, and probably it was for that reason adopted. At all events it is too late now to say this is not a branch of the law merchant with respect to bills of exchange. The stat. 3 & 4 Anne, c. 9, put promissory notes entirely on the same footing as bills of exchange, and the same law applies to them. Now bills of exchange and promissory notes differ from other contracts at common law in two important particulars. In the first place they are assignable, whereas choses in action at common law are not. In the second place the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In these two important particulars bills of exchange differ from contracts at common law, and in those same particulars promissory notes are put on the same footing by the statute of Anne. Therefore we think the same law applies to promissory notes as applies to bills of exchange, and that was considered by the court, although their opinion was not necessary to be expressed to that extent in order to decide the case in *Mayhew v. Kerr* (not reported), a case which was tried before me, in which there was such a plea on the record that a promissory note was recorded and discharged by parol." *Foster v. Dawber*, 6 Ex. 839.

No delay in calling upon the acceptor will exonerate him. Nothing short of an express discharge will suffice. *Dingwall v. Dunster*, Dougl. 235; and *Black v. Peel* and *Walpole v. Pulteney* therein cited. *Anderson v. Cleveland*, 13 East, 430, n. *Farquhar v. Southey*, M. & M. 14; 2 C. & P. 497. *Adams v. Gregg*, 2 Stark. 531. *Stephens v. Thacker*, Peake, 187. So it has been held that a right to sue the drawer may be waived. *Delatorre v. Barclay*, 1 Stark. 7. See *Cartwright v. Williams*, 2 Stark. 340. *Adams v. Gregg*, id. 531. *Steale v. Hamer*, 15 L. J. Ex. 217. *Stephens v. Thacker*, *supra*.

If the renunciation be not express and for the whole amount, there must be a consideration. *Parker v. Leigh*, 2 Stark. 228.

or conditional: if it was absolute, defendants were clearly discharged from all liability; if, on the contrary, it was only conditional, or, in other words, that they intended only to say that they should look to the drawer in the first instance for satisfaction, then the acceptors were clearly liable. Verdict for plaintiffs.

(K) *Discharge of Acceptor by substituted Security.*[1]

VIII. Acceptance supra Protest.[2]

(A) *Liable on Default of Drawee.*

Hoare v. Cazenove, 16 East, 391.

A person who accepts for honour is only liable if the original drawee does not pay.[3]

A foreign bill was drawn on A. B. They refused acceptance, and it was protested for non-acceptance. Defendant accepted it for the honour of the first indorsers, but did not pay, and the action was thereupon brought. Defence, that it had not been presented for payment when due to A. and B., nor protested for non-payment by them. A verdict was found for the plaintiff, subject to the opinion of the court. The facts now came before them.

Per Cur. "The question before us depends upon the nature and obligation

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[1] The liability of the acceptor, as such, will also be varied or extinguished by taking from him a co-extensive security by specialty. But if the new security recognise the bill or note as still existing, it is not extinguished. *Twopenny v. Young*, 3 B. & C. 208; 5 D. & R. 259, S. C.; Byles, 170.

Taking a fresh bill from the acceptor as a collateral security will not discharge the drawer (*Pring v. Clarkson*, 1 B. & C. 14), unless there be a bargain to give time. (Id.)

Taking the separate notes of one of several partners at distant dates, as a collateral security, will not discharge the others, if the party insist at the time that it shall not prejudice his claim upon the partnership, and he do not bind himself to wait till the notes are due. *Bedford v. Deakin, Bickley and Hickman*, 2 Stark. 178; 2 B. & A. 210.

Though the partnership were dissolved before such notes were given (*Bedford v. Deakin, Bickley and Hickman*), otherwise, if he bind himself to wait. (Id.) Or, if they be agreed to be taken in satisfaction of the debt (*Thompson et al. v. Perceval et al.* 5 B. & Adol. 925). It is difficult to understand on what ground Lord Ellenborough could have thought, that the giving time to the one partner would have discharged the other two partners, who seem to have been principals, not sureties. The third proposition in the text founded on the case may therefore well be doubted. If the substituted bill is worthless, *e. g.* in consequence of its being a forgery (*Bell v. Buckley*, 11 Ex. 631) or being on unstamped paper (*Sweeting v. Halse*, 9 B. & C. 369), it will not discharge the parties from their obligation on the original bill.

A plea of waiver must state that the party waiving was the holder of the bill at the time of the waiver. *Steele v. Harmer*, 15 L. J. Ex. 217; S. C. 14 Mee. & W. 136. *See* Forms, B. & L. 312.

[2] This description of acceptance is frequently made upon a foreign bill, for the purpose either of promoting the negotiation of a bill when the drawee's credit is suspected, or to save the reputation, and prevent the prosecution, of some of the parties where the drawee either cannot be found, or is not capable of making himself responsible, or refuses to accept; and a stranger accepting such acceptance is called an acceptance for the honour of the person on whose behalf it is made, and it enures to the benefit of all who become parties subsequently to that person. Bayley, 178; 1 Ld. Raym. 88; Beawes, pl. 34; 1 Lutw. 899. These acceptances for honour are sometimes made on account of the person in possession of the bill at the time they are made, and sometimes on account of the drawer.

Acceptances for honour may be made by the drawee, or any other person. Thus, if a bill be drawn by A. on account of B., and the drawee be unwilling to accept on account of B., he (Beawes, s. 33, 2d edit. p. 421; Marius, 21), may accept for the honour of A., and on his account.

[3] Any person may, without the consent of the drawers or indorsers, accept the bill supra protest (5 Ves. 573); and the drawer, though he may not choose to accept on account of him in whose favour he is advised the bill is drawn, may nevertheless accept for the account and honour of the drawer; or, in case he do not choose to accept on account of the drawer, he may accept for the honour of the indorser: in which latter case he should immediately send the protest on which he made the acceptance to the indorser. Beawes, 23. It is said, that if the holder be dissatisfied with the acceptance supra protest, and insist on a simple acceptance, and protest the bill for want of it, the acceptor should renounce the acceptance made by him, and should insist on its being cancelled. Beawes, pl. 37; Chit. 344.

Even a bill previously accepted supra pro-

of an acceptance for the honour of the drawer and indorsee. If an acceptance in these terms be an engagement by the person giving it, that he will pay the bill when it becomes due, and entitles the holder to look to him in the first instance, without a previous resort to any other person, the plaintiff is in that case entitled to recover; but if such an acceptance be in its nature qualified, and amount to a collateral engagement only, that is, an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonouring this bill, and such dishonour by him should be notified by protest to the person who has accepted for the honour of the indorser, then the necessary steps have not been taken upon this bill, and the plaintiffs cannot recover. And such, after much consideration, we are of opinion is the case." *Postea* to the defendant.

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test, may be accepted by another person supra protest, in honour of some particular person. (Id. 42.) No one, however, should accept a bill under protest for non-acceptance for the honour of the drawer, before he has ascertained from the drawee his reason for suffering the bill to be protested; but if the acceptance be in honour of the indorser, such inquiry is unnecessary. (Id.)

It is said that the holder of a bill must receive an acceptance supra protest, if offered by a responsible person, it being of no importance to him whether it be accepted simply or under a protest, as the acceptor pays the charges, unless he had orders from the remitter not to admit of such an acceptance. But this opinion seems to be erroneous, for it has been adjudged that the holder need not acquiesce in any case. *Mitford v. Walcot*, 12 Mod. 410; Beawes, pl. 57.

An acceptance supra protest is as obligatory on the acceptor as if no protest had intervened, it being immaterial to the holder of a bill on whose account it is accepted. Beawes, 35; 1 Ld. Raym. 575; 12 Mod. 410; Burr. 1672. If the acceptance were for the honour of the bill or of the drawer, the acceptor is liable to all the indorsees as well as the holder; if in honour of a particular indorser, then to all subsequent indorsees.

The method of accepting supra protest is this:—The acceptor must personally appear with witnesses before a notary (whether the same who protested the bill or not is of no importance), and declare that he accepts such protested bill in honour of the drawer or indorser, &c., and that he will satisfy the same at the appointed time, and then he must subscribe the bill thus: "Accepted supra protest in honour of T. B.," &c. *Mitchell v. Baring*, 10 B. & C. 4; Beawes, 458. But this acceptance supra protest may be so worded that, though it be intended for the honour of the drawer, yet it may equally bind the indorser, and in such a case it must be sent to the latter. Beawes, 457 Mar. 88.

Doubts having arisen as to the day when the bill should be again presented to the acceptor for honour, or referee in case of need, for payment, the 6 & 7 Wm. 4, c. 58, enacts, "that it shall not be necessary to present, or in case the acceptor for honour or referee live at a distance, to forward for presentment till the day following that on which the bill becomes due."

If the acceptor supra protest thinks fit, on such protest for non-payment, to pay the bill pursuant to his acceptance supra protest, he should declare in presence of a notary, and before payment made, that he pays supra protest; and he should have such declaration duly entered on the notarial register at the time for and payment made, otherwise than in the presence of a notary, and after such protest cannot be recovered from the parties to whom it was made, notwithstanding any protest subsequently made and entered on the register. *Vandewall v. Tyrrell*, as stated by *Maule, J.*, in *Geralopulo v. Wieler*, 10 C. B. 690.

A person accepting a bill supra protest, either for the honour of a drawer or of an indorser, although without his order or knowledge, has his remedy against such person, who must indemnify him from any damage he may have sustained, the same as if he had acted entirely by his direction. Beawes, pl. 47; 1 T. R. 269. He who accepts a bill in honour of the drawer only has no remedy against any of the indorsers, because he accepts merely on the behalf of the drawer; but the acceptor for the honour of the drawer of a bill already accepted by the drawee, but protested by the holder for better security, may, when he has paid the bill, sue the drawer or drawee, though in the case of a bankruptcy of these parties, if the first acceptance were for the accommodation of the drawer, a court of equity will compel the acceptor supra protest first to resort to the drawer's estate. 5 Ves. 574. An acceptor for the honour of an indorser has no claim upon any party to the bill subsequent to him for whose honour he accepted; but the indorser, for whose honour he accepted, and all the prior parties, the drawer included, are bound to make satisfaction to such acceptor. Beawes, 35, 44, 49; Poth. pl. 113; Molloy, b. 2, c. 10, s. 24.

It is the usual and regular course of business, in commercial transactions, to deliver out a bill of exchange left for acceptance to any person who mentions the amount and describes any private mark or number upon it; and if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence

IX. Presentment for Payment, and Payment.

(A) *Necessary to charge Drawer or Indorsers.*

Heylyn v. Adamson, 2 Burr. 671; S. C. 2 Kenyon, 379.

Presentment to the acceptor or maker for payment is essential, in order to charge the drawer or indorsers of a bill or note.[1]

This was an action on an inland bill of exchange, drawn by R. C. and directed to W. D., dated the 13th of March, 1756, by which bill the said R. C. required the said W. D. to pay to the defendant, or his order, 100*l.*, at forty days after date, value received as advised by the said R. C., which bill was indorsed by the defendant to the plaintiffs, and was accepted by the defendant, but not paid by him.

On the trial the plaintiffs proved that the said R. C. made the bill, and that the defendant indorsed it to the plaintiffs; that the said defendant accepted the bill, and afterwards refused payment; and that on the day it became payable the plaintiffs caused it to be protested for non-payment, and soon after brought this action."

It not being proved on the trial that the drawer of the bill had any

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of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out.

[1] A personal demand on the drawee or acceptor is not necessary. It is sufficient if payment be demanded, at his usual residence or place of business, of his wife or other agent; for it is the duty of an acceptor, if he is not himself present, to leave provision for the payment. *Matthews v. Haydon*, 2 Esp. 509. *Brown v. M'Dermott*, id. 265. And it is sufficient if payment be demanded of an agent who has been authorised to pay, or has usually paid bills for the drawee. If a bill be payable at either of two places, the person taking it has the option at which to present it; and it cannot be imputed as laches in him that he presented it at the most distant, and that, if he had presented it at the other, it would have been paid. *Beeching v. Gower*, Holt, N. P. C. 313.

The bankruptcy or insolvency of the drawee is no excuse for a neglect to present for payment, for many means may remain of obtaining payment, by the assistance of friends or otherwise. *Russell v. Langstaffe*, Dougl. 496. *Warrington v. Furber*, 8 East, 245. *Nicholson v. Youchet*, 2 H. Black. 609. *Ex-parte Johnstone*, 1 Mont. & Ayr. 622; 3 Deac. & Chit. 433, S. C.; *Esdaile v. Sowerby*, 11 East, 114. *Lafitte v. Slatter*, 6 Bing. 623; M. & P. 457, S. C. *Camidge v. Allenby*, 6 B. & C. 373; 9 D. & R. 391. It has been held that the shutting up of a bank, when any demand there made would have been inaudible, is substantially a refusal by the bankers to pay their notes to all the world. *Howe v. Bowes*, 16 East, 112. But it was decided in the same case, in error, in the Exchequer Chamber, that an allegation in the declaration that the makers became insolvent, and ceased and wholly declined and refused then and thenceforth to pay at the place specified any of their notes, is insufficient, not being an allegation of presentment. 5 Taunt. 30; Bay. 246; Byles.

But it has been said, notwithstanding the observations of the court in the last case, that it cannot be necessary for the holders of the notes of a bank, which has notoriously stopped payment, to go through the empty form of carrying their notes up to the bank doors and then carrying them home again. Byles, 148. See *Robson v. Oliver*, 16 L. J. Q. B. 437. *Rogers v. Langford*, 1 C. & M. 637, when *Lord Lyndhurst* said: "It is possible, if you had returned the notes in due time that might have done instead of presentment." *See* also *Turner v. Stones*, 1 Dowl. & L. 122.

A presentment for payment is not necessary to charge a man who guarantees the due payment of a bill or note. *Hitchcock v. Humphrey*, 5 Man. & G. 559. *Walton v. Mascall*, 13 Mee. & W. 453; Bay. 288; 8 East, 242; Burge on Suretyship, 299.

When a party was surety for the vendee of goods, who had accepted a bill for the amount and then became bankrupt, it was held that the notorious insolvency of the vendee was sufficient so far to excuse the drawer as to enable him to charge the surety, unless it could have been shown that the bill would have been paid if duly presented; though it would have been otherwise in an action on the bill. *Warrington v. Furbor*, 8 East, 242; 6 Esp. 89.

The consequence of not duly presenting a bill or note is, that all the antecedent parties are discharged from their liability, whether on the instrument or on the consideration for which it was given; but not a person or a guarantor not a party to the bill. Bay. 287.

The acceptor or maker, however, still continues liable; and, indeed, presentment is not in general necessary for the purpose of charging him, the action itself being held to be sufficient demand, and that though the instrument be made payable on demand. *Rumball v. Ball*, 10 Mod. 38. *Frampton v. Coulson*, 1 Wils. 33. *Norton v. Ellam*, 2 Mee. & W. 461. But if a bill or note be payable at or after sight, it must be presented in order to charge the acceptor or maker. *Dixon v. Nuttall*, *post*, p. 466. So must a note payable at a particular place. *Rhodes v. Gent*, 5 B. & A. 244.

notice of such non-payment, or that any demand of the money had been made on him before the commencement of this action, it was objected "that the action would not lie against the defendant (who was the indorser of the bill) till a demand of payment had been made on the drawer, and as no such demand was proved by the plaintiffs, they ought to be nonsuited."

A verdict was given on the first count for the plaintiffs for 100*l.* damages, and 40*s.* costs, subject to the opinion of the court on the question whether, in an action brought on an inland bill of exchange by the indorsee against an indorser, no evidence being adduced of notice to the drawer of the bill, or of making any inquiry after him, was a ground of nonsuit. After argument,—

Per Cur. "We are all clearly of opinion, that in actions on inland bills of exchange, brought by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get, the money from the drawee or acceptor, but need not prove any demand of the drawer. And that in actions on promissory notes, brought by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get, the money from the maker of the note." *Postea* to the plaintiff.

(B) *In case of Note payable "at Sight."*

Dixon v. Nuttall, 1 C., M. & R. 307; S. C. 4 Tyr. 1013; S. C. 6 C. & P. 320.

There must be a presentment where the note is payable "at sight."[1]

"I promise to pay Mary Ann Dixon, or bearer, on demand, the sum of 16*l.* at sight, by giving up clothes and papers, &c.—N. Nuttall." In an action on the note, the declaration contained an averment that the defendant had sight of the note. It appeared that at the time the note was taken certain clothes were given up; but no evidence was adduced that the note was ever presented, or that the defendant ever saw it after it was made.

Per Cur. "The rule applicable to the construction of notes is, that you are not to reject words when you can give them a meaning and a sense. Now, we can give a meaning to the expression "at sight," which is, that before the defendant is called upon to pay the note he must see it. The meaning is, that the maker is not to be called upon to pay till the note has been presented to him. No presentment was here proved, and therefore the plaintiff is not entitled to recover." *See* Bay. 215.

(C) *Where payable "on Demand."*

Ward v. Evans, 2 Salk. 442; S. C. 2 Ld. Raym. 928; S. C. Com. 138.

A bill or note payable on demand, must be presented *within a reasonable time for payment.*[2]

This note being payable on demand, the court held, that the party receiving such note should have a reasonable time to present it for payment; such as the next day: he not being obliged, as soon as he receives it, to go straight for the money.

[1] The time which bills payable after sight have to run is computed from the date of the acceptance. *Campbell v. French*, 6 T. R. 200; 2 H. Black. 163; Pothier, pl. 13; Mar. p. 19, 2d ed.

A note payable at a certain period after sight is payable at that period after presentment for sight. *Sturdy v. Henderson*, 4 B. & A. 592. So, if some time after a refusal to accept a bill payable after sight the bill be accepted supra protest, the time is calculated, not from the date of the exhibition of the bill to the drawee, but from the date of the acceptance supra protest. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

[2] Bills and notes payable on demand, and cheques (*see ante*, p. 126) must be presented within a reasonable time. What is a reasonable time seems to be a question of law. *Tindal v. Brown*, 1 T. R. 168. *Darbyshire v. Parker*, 6 East, 3; 2 Smith, 195. *Parker v. Gordon*, 7 East, 385; 3 Smith, 358. *Haynes v. Birks*, 3 B. & P. 599. *Appleton v. Sweetapple*, Bayley, 192; 2 Dougl. 137. *Ante*, Bankers' Cheques, p. 123.

A man taking a bill or note payable on demand, or a cheque, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity. Though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received. *Ward v. Evans*, 2 Ld. Raym. 928; 6 Mod. 36. *Moore v. Warren*, 1 Stra. 415. *Fletcher v. Sandys*, 2 id.

(D) *Where "after Date."*[1]

(E) *Where Accepted; payable at a particular Place.*

GIBB v. MATHER, 2 C. & J. 254; 2 Tyr. 189; 8 Bing. 214; 1 M. & Scott, 387.

In an action upon a bill of exchange, it appeared that the bill was drawn payable "to my order in London," and addressed to Messrs. F. & Co., Liverpool, with the words "payable in London," added, and was accepted by the latter "at Messrs. J. & Co.'s, bankers, London;" but it was presented to the acceptors at Liverpool, who refused payment; of which due notice was given to the defendant, the drawer.

The 1 & 2 Geo. 4, only applies to acceptors, and not drawers; hence it must be presented where payable, to charge the drawer or indorser.[2]

Per Cur. "Before the passing of the stat. 1 & 2 Geo. 4, c. 78 (*ante*, p. 461), it was a subject of considerable doubt in the courts of law whether, in the case of a

1248. *Turner v. Mead*, 1 id. 416. *Hoar v. Da Costa*, 2 id. 910. The holder of a cheque has the whole of the banking-hours of the next day within which to present it for payment. *Hare v. Henty*, 7 Jur. N. S. 523. *Robson v. Bennett*, 2 Taunt. 388. *Rickford v. Ridae*, 2 Camp. 537. *Moule v. Brown*, 4 Bing. N. C. 266; 5 Scott, 694.

A bill of exchange payable on demand ought, if the parties live in the same place, to be presented the next day after the payee has received it. If the bill must be sent by post to be presented, it ought to be posted on the day next after the day on which it was received, and the person who receives it by post, that he may present it, should do so on the day next following the day on which he receives it.

A common promissory note, payable on demand, differs from a bill payable on demand or a cheque in this respect—the bill and cheque are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note, payable on demand, is very often originally intended as a continuing security, and afterwards indorsed as such. *Brooks v. Mitchell*, 9 Mee. & W. 15. It is, therefore, conceived that a common promissory note, payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received in order to charge the indorser, and that when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury whether, under all the circumstances, the delay of presentment was or was not unreasonable. Byles, 154; Chitty, 263, 10th ed. As to the presentment of bank-notes, *see* p. 138.

[1] When a bill is made payable at a month or months after date, the computation must in all cases be by *calendar* and not by *lunar* months. *Cockeld v. Gray*, 3 B. & B. 106.

The inequality in the length of the respective months may sometimes occasion a difficulty; but it is said to be a rule not to extend the time at which the bill falls due beyond the month in which it would have fallen due had that month been of the length of thirty-one days. Thus, if a bill at one month be drawn on the 31st January, it will be due on the 28th February, and, with the days of grace, payable on the 3d March. Marius, 75; Kydd, 4.

A bill (*Coleman v. Sayer*, 1 Barnard, 303) or note (*Brown v. Harraden*, 4 T. R. 148) importing to be payable within a limited time after a certain event, or on a future given day (*Coleman v. Sayer, supra*), or at sight, is not, in fact, payable until two days after the expiration of the time, nor, unless the third be a day of public rest, until three. *Tassell v. Lewis*, 1 Ld. Raym. 743. The three days are allowed for each instalment in a note so payable. *Oridge v. Sherborne*, 11 Mee. & W. 374.

The words "after sight" are equivalent to "after acceptance;" for sight must appear in a legal way. If a note be made payable at sight, it must be presented before action brought against the maker. *Dixon v. Nuttall*, *ante*, p. 466.

A cancellation by mistake of an acceptance by a banker in London, at whose bank it is made payable by his customer, will not vacate the acceptance. *Novelli v. Rossi*, 2 B. & Adol. 757. Nor will it discharge the drawer or indorser. (Id.) And a banker so cancelling an acceptance does not become irrevocably liable to pay it: he may, therefore, when a party calls for payment or notice to him of the cancellation, indicate on the bill that it was cancelled by mistake. *Warwick v. Rogers and others*, 5 Man. & G. 340.

Action on a bill drawn by the plaintiff on I. Irving, and accepted by him; under his acceptance the defendant wrote, "Accepted, Jos. Hudson. Payable at," &c. The defendant was sued as acceptor. The plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further unless the defendant would become his surety; and that the defendant, in order to guarantee Irving's credit, wrote his credit on the bill. *Lord Ellenborough* said, that this was neither an acceptance by the drawee, nor by a person for the honour of the drawee, but that it was a collateral undertaking that the bill should be paid, and ought to have been declared upon as such. Nonsuit. And see *Bult v. Morrell*, 12 Ad. & E. 745.

It seems, however, that, after an acceptance supra protest for the honour of one party, there may be a similar acceptance for the honour of another. Beawes, s. 72, 2d ed. p. 422.

[2] Where a bill or note was made or accepted, payable at a particular place, it was

bill drawn generally, but accepted, payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration, and proving at the trial, a presentment for payment at the place where the drawer had, by his acceptance, made the bill payable. But the doubt which had been formed was confined to the case where the question arose between the holder and the acceptor. In cases between the indorsee and the drawer, upon a special acceptance by the drawer, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable, upon the dishonour of the bill by the acceptor. Such, then, being the state of the drawer's liability at the time the

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formerly a point much disputed whether a presentment at that place was necessary in order to charge the acceptor, maker, or other parties. At length it was decided in the House of Lords that an acceptance, payable at a particular place, was a qualified acceptance, rendering it necessary in an action against the acceptor to aver and prove presentment at such place. *Rowe v. Young*, 2 B. & B. 165; 2 Bligh, 391. This decision caused the passing of the 1 & 2 Geo. 4, c. 78 (*ante*, p. 461), by which we have seen it is enacted, that an acceptance payable at a particular place is a general acceptance, unless expressed to be payable there only, and not otherwise, or elsewhere. On this statute it has been decided that an acceptance is general, though the bill be made payable at a particular place by the drawer, and not by the acceptor. *Selby v. Eden*, 3 Bing. 611; 1 Moo. 511. *Fayle v. Bird*, 6 B. & C. 531; 9 D. & R. 639; 2 C. & P. 303. A declaration in an action against the acceptor, alleging a bill to be accepted payable at a banker's, need not aver presentment at the house of that banker. *Halstead v. Skelton*, 5 Q. B. 92. Since the statute, a bill drawn generally on a party may be accepted in three different forms—*i. e.* either first, generally; or, secondly, payable at a particular banker's; or, thirdly, payable at a particular banker's and not elsewhere. If the drawer accepts in the second form, payable at a banker's, he undertakes since the statute to pay the bill at maturity when presented for payment, either to himself or at the banker's. *Per Cur. Halstead v. Skelton*, 5 Q. B. 92. Byles, 182; Bayley, 401.

If the bill be drawn payable at a particular place, presentment must be made there in order to charge the drawer. *Parks v. Edge*, 1 C. & M. 429; 3 Tyr. 364; S. C. *Harris v. Parker*, 2 id. 370. *Walter v. Cubley*, 2 C. & M. 151; 4 Tyr. 87. *Saul v. Jones*, 28 L. J. Q. B. 37; Bayley, 408.

If the bill be made payable at a banker's a presentment there will suffice. *Saunderson v. Judge*, 2 H. Black. 509. *Harris v. Parker*, 3 Tyr. 370. And if the bill be accepted, payable at a banker's, which banker happens to become the holder at its maturity, that fact alone amounts to presentment, and no other proof is necessary. *Bailey v. Porter*, 14 Mee. & W. 44. If a bill be made payable in a particular town, a presentment at all the banking-houses there will suffice. (*Hardy v. Woodroofe*, 2 Stark. 319); if at one of two towns, a presentment at either (*Beeching v. Gower*, Holt, 313); if a particular house be pointed out by the bill as the acceptor's residence, a presentment to any inmate (*Buxton v. Jones*, 1 Man. & G. 83); or if the house be shut up, at the door will suffice. *Hind v. Allenby*, 4 B. & Adol. 624; 1 Mee. & W. 433. *Burge v. Legg*, 5 Mee. & W. 418. *Boehm v. Campbell*, Gow. 55.

Where a bill is addressed to the payee, with his private residence added, and is accepted by him, payable at his banker's in order to charge an indorsee, presentment at the banker's is necessary, and the presentment at the acceptor's place of residence is not sufficient. And the circumstance that there were no effects of the acceptor in the banker's hands at the time does not excuse the want of due presentment as against an indorser. *Saul v. Jones*, 28 L. J. Q. B. 37.

The stat. 1 & 2 Geo. 4, c. 78, does not extend to promissory notes. If, therefore, a note be in the body of it made payable at a particular place, it is still necessary to aver and to prove presentment there. *Sands v. Clark*, 8 C. B. 751. *Spindler v. Grellet*, 1 Ex. 384. *Vanderdonckt v. Thellusson*, 8 C. B. 812. *Saunderson v. Bowes*, 14 East, 500. *Howe v. Bowes*, 16 id. 112. *Rowe v. Young*, 2 B. & B. 165. *Williams v. Waring*, 10 B. & C. 2. *Emblin v. Dartnell*, 12 Mee. & W. 831.

But if the place of payment be merely mentioned in a memorandum, that is held to be only a direction, and not to qualify the contract, and consequently a presentment there is not essential. *Masters v. Barretts*, 8 C. B. 433. *Price v. Mitchell*, 4 Camp. 200. *Williams v. Waring*, 10 B. & C. 2; 5 M. & R. 9; S. C. *Trecothick v. Edwin*, 1 Stark. 468. *Selby v. Eden*, 3 Bing. 611. *Fayle v. Bird*, 6 B. & C. 531.

Indorsee against Indorser.—The bill was accepted, payable at Hammersleys', and there was no presentment there proved till after banking-hours; but after declaration delivered, defendant had applied to plaintiff for further time to pay the bill. Nonsuit, on the ground that no sufficient presentment was proved; but on rule *nisi* for new trial, and cause shown, the court thought it should have been left to the jury to say whether, at the time of the promise, defendant did not know there had been no due presentment, and on that account rule absolute. *Hopley v. Dufresne*, 15 East, 275. *Chapman v. Annett*, C. & R. 552. *Borrowdable v. Lowe*, 4 Taunt. 93.

statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange; but that it is confined in its operation to the case of the acceptors alone. The title of the act is, 'An Act to regulate Acceptances of Bills of Exchange;' and after reciting that it has been adjudged that, where a bill is accepted payable at a banker's, the acceptance thereof is not a general, but a qualified acceptance, but a general practice and understanding had prevailed amongst merchants that such acceptance was a general acceptance, it proceeds to enact that, after the passing of that act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place, by the words and in the manner directed in the act. The very reference in the statute to the adjudication by law, imports that the legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act."

(F) *When paid for Honour.*

By 6 & 7 Wm. 4, c. 58. "Whereas bills of exchange are occasionally accepted supra protest for honour, or have a reference thereon in case of need; and whereas doubts have arisen when bills have been protested for want of payment, as to the day on which it is requisite that they should be presented for payment to the acceptors or acceptor for honour, or to the referees or referee; and it is expedient that such doubts should be removed: Be it therefore declared and enacted, that it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that, if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place, other than in the city, town, or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due."

The 6 & 7 Wm. 4 allows presentment to acceptor for honour to be the day after the bill becomes due; and if that be Sunday or Good Friday, &c., then the following day.

By sect. 2 it is enacted, "that if the day following the day on which such bill of exchange shall become due shall happen to be a Sunday, Good Friday, or Christmas Day, or a day appointed by his Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of exchange shall be presented for payment, or be forwarded for such presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following such Sunday, Good Friday, Christmas Day, or solemn fast or thanksgiving.

(G) *At what Time of the Day.*

PARKER v. GORDON, 7 East, 385; 3 Smith, Rep. 358; 6 Esp. 41.

A drawee of a bill of exchange accepted it, payable at D. and Co's, his bankers. At the part of the town where D. and Co. lived, bankers shut up at six o'clock. The bill was not presented for payment until after six, when the shop was shut up, and the clerks gone. In an action against the drawer, *Lord Ellenborough* held that this was not a good presentment, and nonsuited the plaintiff; and on a motion for a new trial the court held, that if a party

Ought to be presented for payment during business hours.[1]

[1] *Per Bayley, J.* If a bill of exchange is presented after the usual hours, it is at the peril of the person presenting it, for if nobody is there it will not do; but if there is, then it is immaterial at what time it is presented. *Henry v. Lee*, 2 Chit. Rep. 124; *see* 1 Stark. 19 Ex. 475; 6 M. & S. 44.

took an acceptance payable at a banker's, he bound himself to present the bill during the banking hours, and therefore rule refused.

Lawrence and *Le Blanc, Js.*, said, the holder was not bound to take such an acceptance.

(H) *Usance.*[1]

(I) *Days of Grace.*

BROWN v. HARRADEN, 4 T. R. 148.

The rule allowing days of grace on bills applies also to promissory notes.[2]

Action by indorsee against indorser on a promissory note, dated the 13th of September, 1789, and payable the 2d of November. The declaration stated a presentment and refusal on that day. The defendant pleaded a tender on the 5th; and the plaintiff replied a bill of Middlesex, sued out on the 4th. *Rejoinder*, that the defendant was not liable to pay at the time the bill of Middlesex was sued out. *Surrejoinder*, that he was. On demurrer, and joinder thereon, the question was, whether three days were to be allowed on promissory notes; the court were of opinion that three days' grace should be allowed on promissory notes, since the effect of the statute 3 & 4 Anne, c. 9, was, that notes were wholly to assume the shape of bills; and that the cases cited (*Tindal v. Brown*, 1 T. R. 167; *Heylyn v. Adamson*, 2 Burr. 676; and *Grant v. Vaughan*, 3 Burr. 1524) showed clearly that the courts of Westminster had thought the analogy between bills and notes so strong, that the rules established with respect to the one ought to prevail with respect to the other; that the language of the

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[1] This is the common period fixed by the usage or custom of dealing between the country where a bill is drawn, and that where it is payable for the payment of bills of exchange. Story on Bills, s. 50. It means in some countries a month; in others, two or more months; in others, half a month. Id. s. 144. *See* id. s. 332. Half usance is always fifteen days. Marius, 93. An usance between London, Aleppo, Altona, and Amsterdam, Antwerp, Brabant, Bruges, Flanders, Geneva, Germany, Hamburgh, Holland, and the Netherlands, Lisle, Middleburgh, Paris, or Amsterdam, Rotterdam, and Rouen, is one calendar month; between London and the Spanish or Portuguese towns, two calendar months; between London and Genoa, Venice, or places in Italy, it is three calendar months. Bay. 245; Chit. 10 ed. 255; Byles, 150.

With the single exception of Russia, the new style is observed. Bayley, 201. In the case of bills drawn in a place using one style and payable in a place using another, if drawn payable at a certain period after date, they fall due as they would have done in the country in which they were drawn. Thus, a bill drawn Feb. 1st in London on St. Petersburgh at one month would be payable without the days of grace on March 1st, in our calendar; and as it was drawn on January 21st old style, it would fall due on February 21st in the Russian calendar. But if the bill were drawn payable at a day certain, or at a certain period after sight, the time must then be reckoned according to the style of the place in which it is drawn. Beawes, 444; Chit. 253, 10th ed.; Mar. 2d ed. 22; Bay. 244; Byles, 195.

[2] There are usually three in number allowed by the custom of merchants for the payment of bills and notes (except such as are payable on demand, or where no time of payment is expressed), beyond the day stipulated for payment on the face of the instrument, the security not actually becoming payable until the third day of grace. 3 Kent's Com. 100, 104, and notes; 2 Steph. Com. 164; Chitty on Bills, 374; Story on Bills, s. 343. *See* a table of days of grace, Chitty on Bills, p. 259, 10th edit.; Byles, 176.

The three days' grace allowed in this country are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace.

Where the third is a day of rest, the second is the proper day.

The days of public rest in England (39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15, ss. 1, 2; and in Ireland, 9 Geo. 4, c. 24, ss. 9, 10, 11), are Sunday, Good Friday, Christmas-day, and every day appointed by proclamation for solemn fast or day of thanksgiving.

Upon a bill or note payable within a limited time after sight, the time must be computed from its (Beawes, s. 252, 1st ed. p. 447; see *Campbell v. French*, 6 T. R. 200) presentment for acceptance; but if a bill be accepted for honour from the time of such acceptance (*Williams v. Germaine*, 7 B. & C. 468), and upon a bill or note payable within a limited time after the date; where it has no date (*Armitt v. Breame*, Ld. Raym. 1076; *Giles v. Bourne, post*) from the day it issued.

They are allowed on bills payable by instalments (*Orridge v. Sherborne*, 11 Mee. & W. 374. *Carlon v. Kenealy*, 12 id. 139); but are not on bills or notes payable on demand (Bayley, 187). Whether days of grace are allowed on bills payable at sight, seems yet undecided. *Dehers v. Harriott*, 1 Show. 163. *Coleman v. Sayer*, Barn. Rep. 303; 2 Stra. 829; *Janson v. Thomas*, 3 Dougl. 421.

preamble of the act was express; that it was the object of the legislature to put notes exactly on the same footing with bills, and that the enacting part pursued the intention.

(J) *To whom Payment must be made.*

(*a*) *To the Holder.*

MILNES v. DAWSON, 20 L. J. Ex. 81.

To whom payment must be made.[1]

To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that J. H., the drawer, indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held it without value or consideration; and that, after the bill became due, J. H. accepted certain scrip certificates from the defendant in full satisfaction and discharge of the bill. The

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Dixon v. Nuttall, 1 C., M. & R. 307; 6 C. & P. 320. The weight of authority has been considered to incline in favour of such an allowance. Chitty, 261, 10th edit. Byles, 152. And in Bay. 241, it is stated positively in the affirmative; cites Poth. pl. 12, 172; *see* 16 M. & R. 307.

A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties. *Wiffen v. Roberts*, 1 Esp. 261.

[1] Payment should be made to the holder and the real proprietor of the bill (*Roberts v. Tucker*, 16 Q. B. 560); payment to any other party is no discharge to the acceptor, unless, indeed, the money paid finds its way into the holder's hands, and the holder has treated it as received in liquidation of the bill. Chit. 393.

Where the defendant accepted a bill of exchange drawn by C., who indorsed it to his bankers, and they entered on the credit side of C.'s account, but the bill having been dishonoured, entered afterwards on the debit side, and a few days after the dishonour the defendant paid the amount of the bill to C., but omitted to take it out of the banker's hands, and C. subsequently paid it into the bank, on his general account, more than enough to cover all the items of the account preceding the bill item, and that item also; and the bankers, for a space of three years, treated the bill as paid, and they then sued defendant on his acceptance:—It was holden that he was not liable; and that the circumstance of the bankers proving the balance under a commission against their customer, without accepting the bills, afforded evidence that they no longer considered them as subsisting securities. *Field & others v. Carr*, 5 Bing. 13; 2 M. & P. 46; and *see* Bayl. 5th ed. 317, 318. See *Henniker v. Wiggs*, 4 Q. B. 792.

Payment to a wrongful owner may, under some circumstances, be therefore protected. If a bill or note payable to bearer, either originally made so or become so by an indorsement in blank, be lost or stolen, a *bonâ fide* holder may compel payment. Not only is the payment to a *bonâ fide* holder protected, but payment to the thief or finder himself will discharge the maker or acceptor; provided such payment were not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. *Raphael v. Bank of England*, 17 C. B. 161. Byles, 189, citing Chit. 291.

It does not appear to be settled whether part payment by the drawer to the holder will discharge the acceptor *pro tanto*, or whether the holder may, nevertheless, receive the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use. *Johnson v. Kennion*, 2 Wils. 262. *Jones v. Broadhurst*, 9 C. B. 173. See *Randall v. Moon*, 12 C. B. 261. *Jewell v. Parr*, 13 id. 509. *Walwyn v. St. Quintin*, 1 B. & P. 652. *Pierson v. Dunlop*, Cowp. 571. *Reid v. Furnival*, 1 C. & M. 538; 5 C. & P. 499. *Browne v. Rogers*, Dougl. 455. Perhaps the better opinion is, that the holder can only receive of the acceptor the amount of the bill, *minus* the sum paid by the drawer. *Hemming v. Brooke*, 1 Car. & M. 57. And in a recent case, *Lord Campbell* appears to have intimated that he considered it to be a presumption of law that a payment by the drawer is made for the benefit of the acceptor. *Williams v. James*, 15 C. B. 498; Byles, 191.

The payment by the drawer of an accommodation bill is a complete satisfaction of the bill. *Lazarus v. Cowie*, 3 C. B. 459.

Payment of a bill or note may not only be made by the drawee of the former or maker of the latter, but also by any other party to it, and even by a total stranger; and if it be made on account of the acceptor, and he either presently agree to it or subsequently adopt it. *Belshaw v. Bush*, 11 C. B. 191. See *Kemp v. Balls*, 10 Ex. 607. *Simpson v. Eggington*, id. 845. *James v. Isaacs*, 12 C. B. 791. *Phillips v. Warren*, 14 Mee. & W. 379.

With respect to inland bills, it has been much discussed whether the acceptor has the whole day for payment (Chit. 397): it seems that he has (Byles, 193). And though he should in the course of that day refuse payment, which refusal entitles the holder to give notice of dishonour, yet if he subsequently

plaintiff replied, that the bill was indorsed for value and consideration; and upon this issue the defendant had a verdict. The defendant having a verdict upon the above plea, the court ordered judgment to be entered *non obstante veredicto.*

Parke, B. "It is quite inconsistent with the negotiability of bills of exchange that the indorsee should transfer the property in the bill, and afterwards pay the amount, so as to affect the title of his indorsee. If the property in the bill passed, the right to sue passed also. Whether the plaintiff could have sued H. is another question, which we are not called on to decide; but I am inclined to think that he could have done so. A bill of exchange is a chattel, and the gift would be complete by delivery, coupled with an intention to

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on the same day make payment, the payment is good, and the notice of dishonour becomes of no avail. *Hartly v. Case*, 1 C. & P. 555; 4 B. & C. 339; 6 D. & R. 505; Byles, 192.

A tender by the acceptor, subsequent to the bill becoming due, cannot be supported *Hume v. Peplow*, 8 East, 168. *See*, as to drawer or indorser, *Walker v. Barnes*, 5 Taunt. 241; 1 Marsh. 36. *Soward v. Palmer*, 8 Taunt. 277; 2 Moo. 274. *Siggers v. Lewis*, 1 C., M. & R. 370; 4 Tyr. 847; 2 Dowl. 681; Chit. 341.

Payment of a bill or note before it is due will not interfere with the right of a *bonâ fide* indorsee to enforce repayment. Four days before note became due some person went to the bankers where it lay and paid it, and carried it away; it was not cancelled, nor any minute made upon it to denote such payment within the four days; it was indorsed *bonâ fide*, and for valuable consideration to plaintiff; and in an action by him against the payee, this payment was relied on, and it was urged that after payment it could not be negotiated. *Sed per Lord Ellenborough*, "That means payment by due course, not payment by anticipation. Had the note been due before plaintiff took it, he would have taken it away with all its infirmities; but here was nothing to awaken his suspicion. This payment does not extinguish it any more than the discounting would; whilst its time is running, it remains negotiable." Verdict for plaintiff. *Burbridge v. Manners*, 3 Camp. 193. *Morley v. Culverwell*, 7 Mee. & W. 174. If the holder constitutes any one of the parties liable to bind his executor and die, the appointment is equivalent to payment and a release. *Freakley v. Fox*, 9 B. & C. 130; 4 M. & R. 18. A premature release will not, any more than a premature payment, protect the releasee from liability to a subsequent holder without notice. *Dod v. Edwards*, 2 C. & P. 602.

But the payment of a note payable on demand will be a defence even against an indorsee for value without notice. *Bartrum v. Caddy*, 9 Ad. & E. 275; 1 Per. & D. 207; Byles, 193.

A payment after action brought will not prevent the holder from proceeding for his costs (*Toms v. Powell*, 6 Esp. 40; S. C. 7 East, 536); though if there be several actions, the one against the acceptor can be stayed on payment of the debt and costs in the action against himself. R. T. T. 1 Vic.

If the bill be paid, the payer has a right to insist on its being delivered up to him; but if it be not paid, the holder should keep it. Yet it has been decided that an agent is justified by the usage of trade in delivering it up on receiving a cheque, though the cheque be afterwards dishonoured. *Russell v. Hankey*, 6 T. R. 12. But the drawers or indorsers in such a case would be drawees, for they have a right to insist on the production of the bill, and to have it delivered up on payment by them. *Powell v. Roach*, 6 Esp. 76. See *Robinson v. Hawksford*, 9 Q. B. 52. *Lichfield Union v. Green*, 1 H. & N. 884.

The mere production of a bill from the custody of the acceptor is not *primâ facie* evidence of his having paid it, without proof of its having been once in circulation after it had been accepted. *Pfiel v. Vanbatenberg*, 2 Camp. 439.

The party paying a bill or note, we have seen, has a right to insist on its being delivered up to him (*Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860. *Powell v. Roach*, 6 Esp. 76. *Alexander v. Strong*, 11 L. J. Ex. 316); or if lost, that an adequate indemnity shall be given. 17 & 18 Vic. c. 125, s. 87. See *Ramuz v. Crowe*, 1 Ex. 172. *Crowe v. Clay*, 9 id. 604. But when the bill or note is not negotiable he cannot refuse to pay it till it is delivered up. *Wain v. Bailey*, 10 Ad. & E. 616; 2 Per. & D. 507.

It is usual to write a receipt on the back of bills; and it has been said that it is the duty of bankers to make some memorandum on bills or notes which have been paid. *Per Lord Ellenborough: Burbridge v. Manners*, 3 Camp. 194. A receipt on a bill or note duly stamped does not require an additional stamp. 55 Geo. 4, c. 184, sched.; 16 & 17 Vic. c. 59, sched. Letters by the general post, acknowledging the safe arrival of any bills of exchange, promissory notes, or any other securities for money, are exempted from stamp-duty. 55 Geo. 3, c. 184. A receipt on the back of a bill imports, *primâ facie*, that it has been paid by the acceptor. *Pfiel v. Vanbatenberg*, 2 Camp. 439. *Scholey v. Walsby*, Peake, 25.

A tender of part of the amount of an entire sum due on a bill or note seems not to be good even *pro tanto*. *Cotton v. Godwin*, 7 Mee. & W. 147. *Hesket v. Fawcitt*, 11 id. 356; Byles, 198.

give. Here the indorsement conferred the title to sue, and payment to the donor affords no answer. We cannot infer that it was indorsed after it was due. If, indeed, it had been shown that the plaintiff held the bill merely as agent for H., then the payment to H. would have sufficed; but there is nothing of the kind stated."

X. Payment supra Protest.[1]

XI. Protest and Noting.[2]

(A) *How made, and when Necessary.*

(B) *Where made.*

By 2 & 3 Wm. 4, c. 98. "Whereas doubts have arisen as to the place in which it is requisite to protest for non-payment of bills of exchange, which, on the presentment for acceptance to the drawee or drawees, shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts; Be it therefore enacted, that, from

Bills payable not at the residence of the drawee, if not accepted on presentment, may be protested for non-payment at that place.

[1] After a foreign bill has been protested for non-payment, any person may pay it (under protest) for the honour of the drawer, or of an indorser; and he is entitled to demand repayment, not only from the person for whose honour he made the payment (Beawes, pl. 53), but from all other parties who would have been liable to that person. Beawes, pl. 57. 2d ed. See *Garalopulo v. Wieler*, 10 C. B. 690.

[2] Noting is a minute made on the bill by the officer at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, and his charges for minuting (Kyd, 87); and is considered as the preparatory step to protest.

In Buller's *Nisi Prius*, 272, it is said: "The use of noting is that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made."

In *Leftley v. Mills*, 4 T. R. 174, *Buller, J.*, says: "With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace." This, however, is not with reference to any distinction between the time of noting the bill and that of formally drawing up the protest, but merely as furnishing an argument to show within what time payment must be made, and the argument is equally conclusive whether the party have the power of noting or protesting the bill on the last day of grace. Indeed the noting is, in effect, an incipient process.

A protest is usually made where the dishonour occurred. See *Mitchell v. Baring*, 10 B. & C. 4; 4 M. & M. 301; 4 C. & P. 35; 2 & 3 Wm. 4, c. 98, *supra* in text. If the drawer reside abroad, a copy, or some memorial of the protest, ought to accompany the notice of dishonour. Poth. 148; 1 M. & S. 288. But notice of the protest is not necessary if the drawer resides in this country, though, at the time of non-acceptance, he may happen to be abroad (*Cromwell v. Hynson*, 2 Esp. 511); nor if, at the time of dishonour, he had returned home to this country. "If," said *Lord Ellenborough*, "the party is abroad, he cannot know of the fact of the bill having been protested, except by having notice of the protest itself; but if he be at home, it is easy for him, by making inquiry, to ascertain that fact. *Robins v. Gibson*, 1 M. & S. 288; 3 Camp. 334. A copy of the protest need not in any case be sent. *Goodman v. Harvey*, 4 Ad. & E. 870; 6 Nev. & M. 372.

Proof of a protest of a foreign bill is excused if the drawer had no effects in the hands of the drawee, and no reasonable expectation that the bill would be honoured (*Legge v. Thorpe*, 12 East, 171; 2 Camp. 310); or if the drawer has admitted his liability by promising to pay. "By the drawer's promise to pay," observed *Lord Ellenborough*, "he admits the existence of everything which is necessary to render him liable. When called upon for payment of the bill he ought to have objected that there was no protest; instead of that, he promises to pay it. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary." *Gibbon v. Coggan*, 2 Camp. 188. *Patterson v. Beacher*, 6 Moore, 319. *Greenway v. Hindley*, 4 Camp. 52.

It is said, that when the drawer adds a request or direction that, in the event of the bill not being honoured by the drawee, it shall be returned without protest, by writing the words "*retour sans protet*," or "*sans frais*," a protest as against the drawer, and perhaps as against the indorsers, is unnecessary. 2 Pardess. No. 34; Chit. 114, 10th ed.

Inland bills may be protested for non-payment under the 9 & 10 Wm. 3, c. 17, and for non-acceptance under the 3 & 4 Anne, c. 9. But it has been held that a protest is unnecessary, except to enable the holder to recover interest (*Harris v. Benson*, 2 Stra. 910); and the practice (*Windle v. Andrews*, 2 B. & A. 696) is now settled that it is superfluous even for this purpose. Byles,

and after the passing of this act, all bills of exchange wherein the drawee or drawees thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not, on the presentment for acceptance thereof, be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawee or drawees expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which the bills of exchange would have become payable had the same been duly accepted."

XII. Notice of Dishonour.

(A) *To whom it must be given.*[1]

(B) *Form of Notice.*[2]

King v. Bickley, 2 Q. B. 419.

It is not necessary that it should state that the holder looks to the other party for payment.[3]

Notice of dishonour of a bill of exchange was given in the following terms: "I hereby give notice that a bill for 50*l.* at three months after date by A. upon and accepted by B., and indorsed by you, lies at No. 6 Ely Place, dishonoured." It was objected on the behalf of the defendant, that although the notice stated the bill to have been dishonoured, it did not tell the defendant that the plaintiff

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224; Bay. 264; Chit. 334, 335, and cases there cited.

A protest is hardly ever made for non-acceptance of an inland bill, though it is sometimes protested for non-payment. Kydd, 25; 2 & 3 Wm. 4, c. 98. Byles, 224. The loss of a foreign bill does not dispense with its being protested. Pothier, 445.

A protest is subject to an *ad valorem* stamp. 55 Geo. 3, c. 184.

[1] In general it is incumbent on the holder of a bill or note dishonoured, whether by non-acceptance or by non-payment, to give notice of that fact to the antecedent parties. *Maltass v. Siddle*, 28 L. J. C. P. 257. The requisites of notice and the consequences of neglect are much the same in both cases. The effect of neglect of notice is, that the party to whom it should have been given is discharged from all liability, whether on the bill or on the consideration for which the bill was paid. *Bridges v. Berry*, 3 Taunt. 130.

[2] It is difficult to reduce the cases to any rule. "If we are," said *Lord Denman, C. J.*, "to refer the question to a reasonable intendment, and what a man of business would naturally conclude from the words, we can hardly decide it without the intervention of a jury, whose opinions will naturally vary with the circumstances of each case; and if, on the other hand, the court must decide, on examination of the document, according to legal and grammatical rules of interpretation, we shall frequently give it a sense in which neither of the parties could have understood it. If we adopt the middle course, requiring at least a necessary implication, but qualifying these words by Lord Eldon's comment in *Wilkinson v. Adlem* (1 Ves. & B. 422), we have just seen that (if the reports be accurate) the same eminent judge, who gave them one sense in *Boulton v. Welsh* (3 New C. 688), may admit them to be susceptible of a sense directly opposite. See *Hedger v. Stevenson*, 2 Mee. & W. 799.

[3] Where the indorsee of a promissory note wrote to the indorser the following letter: "The note for 200*l.* drawn by H. & H., dated 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid: I therefore request you will let me have the amount forthwith:"—*Held*, not a sufficient notice of dishonour. *Boulton v. Welsh*, 3 Bing. N. C. 688. See *Houldsitch v. Canty*, 4 id. 411. But see *Grugeon v. Smith*, 6 Ad. & E. 499. *Hedger v. Stevenson*, 2 Mee. & W. 799. *Edmonds v. Cotes*, 2 Jur. 183.

The following notices have been held not to be valid:—"Messrs. Strange & Co. inform Mr. Price that J. B.'s acceptance, 875*l.*, is not paid. As indorser, Mr. Price is called upon to pay the money, which will be expected immediately." *Strange v. Price*, 10 Ad. & E. 125. "A bill for 30*l.*, dated 18th August, 1837, drawn and indorsed by R. E., upon and accepted by W. T., and indorsed by you, lies at my office, due and unpaid." *Phillips v. Gould*, 8 C. & P. 355. "The bill I took of you, 11*l.* 2*s.* 6*d.* is not paid up, and 4*s.* 6*d.* expenses, and the money I must pay immediately." *Messenger v. Southey*, 1 Man. & G. 76.

In *Hedger v. Stevenson*, 2 Mee. & W. 799, it was laid down, that if the notice discloses by a reasonable intendment, so that it would be inferred from it, by any man of business, that the bill had been presented to the acceptor, and had not been paid by him, it is sufficient, although it does not so state in terms. And in *Paul v. Joel* (27 L. J. Ex. 381, affirmed 28 id. 143; 3 H. & N. 455), a written notice in these terms was

looked to him for payment. The objection was overruled, and the point reserved. *Cur. ad. vult.*

Lord Denman, C. J. "As to the point in this case as to notice of dishonour, we have conferred with the other judges, and are of opinion that it is not necessary in express terms to inform the party whom it is intended to charge that he will be looked to for payment. We think that the sending notice of dishonour is itself sufficient for the purpose."

(C) *Mode of transmitting Notice.*

BURMESTER v. BARRON, 21 L. J. Q. B. 135; 17 Q. B. 828.

It is sufficient if due diligence be used in transmitting notice.[1]

Notice of dishonour of a bill of exchange for non-payment by the acceptor was sent by the holder to the drawer through the post, addressed "London," the bill itself being dated "London" simply. The drawer resided at Chelsea, and the notice never reached him. It was stated in evidence that, had inquiry been made of

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held sufficient:—"B.'s acceptance to J., 500*l.* due 12th January, is unpaid. Payment to Robarts & Co. is requested before four o'clock."

And the following notices have been held available:—

"B.'s acceptance to J., 500*l.* due 1st May, is unpaid. Payment to Roberts and Co. is requested before four o'clock," is good. *Paul v. Joel*, 28 L. J. Ex. 143.

"Your note has been returned dishonoured." *Edmonds v. Cotes*, 2 Jur. 183.

"Your bill, drawn on T. T., and accepted by him, is this day returned with charges, to which we request your immediate attention." *Grugeon v. Smith*, 6 Ad. & E. 499.

"Mr. Ellis (the maker) is unable to pay the note for a few days, but he says he shall be ready in a week, which will be in time for us. Only form to acquaint you." *Margeson v. Goble*, 2 Chit. R. 364.

"James Court's acceptance due this day is unpaid, and I request your immediate attention to it." *Bailey v. Porter*, 14 Mee. & W. 44.

"Bill for 30*l.*, drawn by S. on W., dishonoured, lies due as on other side (*Rowlands v. Springett*, 14 Mee. & W. 7), is due and unpaid." 27 L. J. Ex. 380.

"We beg to acquaint you with the non-payment of W. M.'s acceptance of J. W.'s draft of 29th December last, at four months, 50*l.*, amounting, with expenses, to 50*l.* 4*s.* 1*d.*, which remit to us in course of post without fail, or pay to Messrs. E." *Everard v. Watson*, 1 E. & B. 801.

Where a bill of exchange, indorsed in blank, was left by the indorsee at the office of R, an attorney, to be presented by him, and on being presented by R. was dishonoured, whereupon R. wrote to the drawer on the following day, describing the bill, and saying that it was returned dishonoured, and remained unpaid, and that he was desired to give notice thereof and subscribe his name and residence to the letter; this was held a sufficient notice of dishonour, though he did not state on whose behalf he applied, or where the bill was lying. *Woodthorpe v. Laws*, 2 Mee. & W. 109.

An error in the description of the bill or note, unless it be such as to mislead the party (*Bromage et al. v. Vaughan et al.* 16 L. J. Q. B. 10), or to render it uncertain as to the instrument to which it is intended to apply (*Shelton v. Braithwaite, post*, p. 477, n.), will not vitiate the notice. And if such uncertainty arise by reason of the existence of some other instrument to which the notice could apply, the defendant must prove it. (Id.)

Bromage et al. v. Vaughan et al. 16 L. J. Q. B. 10, Nov. 16th, 1846.—In an action against the drawer of a bill payable at the London Joint-Stock Bank, the notice of dishonour described the bill correctly as to date, amount, and parties, but stated it to be payable at the London and Westminster Bank. *Wilde, C. J.*, reserved the point, and, after motion for nonsuit and time taken to consider, the court said that if the misdescription were such as would mislead the defendant in respect of the bill intended, the notice was not vitiated thereby, and upon that principle, in absence of any evidence that defendant was misled, the rule refused. But see *Beauchamp v. Cash*, 1 D. & R. (N. P. C.) 3. And an inaccuracy as to the place where the bill is lying will not vitiate it. *Rowlands v. Springett*, 14 Mee. & W. 7. In case of a bill drawn in this country on persons residing in a foreign country, payable there, the form of notice of dishonour, and time of giving it, must be regulated by the laws of that country. *Rothschild & others v. Currie & others*, 1 Q. B. 43.

It is not necessary that a copy of the protest should accompany notice of the dishonour of a foreign bill. *Goodman v. Harvey*, 4 Ad. & E. 870; 6 Nev. & M. 372. But information of the protest should be sent. *Rogers v. Stephens*, 2 T. R. 713. *Gale v. Walsh*, 5 id. 239. *Robins v. Gibson*, 1 M. & S. 288.

[1] It suffices, in all cases, to send notice by post, properly directed (*Esdaile v. Sowerby*, 11 East, 117), even though the letter should miscarry (*Saunderson v. Judge*, 2 H. Black. 509. *Dobree v. Eastwood*, 2 Car. & P. 250); for it would be very unreasonable to make it incumbent on the holder to send in every instance a special messenger. *Saunderson v. Judge*, 2 H. Black. 509. *Kuft v.*

the acceptor, whose address was given on the bill, the drawer's address might have been ascertained.

Lord Campbell, C. J. "I lay down no general rule that such a notice as this is conclusively good. If the judge at the trial had been asked to leave to the jury the question of whether or not due diligence had been used, he would have done so. That course, however, was not taken. But it is said there was no evidence of due diligence. I think there was abundant evidence. The only address put upon the bill was 'London;' and the holder sent through the post-office a notice so addressed. That is evidence of due diligence. If the party sending notice of dishonour has done all that could reasonably be required of him, that is enough. I do not see that due diligence was not used, because, by going to the acceptor, or elsewhere, further particulars about the defendant might have been learned. There was evidence to justify the jury in finding that due diligence had been used, and I have no doubt they would have so found."

(D) *Place at which Notice to be given.*

CROSSE v. SMITH, 1 M. & S. 544.

Sending a verbal notice to the drawer's

Per Cur. Notice to the drawers of non-payment of a bill of exchange, by sending to their counting-house during the hours of business, on two successive

Weston, 3 Esp. R. 54. *Haynes v. Birks*, 3 B. & P. 602. *Parker v. Gordon*, 7 East, 385, 386; 3 Smith, 358; 6 Esp. 41. *Pearson v. Cranlan*, 2 Smith's Rep. 464. *Langdon v. Hulls*, 5 Esp. 157. *Dale v. Lubbock*, 1 Barnard, B. R. 119. And, indeed, there is considerable risk in sending notice by a private hand where there is a regular post, for if the notice arrive a day later by the former than by the latter the parties may be discharged. *Darbishire v. Parker*, 6 East, 8, 9; 2 Smith. 195. But it is reported to have been decided that the holder of a dishonoured bill is not bound to send to the drawer by the mail or first conveyance that sets out from the place where such holder resides; and it is sufficient, provided there be no essential delay, if he send notice by a private hand; and although such notice should thereby reach the drawer later on the same day than if it had been sent by the mail, he will not on that account be discharged. *Bancroft v. Hall*, Holt, N. P. C. 476. The safer course, however, is to send by the regular post.

If the notice to the drawer arrived too late through misdirection, it is for the jury to say whether the holder used due diligence to discover the drawer's address. *Esdaile v. Sowerby*, 11 East, 114. If the notice miscarry from the indistinctness of the drawer's handwriting on the bill, he will not be discharged. *Hewitt v. Thompson*, 1 M. & Rob. 543.

Where a witness said that the letter containing notice of dishonour was put on a table to be carried to the post-office, and that by the course of business all letters deposited on this table were carried to the post-office by a porter, *Lord Ellenborough* said, "You must go further; some evidence must be given that the letter was taken from the table in the counting-house and put into the post-office. Had you called the porter, and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done; but I cannot hold this general evidence of the course of business in the plaintiff's counting house to be sufficient." *Hetherington v. Kemp*, 4 Camp. 194. See *Hawkes v. Salter*, 4 Bing. 715. *Skilbeck v. Garbett*, 14 L. J. Q. B. 338. The post-marks in town or country, proved to be such, are evidence that the letters on which they are were in the office to which those marks belong at the time of the dates of such marks. *Kent v. Lowen*, 1 Camp. 177. *Fletcher v. Braddyll*, 13 Stark. 64. *Rex v. Johnson*, 7 East, 65. But they are not conclusive evidence. *Stocken v. Collins*, 7 Mee. & W. 515; 9 C. & P. 653. A duplicate original, or an examined copy, or verbal evidence of a written notice of dishonour, are admissible without notice to produce the original. *Ackland v. Pearce*, 2 Camp. 601. *Roberts v. Bradshaw*, 1 Stark. 28. *Kine v. Beaumont*, 3 B. & B. 288; Byles, 246; Bay. 489.

Though there be a general post, the holder may send notice by a special messenger; but if the notice be not communicated by the special messenger till after the day when it would have been conveyed by the post, we have seen it is insufficient. *Darbishire v. Parker*, 6 East, 3; 2 Smith, 195. *Bancroft v. Hall*, Holt's N. P. C. 476; Byles, 241.

Where there is no post, it is sufficient to send notice by the ordinary mode of conveyance, though notice by special messenger might arrive earlier, and therefore, in the case of a foreign bill, it is sufficient to send it by the first regular ship bound for the place to which it is to be sent; and it is no objection that, if sent by a ship bound elsewhere, it would by accident have arrived sooner, though the holder wrote other letters by that ship to the place to which the notice was to be sent. *Muilman v. d'Eguino*, 2 H. Black. 565.

days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing or sending by the post, though some of the drawers live at a small distance from the place. The counting-house is a place where all appointments respecting the business, and all notices, should be addressed. And it is the duty of the merchant to take care that a proper person be in attendance. Putting a letter into the post is only one mode of giving notice; but where both parties are residing in the same town, sending a clerk is a more regular and less exceptionable mode.

counting-house within the usual hours of business, is sufficient.[1]

(E) *Within what time Notice must be given.*

ROWE v. TIPPER, 22 L. J. C. P. 135; 13 C. B. 249.

Indorsee against indorser of a bill of exchange. The bill became due on Saturday, the 15th of Nov., and was dishonoured. The plaintiff, the holder, gave notice of dishonour to his indorser on the 17th; and on the 18th he gave notice to the defendant, who had indorsed the bill to the plaintiff's indorser, and who had not before received notice.

The holder must give notice within a reasonable time to all prior parties;[2] but he may avail himself of notice by other parties given within due time.[3]

Jervis, C. J. "The notice was not in sufficient time. If the holder of a bill of exchange seeks to avail himself of notice of dishonour given by him to a remote indorser, he must have given it within the time within which he would have been required to give it to his own immediate indorser; and he cannot avail himself of the laches of an indorser, to whom he may have given due

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[1] In *Goldsmith v. Bland* (cited in Bayley on Bills, 200, to prove notice of dishonour), the plaintiffs showed that they sent a clerk to the defendant's counting-house, near the Exchange, between four and five o'clock in the afternoon; nobody was in the counting-house. The clerk saw a servant-girl at the house, who said that nobody was in the way, and he returned, having left no message with her.

Lord Eldon, C. J., told the jury that if they thought the defendant ought to have had somebody in the counting-house at the time, he was of opinion that the plaintiffs had done all that was necessary by sending their clerk; that the notice was in law sufficient, if the time was regular.

A message left at the dwelling-house of a private person is also sufficient. *Honsego v. Cowne*, 2 Mee. & W. 348.

If a party, whose name is on a bill, direct a notice to be sent to him when absent at a distance from his residence, so that its transmission thither, and thence to the prior parties, will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will, it seems, not only be a good notice as against him, but also a valid notice as against prior parties. *Shelton v. Braithwaite*, 8 Mee. & W. 252.

[2] *Lysaght v. Bryant*, 9 C. B. 46; *Harrison v. Ruscoe*, 15 Mee. & W. 231.

[3] "The rule is, that the party, other than the acceptor or maker, sought to be charged on a bill or note, is entitled to notice of dishonour within a reasonable time. Where both parties live in the same town, it has been said that notice must be given in time to be received in the course of the day next after the dishonour, or after the party sending the notice had himself received notice of dishonour. Each indorsee has his own day. He is required to use due diligence; he is not bound to abandon all other business the instant he receives notice, and set about giving notice to others. To avoid going into nice distinctions as to the time of day at which he received notice, and as to how soon after he ought have sent off notice, the rule has been established, that he may wait till the next day, and then give notice. The rule, however, is, not that he is to have a day and no more, but that he is to have so much time as will enable him to give notice with due diligence, and no matter how much time has been occupied in giving notice, if there has been no want of due diligence, the notice will be in proper time." *Per Maule, J.: Rowe v. Tipper*, 22 L. J. C. P. 135; 13 C. B. 249.

Where the holder and the party to whom notice is addressed live at different places, it is sufficient to send off notice on the day next after the day of dishonour. "It is," said *Abbott, C. J.*, "of the greatest importance to commerce that some plain and precise rule should be laid down to guide persons, in all cases, as to the time within which notice of the dishonour of bills must be given. That time I have always understood to be the departure of the post on the day following that on which the party receives intelligence of the dishonour. If, instead of that rule, we are to say that the party must give notice by the next practicable post, we should raise, in many cases, difficult questions of fact, and should, according to the different local situation of

notice, to extend the time. For if he might, then, in cases of bills, where there are twelve or twenty indorsers, the holder might wait till the expiration of

parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated." *Williams v. Smith*, 2 B. & A. 496.

If the post does not go out on the next day, notice need not be posted till the day after, or till the next post day. Thus, where the plaintiff received intelligence of the dishonour on Thursday morning, at nine o'clock, though the post did not go out till nine o'clock at night, and no bag was made up on the Friday, but the plaintiff wrote on Saturday, *Lord Tenterden* said, "It suffices, in this case, that the plaintiff put the letter into the post on Saturday; for if he had done so on Friday, it would not have been forwarded till the Saturday night, and it is immaterial whether the letter lay in the post-office or in the plaintiff's hands till the Saturday" (*Gull v. Jeremy*, M. & M. 61). So, if the post goes out at an unseasonable hour in the morning, the holder is not bound to get up and write by the second post, but may wait for the third. Thus, where a bill was dishonoured on Saturday, in a place where the post went out at half-after-nine in the morning, it was held that it was sufficient notice of dishonour to send a letter by the following Tuesday morning's post. *Hawkes v. Salter*, 4 Bing. 715; 1 M. & P. 750. *Wright v. Shawcross*, 2 B. & A. 501, n. *Bray v. Hadwen*, 5 M. & S. 68.

Where both the parties live in the same town, or where they live in London, notice must be given in time to be received in the course of the day following the day of dishonour. *Scott v. Lifford*, 9 East, 347. *Haynes v. Birks*, 3 B. & P. 599. *Williams v. Smith*, 2 B. & A. 500. *Fowler v. Hendon*, 4 Tyr. 1002. And, therefore, though a letter be put into the post on the day after the dishonour, it will not be sufficient notice unless posted in time to be delivered the same day. *Lord Ellenborough:*—"Where the parties reside in London, each party should have a day to give notice. The holder of a bill is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonour. If you limit a man to a fractional part of a day, it will come to a question how swiftly the notice can be conveyed; a man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on the Monday, put in the letter on Tuesday afternoon, and the defendant does not receive notice till the Wednesday. If a party has an entire day, he must send off his letter conveying his notice within post-time of that day." *Smith v. Mullett*, 2 Camp. 208.

A person who puts the letter into the post on the day when it ought to be received, must show affirmatively that it was posted in time to be received on that day. *Fowler v. Hendon*, 4 Tyr. 1002. The post-mark is not conclusive evidence of the time when a letter is posted. *Stocken v. Collin*, 7 Mee. & W. 515.

It has been doubted whether, seeing that the acceptor of an inland bill has the whole of the day on which the bill falls due to pay it, notice of non-payment can be given till the day after. But it is now settled, that notice can be given at any time after demand on the day the bill becomes due. *Burbridge v. Manners*, 3 Camp. 193. *Ex-parte Moline*, 19 Ves. 216. *Hume v. Peploe*, 8 East, 169. "The other party," observed *Ld. Ellenborough*, "cannot complain of the extraordinary diligence used to give him information." And notice of dishonour may be given on the same day, though there be no actual refusal, if the house where the bill be payable be shut up, and no one be there. *Hine v. Allely*, 4 B. & Adol. 624.

A banker with whom a bill is deposited to receive payment is, for the purpose of notice, to be considered as a distinct holder, and has a day to give notice to his customer, and the customer another day to give notice to the antecedent parties. *Robson v. Bennett*, 2 Taunt. 388. *Langdale v. Trimmer*, 15 East, 291. *Bray v. Hadwen*, 5 M. & S. 68.

Where a bill passes through several branch banks of the same establishment, each branch may be considered as a distinct holder, entitled to receive and transmit notice as such. *Clode v. Bayley*, 12 Mee. & W. 51.

Where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man, requesting him to ascertain the indorser's residence, and received an answer to his letter, conveying the desired information, on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th forwarded the letter containing the notice of dishonour, it was held sufficient. "If," said *Lord Tenterden*, "the notice had been sent to the principal, he would have been bound to give notice on the next day; but it having been sent to the agent, he was not bound to give notice on the following day. A banker who holds a bill for a customer is not bound to give notice of dishonour on the day on which the bill is dishonoured (*Firth v. Thrush*, 8 B. & C. 387; 2 M. & R. 359); he has another day; and upon the same principle, I think, the attorney in this case was entitled by law to be allowed a day to consult his client."

Sunday, Christmas Day, Good Friday, a public thanksgiving, a fast-day, or any festival on which a man is forbidden by his religion to transact any secular affairs (for the law merchant respects the religion of different people), is not to be reckoned in computing the time within which notice of dishonour should be given. 7 & 8 Geo. 4, c. 15. *Lindo v. Unsworth*, 2 Camp. 602; *Tassel v. Lewis*, 1 Ld. Raym. 743.

It lies on the plaintiff to show that notice

twelve or twenty days, and then give notice to the first indorser, which it is clear they cannot do. *Dobree v. Eastwood* (3 C. & P. 250) is expressly in point, and decides that the holder of a dishonoured bill must, if he resort to the drawer in the first instance, give him notice within the same time that he would be required to give to his immediate indorser. *Burrough, J.*, there says, 'It is not that the holder of the bill has as many days as there are indorsers, but that each indorser has his own day.' The present case is not distinguishable from that. It is true that notice of dishonour need not be given by the holder, and that he may avail himself of notice given in due time by any party to the bill. That was decided in *Chapman v. Keane* (3 Ad. & E. 193); and *Parke, B.*, commenting on that case, in *Harrison v. Ruscoe* (15 Mee. & W. 231), says, 'The notice, by the terms of the rule, as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill—that is, in due time if he himself were suing.' The notice in the case on which the plaintiff relies is his own note, and he must show that he gave due notice to Abley, but not that he gave due notice to the defendant; and I am of opinion that he thus discharged the debt by his laches."

(F) *By whom Notice should be given.*[1]

(G) *What excuses the Want of Notice.*[2]

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was given in due time, and before action brought. *Lawson v. Sherwood*, 1 Stark. 314. *Castrique v. Bernabo*, 14 L. J. Q. B. 3.

[1] Notice can only be given by some party to the instrument, though he need not be the actual holder of the bill at the time, but a stranger is incompetent to give it. *Chapman v. Keane*, 3 Ad. & E. 193. *Harrison v. Ruscoe*, 15 Mee. & W. 231. Even a party to the bill who has been already discharged by laches, or who could not in any event sue, is incompetent to give notice. *Harrison v. Ruscoe, supra.* But a prior indorser, who has himself received due notice, may transmit it; and notice by the holder, or by a party who is liable to be sued and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties. *Roe v. Tipper*, 13 C. B. 249. *Wilson v. Swabey*, 1 Stark. 34. Though if a party who gives notice of dishonour of a bill was ignorant whether it was dishonoured or not at the time he gave the notice, such notice is not thereby rendered invalid, if the bill before that time was actually dishonoured. *Jennings v. Roberts*, 4 E. & B. 615.

Notice of dishonour may be given by any agent who holds the bill, as a banker or attorney, and in the agent's own name. *Harrison v. Ruscoe*, 15 Mee. & W. 231.

[2] In some cases notice is dispensed with or excused. *Cary v. Scott*, 3 B. & A. 619. *Frith v. Thrush*, 8 B. & C. 387. *Fitzgerald v. Williams*, 6 Bing. N. C. 68. *Kemble v. Mills*, 9 Dowl. P. C. 451; 1 Man. & G. 757. *Legge v. Thorpe*, 12 East, 171. *Carter v. Flower*, 16 Mee. & W. 743. *Burgh v. Legge*, 5 id. 418. *Lundie v. Robertson*, 7 East, 231. *Watson v. Minchin*, 1 Jones, Ir. Rep. 583. *Allen v. Edmundson*, 2 Ex. 719. *Caunt v. Thompson*, 7 C. B. 400. *Jackson v. Carrington*, 2 Car. & K. 750. Thus, the going to the party's counting-house during business hours, and finding no one there to receive the notice, is equivalent to a dispensation with notice; since, according to the usage of trade, a merchant who puts his name to a bill ought to be residing at his place of business to receive notice of its dishonour (*Crosse v. Smith*, 1 M. & S. 545. *Allen v. Edmundson*, 2 Ex. 719). But the drawer or indorser, if he partly liquidate, or promise to liquidate, a bill in ignorance that he has been discharged by want of proper notice, is not precluded from insisting upon such discharge when he discovers it (*Blissard v. Huish*, Burr. 2670. *Goodall v. Dolley*, 1 T. R. 712. *Perkin v. Graham*, 1 C. & M. 725. *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229. *Houlditch v. Cuuty*, id. 411. See *Burnnell v. Bonney*, 1 Q. B. 39. *Croxon v. Worthem*, 5 Mee. & W. 5); yet, if he had full knowledge of the circumstances, he will be precluded. *Vaughan v. Fuller*, 1 Stra. 1246. *Gunson v. Metz*, 1 B. & C. 193. *Horford v. Wilson*, 1 Taunt. 12. *Lundie v. Robertson*, 7 East, 231. *Gibbon v. Coggan*, 2 Camp. 188. *Greenway v. Hindlay*, 4 id. 52. *Hodge v. Fillis*, 3 id. 463. *Wood v. Brown*, 1 Stark. 217. *Cotter v. Raworth*, 13 East, 417. *Rogers v. Stephens*, 3 T. R. 713. *Wilkes v. Jacks*, Peake, 202; R. N. P. 276. It has also been held, that if a bill has been accepted for the accommodation of the drawer, who had not the least ground to expect that it would be paid, he will not be entitled to notice of its dishonour (*Sharp v. Bailey*, 9 B. & C. 44. *Rogers v. Stephens*, 3 T. R. 713. *Bickerdike v. Bollman*, 1 id. 405. *Goodall v. Dolley*, 1 id. 712: *per Buller, J., Legge v. Thorpe*, 12 East, 171. *Claridge v. Dalton*, 4 M. & S. 226. *Kemble v. Mills*, 2 Dowl. P. C. 446; 1 Man. & G. 757. *Fitzgerald v. Williams*, 6 Bing. N. C. 68. *Thornley v. Fenton*, 5 D. & L. 28); since the reason for notice is, that the drawer may, without delay, withdraw his effects from the drawee's hands; which

(H) *Waiver of Notice.*

(*a*) *By admitting Liability he dispenses with the Necessity of proving Notice.*

RABEY v. GILBERT, 30 L. J. Exch. 170.

An acknowledgment of liability dispenses with proof of notice of dishonour.[1]

In this case the question was, whether the circumstance that the defendant, the indorser, had suffered judgment by default in an action brought against him by a subsequent indorser of the same bill, dispensed with proof of notice of dishonour.

Bramwell, B., delivering the considered judgment of the court, said: — "It is quite certain that if a man who has not had due notice of dishonour (and

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reason, of course, cannot apply when he has none there. But it is dangerous to rely on this excuse, for the drawer is entitled to notice if, on taking up the bill, he could sue the acceptor, or any other party (*Ex-parte Heath*, 2 Ves. & B. 240); or if he had effects on their way to the drawee (*Rucker v. Hiller*, 3 Camp. 217; 16 East, 43); or had effects in the drawee's hands at the time when the bill was drawn. *Orr v. Maginnis*, 7 East, 350); or when it was presented for acceptance (*Blackhun v. Doren*, 2 Camp. 503), or afterwards, but before it became due (*Hammond v. Dufresne*, 3 id. 145), though the effects were less than the amount of the bill, and the drawer was indebted to the acceptor in a larger amount than their value. *Thackray v. Blackett*, 3 Camp. 164. *Blackhun v. Doren*, 2 Camp. 503. In a word, if he have any reasonable ground to expect that the bill will be paid, he is entitled to notice. *Lafitte v. Slatter*, 6 Bing. 623.

Ignorance of a party's residence will excuse neglect to give notice of dishonour, so long as that ignorance continues without neglecting to use the ordinary means for acquiring information. "It would be very hard," observed *Lord Ellenborough*, "when the holder of a bill does not know where the indorser is to be found, if he lost his remedy by not communicating immediate notice of the dishonour of the bill, and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice of the dishonour of the bill within the usage and custom of merchants." *Bateman v. Joseph*, 2 Camp. 461; 12 East, 433. *Browning v. Kinnear*, Gow, 81. *Harrison v. Fitzhenry*, 3 Esp. 240. *Baldwin v. Richardson*, 1 B. & C. 245; 2 D. & R. 285. See *Beveridge v. Burgis*, 3 Camp. 262. *Chapcott v. Curlewis*, M. & Rob. 262. It should seem, on general principles, that the death, or any serious illness of the holder or his agent, or other accident not attributable to the owner's negligence rendering notice impossible, may excuse it. R. & M. 144. *Pardessus au contrat de Change*, 426; Thompson, 483, 548. But where an indorser left home on account of the dangerous illness of his wife at a distance, and a letter, containing notice of dishonour of a bill, lay unopened at his shop during his absence till after the proper time for giving his indorsee notice, *Lord Ellenborough* held that these circumstances offered no excuse for the delay. *France v. Leech*, Chit. 9th ed. 330.

Where a bill is drawn by several persons upon one of themselves, since the acceptor is likewise a drawer, notice of dishonour is superfluous, as the dishonour must be known to one of them, and the knowledge of one is to be deemed of all. *Porthouse v. Parker*, 1 Camp. 82. But in case of fraud a different rule would prevail. *Bignold v. Waterhouse*, 1 M. & S. 259.

[1] The consequences, however, of a neglect to give notice of non-payment of a bill or note, or to protest a foreign bill, may be waived by the person entitled to take advantage of them. Thus it has been decided that a payment of a part (*Vaughan v. Fuller*, 2 Stra. 1246) which was an action against the indorser of a note; and it being proved that the defendant had part paid, *Lee, C. J.*, held, that that made the proof of demand upon the maker unnecessary; or a promise to pay the whole or part (Selw. N. P. 9th ed. 57. *Haddock v. Bury*, Mich. Term, 3 Geo. 2, M.S., *Burnet, J.*, 7 East, 236, n. a) has the same effect. *Per Lord Raymond, C. J.*: "If an indorsee has neglected to demand of the maker of the note in due time, a subsequent promise to pay by the indorser will cure this laches." *Whitaker v. Morris*, Worcester Lent Assizes, 1756, M.S., 1 Esp. 58; Select Ca. 171. *Lundie v. Robertson*, 7 East, 231; 3 Smith, Rep. 225); or to "see it paid" (*Hopes v. Alder*, 6 East, 16); or an acknowledgment that "it must be paid" (*Rogers v. Stephens*, 2 T. R. 713); or a promise that "he will set the matter to rights" (*Anson v. Bailey*, Bull. N. P. 276); or a qualified promise. (*Semble*, *Fletcher v. Froggatt*, Guildhall, 3d March, 1187, M.S., and 2 Car. & P. 569. S. C. Chit. 506); or a mere unaccepted offer of composition (*Margetson v. Aitken*, 3 Car. & P. 338; Dans. & L. 157. *Dixon v. Elliott*, 5 C. & P. 427. But see *Standage v. Creighton*, id. 406, and other cases (Chit. 506), made by the person insisting on the want of notice (after he was aware of the laches) to the holder of a bill, amounts to a waiver of the consequences of the laches of the holder, and admits his right of action. Where there has not been an express waiver of notice of dishonour, facts implying a waiver must be left to the

when I say 'due,' I mean the ordinary notice of dishonour), nevertheless thinks fit to acknowledge his liability, and to acknowledge it to a party to the bill, other than the party who afterwards sues upon it, that will enable such a person, although the acknowledgment was not to him, to maintain an action. It is only necessary to refer to the case of *Potter v. Rayworth* (13 East, 417), where it is perfectly clear that it was known that the ordinary notice required by law had not been given; nevertheless, the defendant in that case acknowledged his liability to an indorsee of the bill subsequent to the plaintiff. The plaintiff brought his action, and relied upon the acknowledgment so given and so made; and in giving judgment *Lord Ellenborough* says: 'Whether the promise to pay was made to the plaintiff, or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had had due notice of the dishonour.' That means, due so far as he was concerned. It does not mean the ordinary notice, because it is quite certain that it was not given. *Mr. Justice Bayley* says: 'He

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jury. Thus, where the plaintiff, in an action against the drawer of a bill of exchange, does not prove express notice, given in due time, of the dishonour of the bill, but relies upon certain facts in the defendant's own conduct subsequently as showing that he had notice, and knew that he was liable to pay, those facts must be left to the jury, and the judge at Nisi Prius will not pronounce upon their legal effect without submitting the case to the jury. *Rickett v. Toulmin*, 7 L. J. 108.

Though a party may waive the consequence of laches in respect of himself, he cannot do so in respect of antecedent parties. *Roscoe v. Hardy*, 12 East, 434. *Turner v. Leach*, 4 B. & A. 451. *Marsh v. Maxwell*, 2 Camp. 210, n.

In some instances the effect of such partial payment, or promise to pay, has been carried still further, and been considered not merely as a waiver of the right to object to the laches, but even as an admission that the bill or note had, in fact, been regularly presented and protested, and that due notice of dishonour had been given, and this even in cases where the party who paid or promised *afterwards*, stated that in fact he had not due notice, &c.; because it is to be inferred that the part payment, or promise to pay, would not have been made unless all the circumstances had concurred to subject the party to liability, and induce him to make such payment or promise. *Lundie v. Robertson*, 7 East, 201; 3 Smith's R. 225. And see *per Tindal, C. J.*, in *Hicks v. Duke of Beaufort*, 5 Scott, 589, 604; 4 Bing. N. C. 229, 232. Thus where an indorsee, three months after a bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said that he had not had regular notice, but, as the debt was justly due, he would pay it, it was held that the first conversation being an absolute promise to pay the bill, was *primâ facie* an admission that the bill had been presented to the acceptor for payment in due time, and had been dishonoured, and that due notice had been given of it to the indorser, and superseded the necessity of other proofs to satisfy those averments in the declaration, and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonour to the defendant went, which objection he then waived. *Lundie v. Robertson*, 7 East, 231. *Gibbon v. Coggan*, 2 Camp. 188. *See* also *Taylor v. Jones*, 2 Camp. 105. So where the drawer of a foreign bill, upon being applied to for payment, said, "My affairs are at this moment deranged, but I shall be glad to pay it as soon as my accounts with my agent are cleared." *Gibbon v. Coggan*, 2 Camp. 188. *Greenway v. Hindley*, 4 id. 52. *Patterson v. Beecher*, 6 Moore, 319. And where in an action by the indorsee against the drawer of a bill the plaintiff did not prove any notice of dishonour to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer after the bill became due, which recited that the defendant had drawn, amongst others, the bill in question; that it was overdue, and ought to be in the hands of the prior indorser, and that it was agreed that the latter should take the money due to him upon the bill by instalments, it was held that this was evidence that the drawer was at that time liable to pay the bill, and dispensed with other proof of notice of dishonour. *Gunson v. Metz*, 1 B. & C. 193; 2 D. & R. 334. Again, where in an action against the drawer, in lieu of proof of actual notice, the defendant's letter was proved, stating, "that he was an accommodation drawer, and that the bill would be paid before next term," though not saying "by defendant," *Lord Ellenborough* said, "The defendant does not rely upon the want of notice, but undertakes that the bill will be duly paid before next term, either by himself or by the acceptor. I think the evidence sufficient." *Hood v. Brown*, 1 Stark. R. 217; 2 East, 471, n. *Hicks v. Duke of Beaufort*, 5 Scott, 598; 4 Bing. N. C. 229.

considered the promise by the defendant either as an acknowledgment that he had had due notice of the dishonour, or that without such notice he was the proper person to pay the note, as the party for whose use it was drawn.' In this case the only fact necessary to call attention to is this, that the person to whom the plaintiff had indorsed the bill brought his action against the defendant, and the defendant suffered judgment by default. Of course, that was a plain and distinct recognition that he was liable to that person; and applying the principle of the case which I have cited, it was equally efficacious as a recognition of his liability. In the result, therefore, we think the plaintiff was entitled to maintain the action, either on the ground that the notice given was acknowledged to be sufficient by the defendant as against himself, or in whatever other way it can be put as a waiver of giving notice."

XIII. Foreign Bills, and Foreign Law relating to them.

(A) *What are Foreign Bills.*[1]

(B) *Drawn in Sets.*[2]

(C) *Of the Rule as to* Lex Loci Contractus.[3]

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[1] Bills of exchange are either foreign or inland. By the 19 & 20 Vic. c. 97, s. 7, "every bill of exchange or promissory note, drawn or made in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp-duty, if any, which, but for this enactment, would be payable in respect of any such bill or note." Before this statute, a bill drawn in one realm of the United Kingdom and payable in another was a foreign bill. *Mahoney v. Ashlin*, 2 B. & Adol. 478.

Foreign bills, as distinguished from inland bills, are such as are drawn and payable, or both, abroad.

[2] Foreign bills are often drawn in sets—that is, exemplars or parts of the bill are made on separate pieces of paper, each part being numbered, and referring to the other parts. Each part contains a condition that it shall continue payable only so long as the others remain unpaid. These parts should circulate together, or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorsee's security immediately, and diminishing the chances of losing the bill. *Straker v. Graham*, 4 Mee. & W. 721.

As between *bonâ fide* holders for value of different parts of the same bill, he who first obtains a title to his part is entitled to the other parts (*Holdsworth v. Hunter*, 10 B. & C. 449. *Pereira v. Copp*, 10 id. 450, n. a. See *Kearney v. West Grenada Mining Co.* 1 H. & N. 413); and may, it has been said, maintain trover for them even against a subsequent *bonâ fide* holder. *Lang v. Smith*, 7 Bing. 284, 294; 5 M. & P. 78.

An omission on one part to express the reference to the others, and the condition relating to them, may have the effect of obliging the drawer to pay more than one part. *Davison v. Robertson*, 3 Dow, 218, 228.

The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also. See *Holdsworth v. Hunter*, 10 B. & C. 449.

And he should not pay without taking back the part which he has accepted; for, having paid the unaccepted part, he may be obliged afterwards to pay the accepted part also. Byles, 294.

[3] An acceptance which is void, or avoided by the law of the country where it is given, is not binding here. By the law of Leghorn, if a bill be accepted, the drawer then fail, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance becomes void. An acceptor at Leghorn under these circumstances instituted a suit at Leghorn, and his acceptance was thereupon vacated. Afterwards he was sued in England as acceptor, and now filed his bill for an injunction and relief. Lord Chancellor King granted a perpetual injunction, enjoining the plaintiff at law from suing on the bill. *Burrows v. Jemino*, 2 Stra. 733; Sel. Ca. 144; 2 Equ. Abr. 526. See *Wynne v. Calender*, 1 Russ. 295.

A bill of exchange was drawn in France, and indorsed in blank in France, without following the formalities prescribed by the penal code:—It was held that, the indorsement being void by the French law, was void here; for that the contract and indorsement being made in France, must be governed by the law of France. *Trimbey v. Vignier*, 1

(D) *Of the Rule as to* Lex Loci Solutionis.[1]

(E) „ „ Lex Fori.[2]

(F) *Of Re-exchange.*

(*a*) *The Indorser of a Bill drawn on a Foreign Country is liable, in case of Dishonour, to Re-exchange.*

SUSE AND OTHERS v. POMPE AND ANOTHER, 8 C. B. (N. S.) 538; 30 L. J. C. B. 75.

On dishonour of a bill, drawn payable abroad, an indorser in this country is liable to pay to the holder the re exchange value; that is, a sum equivalent to what a bill could have been obtained for in the place of payment

In this case the question was raised, What was the extent of the indorser's liability, when a bill drawn and indorsed in England and payable abroad is dishonoured by the acceptor's non-payment? The bill in question was drawn at Liverpool, in pounds sterling, upon a merchant at Vienna, and was accepted by him, and dishonoured. The defendant pleaded a tender, and paid into court a sum sufficient to cover the number of florins which the acceptor of the bills would have had to pay if he had paid them at maturity, together with interest and the necessary expenses arising from their dishonour; and it was contended on behalf of the defendants that they were not bound to pay more. The value of the florin having fallen between the indorsing of the bills to the plaintiffs and their becoming due, the plaintiffs claimed the price they paid for the bills when they were indorsed to them; and they gave evidence of a usage in London, entitling the holder of a dishonoured bill, like the bill in question, to the option

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Bing. N. C. 151; 4 M. & Scott, 695; 6 C. & P. 25. But see *Wynne v. Jackson*, 2 Russ. 51.

Where the defendant gave the plaintiff in a foreign country, where both were resident, a bill of exchange drawn by the defendant on a person in England, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state, it was held that such certificate was a bar to an action here upon an implied *assumpsit* to pay the amount of the bill, because the implied contract was made abroad. *Potter v. Brown*, 5 East, 124; 1 Smith, 351. So, in an action here against the Bank of England on their promissory note, which had been negotiated in France after being stolen here, the court said that the negotiability of the note was governed in France by the law of England. *De la Chaumette v. Bank of England*, 9 B. & C. 215; 2 B. & Adol. 385. English courts, however, will not regard the revenue laws of other countries. *Pellecat v. Angell*, 2 C., M. & R. 311.

[1] The *lex loci solutionis* prevails where a contract is made in one country to be performed in another. According to the accepted rule in such cases, the country where the contract is to be performed is deemed the country in which it was made. Accordingly, it has been held that an I. O. U. given for money lent in Germany to play at games of chance not illegal in Germany, is valid here (*Quarrier v. Colston*, 12 L. J. Ch. 57); and that the time of payment is to be calculated according to the law of the country where the bill is made payable (Beawes, 151; Marius, 75, 89–92): but the protest and notice of dishonour must be regulated by the law of the country where the bill is payable. *Rothschild v. Currie*, 1 Q. B. 43.

But a general acceptance, being a contract to pay everywhere, is governed by the law of the place where it is given, for it is payable there as well as in every other place. *Don v. Lipman*, 5 Clark & Fin. 1. *Sprowle v. Legge*, 1 B. & C. 16; 2 D. & R. 15; 3 Stark. 156. *Kearney v. King*, 2 B. & A. 301; 2 Chit. Rep. 16.

[2] And though the *lex loci contractus* must interpret the contract, yet the *lex fori* must govern the remedy. Thus, statutes of limitation affect the remedy only, and not the substance of the contract. Therefore, where by the law of the country in which the contract was made the plaintiff would have had forty years to bring his action, yet, as he sued in England, it was held that he must must bring his action within six years. *British Linen Company v. Drummond*, 10 B. & C. 903. So, on the other hand, though the payee of a French promissory note must, if he had sued in France, have brought his action there within five years, it was held that he might here bring his action at any time within six years. *Huber v. Steiner*, 2 R. & R. C. C. 202; 2 Scott, 304. Although a defendant may not be subject to arrest in the country where the contract is made, yet he is subject to arrest where the law of this country gives the creditor the right to arrest, if the remedy is sought there. *De la Vega v. Vianaa*, 1 B. & Adol. 284; and see *Shaw v. Hanny*, M. & M. 526. *Kelsall v. Marshall*, 26 L. J. C. P. 19. The protest and notice of dishonour are parcel of the contract, and not incidents of the remedy for the breach of it. They must, therefore, be regulated by the law of the country where the bill is payable. *Rothschild v. Currie*, 1 Q. B. 43.

drawn upon England, on the day of payment.[1]

of demanding either the amount of the re-exchange (which would be taking the value of the florin at the time of the maturity of the bill) or the price given for the bill.

Byles, J., delivering the considered judgment of the court said:—" The solution of the question depends on the contract of the indorser. That contract is an engagement by the indorser, that if the drawee shall not at maturity pay the bill, he, the indorser will, on due notice, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract, as understood in America. (Story on Bills, s. 107.) Apply this contract to the present case. The holder is entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. He has, in effect, bought from the indorser so many Austrian florins, to be received in Vienna on that day. It should seem to follow that on non-payment by the drawee, the holder is entitled as against the indorser to as much English money as would have enabled him in Vienna on that day to purchase as many Austrian florins as he ought to have received from the drawee; and further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that money is to draw in Vienna upon the indorser in England a bill at sight, for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonour, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called, in law Latin, *recambium;* in Italian, *recambio;* in French and English, re-exchange. The bill in French is called *retraite.* This bill for re-exchange being negotiated at Vienna, puts into the pocket of the holder, at the proper time and place, the exact sum which he ought to have received from the drawee. On this bill for the re-exchange, the holder, of course, has not at Vienna the acceptance of the indorser on whom it is drawn, but holds as his security the original bill, with the indorser's indorsement thereon. If the indorser pays the re-exchange bill he has fulfilled his engagement of indemnity; if not, the holder sues him on the original bill, and will be entitled to recover in that action what the indorser ought to have paid: that is to say, the amount of the re-exchange bill. Although in English practice the re-exchange bill is seldom drawn, yet the theory of the transaction is as we have above described it, and settles the principle on which the damages are to be computed, although no re-exchange bill be, in fact, drawn. If the indorser were held liable for the amount which the indorsee gave for the bill, when the amount is more than the drawee ought to have paid, the contract of the indorsee would be extended, and he would be held liable, not merely for the damages sustained by the breach of the contract, but for the damages sustained by the making of the contract; for a portion of those damages the holder must have sustained, though the contract had been performed by the drawee paying the bill. In effect, the holders here attempt to treat the contract as rescinded. But the consideration has not failed. They have what they bought; that is to say, a genuine bill, and now seek to treat it as if a forged bill had been imposed upon them. If the value of the Austrian florin, as compared with the pound sterling, had risen instead of fallen, the holders would have gained by the re-exchange. It would be inequitable if they were entitled to the gain where there is a gain, and not liable for the loss where there is loss. We think the law is clear that the holders of the bill on which this action is brought are entitled to recover no more than the re-exchange; that is to say, the value of the Austrian florins,

[1] See *De Tastet v. Baring*, 11 East, 269; 2 Camp. 65. *Mellish v. Simeon*, 2 H. Black. 378. *Francis v. Rucker*, Amb. 672. *Pollard v. Herries*, 3 B. & P. 335. The acceptor is not liable to re-exchange, for his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest where interest is due. *Dawson v. Morgan*, 9 B. & C. 618: *per Lord Tenterden.*

payable in Vienna, expressed in English money, at the rate of exchange on the day of dishonour, with interest and expenses."

Evidence was not admissible to prove a different custom among merchants in London, since that custom would contradict the instrument; for the law merchant on this point being settled, the obligation of the indorser, in the event of nonpayment by the drawee to pay the re-exchange and expenses, is as clearly implied as if it had been expressed.

XIV. Of Lost Bills and Notes.

(A) *Title of Indorsee of.*[1]

(B) *Upon giving Indemnity, Action maintainable on.*

17 & 18 Vic. c. 125, s. 87. "In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court, or judge, or a master, against the claims of any other person upon such negotiable instrument."

Action may be maintained on lost instrument upon giving an indemnity.[2]

XV. Cancellation.[3]

[1] Though the finder of a lost bill or note acquires no property in it, so as to enable him to defend an action of trover brought by the rightful owner, or to sue the acceptor or maker; yet if the finder transfer a bill or note which may pass by delivery, his transferee, provided he took it without fraud, is entitled both to retain the instrument against the loser, and to compel payment from the parties liable thereon. Byles, 282.

The loser should immediately give notice to the parties liable on the bill, for they will thereby be prevented from taking it up without due inquiry. Public advertisement of the loss should also be given, for if any person whatsoever discounts it with notice of the loss, that will be strong evidence of fraud. Chit. 179; Bay. 140.

It is not enough, however, in order to impeach the title of a holder for value of a lost or stolen bill, to show that he negligently abstained from inquiries on taking it, or that a reasonably careful man would not have discounted it under the circumstances; the defendant must go further, and prove fraud or *mala fides*. *Carlon v. Ireland*, 5 E. & B. 765. *Raphael v. Bank of England*, 17 C. B. 161. *See* vol. i. p. 128, n. [4]. Chit. 178. *Lovel v. Martin*, 4 Taunt. 799.

If the bill be transferable only by indorsement, a forgery can convey no title; and a payment by the acceptor, or other party, to a man claiming under the forged indorsement, will not exonerate him. *Smith v. Chester*, 1 T. R. 654; 3 id. 127; 4 id. 28; 1 H. Black. 607. *Cocks v. Masterman*, 9 B. & C. 908.

The party who has lost or destroyed a bill, must nevertheless make application to the drawee for payment at the time it is due, and give notice of dishonour, for the bill might still have been paid with or without an indemnity, and the prior parties, by not having been advised of the dishonour, may have been prevented from pressing their respective remedies against parties liable to them. *Thackray v. Blackett*, 3 Camp. 164.

[2] At common law no action was maintainable on a lost bill or note (*Crowe v. Clay*, 9 Ex. 604), or on a destroyed bill (*Hansard v. Robinson*, 7 B. & C. 95), unless it were originally not negotiable. See *Ramuz v. Crowe*, 1 Ex. 167. Previously, therefore, to the above statute, the holder of a lost bill or note had no remedy, except in a court of equity; but there payment was enforced upon the giving of an indemnity, in all cases where there was no remedy at law. *Hawkes v. Hawkes*, cited Chit. 184. *Macartney v. Graham*, 2 Sim. 285. This relief has been extended by the statute to courts of law. The order under the statute can be obtained only at the instance of the plaintiff. *Aranguron v. Schofield*, 1 H. & N. 494. Chit. 185.

[3] Cancellation of the acceptor's name by the holder, or by a third person, with the holder's consent, is a waiver by him of the acceptance. *Sweeting v. Halse*, 9 B. & C. 369. But if a banker, at whose house the bill is made payable, cancel the acceptance by mistake, without any want of due care, and return it unpaid in that condition, with the words "cancelled by mistake" written upon it, he does not thereby incur any legal liability; yet he would be liable to an action for any special damage actually sustained by the cancellation, if in doing that act there were a want of due care. *Warwick v. Rogers*, 5 Man. & G. 340. As regards the parties to the instrument, such a cancellation through mistake by the banker, where there is no want of due care, leaves their rights and liabilities where they were before. *Novelli v. Rossi*, 2 B. & Adol. 757. *Wilkinson v. Johnson*, 3 B. & C. 428. Chit. 209.

(A) *Bill imperfectly Cancelled.*

Ingham v. Primrose, 2 C. B. (N. S.); 28 L. J. C. P. 294; 23 Jur. 710.

Unless the act of cancellation be apparent on the face of the instrument, if it is afterwards fraudulently put in circulation, the maker will be responsible to a *bonâ fide* holder.

In this case the question was, whether the acceptor of a bill of exchange was liable to a *bonâ fide* indorsee without notice, the bill in question having been cancelled by him by tearing it in pieces, which were pasted together, and the bill fraudulently put in circulation by an unauthorised person, and ultimately indorsed to the plaintiff.

Williams, J., delivering the considered judgment of the court, said:—"It is, we think, settled law, that if the defendant had drawn a cheque, and before he had issued it he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee. (*Marsten v. Allen*, 8 Mee. & W. 494.) The reason is, that such negotiable instruments have by the law merchant become part of the mercantile currency of the country; and in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who, by making them, have caused them to be apparently a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud. If these were all the facts of the case, it seems impossible to distinguish it in any material point from the cases already mentioned of liability, where the original circulation has been effected by fraud, without the consent of him who made the instrument. The question then is, whether such liability is precluded by the fact, that before the instrument was put in circulation for the second time, the defendant had torn it, with the intention of destroying or annulling it. If an act done with such an intention by the maker of a negotiable instrument does not manifest the intention on the face of the instrument, it can hardly be maintained that the act would be of any efficacy, because the instrument would nevertheless be apparently part of the mercantile currency; as, for instance, if in the present case the defendant had merely crumpled up the bill and thrown it away, and it had been restored to its original appearance, without leaving any trace of the act which was intended to annul it. But, on the other hand, if the act be such that the paper bears on the face of it the signs of something having been done to it which is characteristic of an intention to destroy or annul it, as in the case of *Scholley v. Ramsbottom* (2 Camp. 485), where the drawer of a cheque tore it into four pieces and threw it from him, and the four pieces were afterwards neatly pasted together on another slip of paper, and the rents were quite visible, and the face of the cheque soiled and dirty, no holder of an instrument in such a condition could enforce it, because, in truth, no man of ordinary intelligence and caution could fairly regard it as part of the apparent commercial currency. The act before us, therefore, appears to turn on the question whether the act of tearing the bill into two pieces, being apparent on the face of it, is such an act as ought, *primâ facie*, to have indicated to the plaintiff that it had been withheld or withdrawn from circulation. As we understand the facts, the tearing had been done in such a way that the appearance of the bill, when it reached the plaintiff's hands, was at least as consistent with its having been divided into two, for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it. Even assuming that the act of reconstruction constituted a forgery (which may admit of grave doubt), yet, on the principle of the decision of *Young v. Grote* (4 Bing. 253), this would be no answer to the claim of the plaintiff, because

the defendant, by abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff becoming the holder of it for value, without having any just cause for supposing that it had been cancelled or annulled. The rule must, therefore, be absolute for entering the verdict for the plaintiff for the amount of the bill and interest."

XVI. Action on Bill or Note.

(A) *Parties.*[1]

(B) *Pleading.*[2]

XVII. Summary Procedure on Bills of Exchange.

(A) *Writ being Indorsed in Special Form, Judgment may be signed thereon.*

Writ indorsed in special form may be issued, and judgment signed thereon.

The 18 & 19 Vic. c. 67,[3] s. 1, after reciting that the *bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed

[1] Whenever the holder of a bill or note has a remedy against several parties to it, he may proceed with actions against any or all of these parties severally, at the same time; and an action commenced against one will not preclude any other remedy against the others: but as the different persons liable on the bill are debtors to the holder in respect of the same debt, satisfaction by any one will discharge the others from liability as to the principal sum due on the bill. *Wyndham v. Wither*, 1 Stra. 515. *Claxton v. Swift*, 2 Show. 441–494; Lutw. 882. *Burgess v. Merrill*, 4 Taunt. 468. *Ex-parte Wildman*, 2 Ves. sen. 115. But if the holder reject the offer of a drawer or indorser of a bill to pay debt and costs in the action against him, the court will make an order to restrain the holder from suing out execution; though, if the money be paid pending several actions against other parties to the bill, the plaintiff may proceed with the other actions for the recovery of his costs. *Toms v. Powell*, 7 East, 536; 3 id. 316; 3 Camp. 331; Holt, 6. *Randall v. Moon*, 12 C. B. 261. Where, however, a party was sued jointly with others as drawers, and separately as acceptor of a bill, the court, considering him to be liable in two characters, which could not be comprised in the same declaration, and that the plaintiff was entitled to his remedy against him in both actions, refused to stay the proceedings in one as vexatious. *Wise v. Prowse*, 9 Price, 393. *See*, as to the choice of parties, *post*, Parties.

[2] In an action on a bill of exchange, cheque, or promissory note, if between the original parties it is at the option of the plaintiff to declare either upon the instrument itself, or upon the consideration for which it was given; but in the case of remote parties, *e. g.* in an action by the indorsee against the acceptor of a bill or the maker of a note, and where, independently of the bill or note, there is no privity of contract between the parties, the instrument itself must be declared on, but such of the common counts may be added as the evidence will support. Chit. 368, 10th ed. In actions between the immediate parties it is often advisable to add counts upon the consideration.

The following forms of declaration are prescribed by 15 & 16 Vic. c. 76, Sched. (B):—

Payee against Maker of Note.

That the defendant, on the day of A.D. by his promissory note now overdue, promised to pay to the plaintiff £ *two* months after date, but did not pay the same.

Indorsee against Indorser of Note.

That one A. on, &c., by his promissory note now overdue, promised to pay to the defendant, or order, £ months after date, and the defendant indorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonoured, whereof defendant had due notice, but did not pay the same.

Drawee against Acceptor of Bill.

The plaintiff on, &c., by his bill of exchange now overdue, directed to the defendant, required the defendant to pay to the plaintiff £ months after date, and the defendant accepted the said bill, but did not pay the same.

Payee against Drawer.

That the defendant on, &c., by his bill of exchange, directed to A., required A. to pay to the plaintiff £ months after date, and the said bill was duly presented for acceptance, and was dishonoured, of which the defendant had due notice, but did not pay the same.

Pleas.—By 7 T. T. 1853, in all actions upon bills and notes the plea of "non assumpsit" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

The operation of this rule is confined to counts framed on the bills or notes only. See *Donaldson v. Thompson*, 6 Mee. & W. 316. *Hughes v. Pool*, 6 Man. & G. 271. *Weeks v. Argent*, 16 Mee. & W. 817.

See Statute of Limitations; Set-off; Payment; Release, &c.

[3] Extended to Ireland by 24 & 25 Vic. c. 43.

and put to unnecessary expense in recovering the amount thereof, by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes, enacts, "that from and after the 24th day of October, 1855, all actions upon bills of exchange or promissory notes, commenced within six months after the same shall have become due and payable,[1] may be by writ of summons in the special form contained in Schedule (A.) to this act annexed,[2] and indorsed as therein mentioned;[3] and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed as provided by the Common Law Procedure Act, 1852, s. 17, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear,[4] and have appeared to such writ, according to the exigency thereof, at once to sign final judgment in the form contained in Schedule (B.) to this act annexed (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) to the date of the judgment, and a sum for costs to be fixed by the masters of the superior courts, or any three of them, subject to the

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[1] A cheque is within the act, and may be proceeded on under its provisions. *Eyre v. Waller*, 29 L. J. Ex. 246. So also is a promissory note payable *on demand;* and in this case the six months is to be reckoned from the date of the note. *Maltby v. Murrells*, 29 L. J. Ex. 377.

[2] *Form of Writ of Summons*, Sched. (A).

VICTORIA, by the grace of God. &c.
To C. D., of
We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear, in our court of in an action at the suit of A. B., the said A. B. may proceed to judgment and execution. Witness, &c.

Memorandum to be subscribed on the Writ.

N.B. This writ is to be served within six calendar months from the date hereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

[3] *Indorsement to be made on the Writ before service thereof.*

This writ was issued by E. F., of attorney for the plaintiff [*or* this writ was issued in person by A. B., who resides at *mention the city, town, or parish, and also the name of the hamlet, street, and number of the house, of the plaintiff's residence*]. The plaintiff claims £ principal and interest [*or* £ balance of principal and interest], due to him as the payee [*or* indorsee] of a bill of exchange [*or* promissory note], of which the following is a copy [*here copy bill of exchange or promissory note, and all indorsements upon it*]. And also shillings for noting [*if noting has been paid*], and for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed. An amendment has been made by inserting maker's name. *Knight v. Pocock*, 26 L. T. 61. The blank as to days may be filled up within 5 days, according to C. L. P. Act, and costs added. *Robinson v. Cotterill*, 2 id. 137.

Notice.

Take notice, that if the defendant do not obtain leave from one of the judges of the court within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty, at any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the judge's chambers, Serjeants' Inn, London, supported by affidavits showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after service thereof.

This writ was sued by X. Y. on L. M. (the defendant), on Monday, the day of 18 . X. Y.

The claim of costs was omitted in the form prescribed by the statute, but was supplied by rule of Mich. T. 1855. See *Robinson v. Cotterill*, 25 L. J. Ex. 3; 11 Ex. 476.

By Reg. Gen. M. T. 1855, "no other claim than a claim on a bill of exchange or promissory note is to be included in writs issued under the Summary Procedure on Bills of Exchange Act, 1855." But by a subsequent rule (H. T. 1858), if the defendant, by leave, enters an appearance to the writ, the plaintiff may include in his declaration a count on the consideration, if any, as between him and the defendant, and deliver a particular of demand accordingly.

[4] The application is *ex-parte*. The judge,

approval of the judges thereof, or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and the plaintiff may, upon such judgment, issue execution forthwith."

The holder of a dishonoured bill or note may recover the expenses of noting, for non-acceptance or non-payment, in the same way as he may recover the amount of the bill or note (s. 6).

These proceedings are competent in the Common Pleas at Lancaster and the Common Pleas at Durham, or any other court of record in England and Wales, if so directed by an order in council (ss. 8, 9). An order in council has since directed the provisions of the act to extend to the county courts and many borough courts.—(*Gazette*, 1 Feb. 1856.)

By sect. 6, "the holder of any bill of exchange or promissory note may, if he think fit, issue out writ of summons, according to this act, against all, or any number, of the parties to such bill or note; and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively; and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued."

One writ may be issued against several parties.

(B) *Unless within Twelve Days, Defendant must obtain Leave to Appear.*

By sect. 2, "a judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ and defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence,[1] or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms, as to security or otherwise, as to the judge may seem fit."

Unless within twelve days, defendant must obtain leave to appear.

By sect. 4, "it shall be competent to the court, or judge, to order the bill or note sought to be proceeded upon, to be forthwith deposited with an officer of the court; and further, to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof."

Judge may require bill to be deposited, or stay proceedings till plaintiff give security for costs.

(C) *Judgment.*[2]

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if dissatisfied with the offer, will grant an order *nisi*. *Fitch v. Glover*, 26 L. T. 59. The costs paid by the master, in pursuance of the act, are the following (Reg. Gen. M. T. 1855):—

	Above 20*l*.			Und. 20*l*.		
Agency or country cases, including mileage	£ 4	*s.* 0	*d.* 0	£ 3	*s.* 2	*d.* 0
Town cases	3	8	0	2	14	0

[1] It is sufficient if the affidavit disclose the substance of the defence, or even some plausible grounds for supposing there may be one (*Clay v. Turley*, 27 L. J. Ex. 2), unless the point be frivolous. *Mathews v. Marsland*, 27 L. J. Ex. 149. The order will not be set aside on an affidavit denying the facts on which it was obtained. *Febart v. Stevens*, 30 L. J. Ex. 1.

In an action in the county court, under the Summary Procedure Act, the defendant may avail himself of any defence of which the facts admit, and is not confined to the particular defence disclosed on the affidavit on which he was let in to defend. *Saul v. Jones*, 28 L. J. Q. B. 37; 23 Jur. 220.

[2] *Form of Judgment*, Sched. (B).

In the Queen's Bench.

England } On the day of in the
to wit. } year of our Lord, 18 [*day of signing judgment*], A. B., in his own person [*or*, by his attorney], sued out a writ against C. D., indorsed as follows [*here copy indorsement of plaintiff's claim*], and the said C. D. hath not appeared.

Therefore it is considered that the said A. B. recover against the said C. D. £ together with £ for costs of suit.

"After judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution; and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just." 18 & 19 Vic. c. 67, s. 3.

A plaintiff recovering judgment by default of appearance is entitled to costs, though the sum recovered is less than 20*l*., and the action is within the jurisdiction of the City of London Small Debts Court. *Healey v. Johns*, 8 E. & B. 946.

BILL of Lading. *See* Charterparty; Freight; Ship and Shipping; Stoppage *in transitu.*

(A) *Nature and Form of, and Stamp on*, p. 490.

(B) *Authority of Master to Sign*, p. 490.

(C) *The Rights under vest in Consignee or Indorsee*, p. 491.

(D) *Without Prejudice, however, to the Right of Stoppage* in Transitu, *or Claim of Freight*, p. 492.

(E) *In the Hands of an Indorsee for Value is conclusive Evidence of the Shipment of Goods*, p. 492.

(F) *Construction of*, p. 492.

(*a*) *Exception of* "*Act of God*," p. 492.

(*b*) „ "*Dangers of the Seas*," p. 492.

(*c*) „ "*Robbers and Dangers of Rivers*," *&c.* p. 493.

(*d*) *Condition as to Payment of Freight*, p. 493.

(G) *Right to Sue*, p. 493.

(A) *Nature and Form of*,[1] *and Stamp on a Bill of Lading.*

(B) *Authority of Master to Sign.*[2]

[1] Where the master and owners of a ship engage with separate merchants to convey their goods to the place of her destination, the contract is said to be for a conveyance in a general ship. It is usual to advertise such ship in the newspapers, or in cards and handbills. It is not clear that some of the terms of such advertisement may not be looked upon as incorporated with the contract. Abbott by Shee, part 3, c. 2. See *Freeman v. Baker*, 5 B. & Adol. 797. But the instrument to which reference is generally had for the terms of agreement is the bill of lading. This is a written memorandum or document, signed (usually in triplicate) by the master of a vessel, acknowledging the receipt of goods on board, and undertaking (with certain exceptions) to carry and deliver them to the person to whom they are addressed (the consignee) or his order, in as good condition as when received, for a certain remuneration or freightage. It is, in other words, a contract for the conveyance of goods, and, though signed by the master, binds the owners also. 3 Kent's Com. 206, 207. Abbott by Shee, 319.

There is some doubt whether a bill of lading, properly so called, be not confined to marine adventures, and whether an instrument so worded, given by a boatmaster in a canal navigation, would operate in any way except as a receipt or memorandum. *Bryans v. Nix*, 4 Mee. & W. 775.

The following is a form of a bill of lading:

J. W. } Shipped in good order, by A.
No. 1. } B., merchant, in and upon the
a 20. } good ship called the

whereof C. D. is master, now riding at anchor in the river Thames, and bound for Barcelona, in Spain, 20 bales, containing 100 pieces of broadcloth, marked and numbered as per margin, and are to be delivered in the like good order and condition at Barcelona aforesaid (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted) unto E. F., merchant there, or his assigns, he or they paying freight for the said goods per piece freight, with the primage and average accustomed. In witness whereof the master or purser of the said ship hath affixed his name to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void.

Dated at London, the day of

In the above form a consignee of the goods, namely, E. F., is mentioned, to whom, or to his assigns, they are to be delivered. But the bill is sometimes made out for delivery to the consignee "or his assigns," and sometimes "to or order, or assigns," which import an engagement to deliver the goods to the person whom the consignor shall nominate and his assigns. Other clauses may be and sometimes are introduced into the bill of lading, according to the nature of the contract between the parties to it; to provide, for instance, for the payment of demurrage by the consignee, the effect of which will be to raise an implied undertaking on his part to pay it, if he receive the goods under such bill of lading, and that though he have no valuable interest in them; "for the acceptance of goods in pursuance of a bill of lading, whereby the shipper has made the payment of freight or demurrage a condition precedent to delivery, is evidence of a contract by the consignee to pay such demands." *Scaife v. Tobin*, 3 B. & Adol. 523: *per Parke, J.*

[2] The master cannot bind his owners by a contract to carry freight free (*Grant v. Norway*, 10 C. B. 687); nor can the charterer insist on his signing bills of lading, expressing a lower rate of freight than that mentioned

(C) *The Rights under a Bill of Lading vest in the Assignee or Indorsee.*[1]

The rights under a bill of lading vest in the assignee or indorsee.

18 & 19 Vict. c. 111, s. 1, enacts that "every assignee named in a bill of lading, and every indorsee of a bill of lading to whom the goods, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself."[2]

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in the charterparty. *Hyde v. Willis*, 3 Camp. 202. The master has, as against his owner, no authority to sign bills of lading for goods not received on board, or to charge his owners by signing bills for a greater quantity than those placed there (*Hubbersly v. Ward*, 8 Ex. 330. See *Coleman v. Forbes*, 24 L. J. C. P. 125); and all persons taking bills by indorsement or otherwise must be taken to have notice of this. *Grant v. Norway*, *supra*. See *Gadsden v. M'Lean*, 9 C. B. 283.

[1] The bill of lading being made out for the delivery of the goods to some person, *ex. gr.* E. F. or his assigns, E. F. can, by naming an assign, transfer his right to them to some other person. See *Renteria v. Ruding*, 1 M. & M. 511. The mode of appointing an assignee is by indorsing and handing over to him the bill of lading, which is thus a negotiable instrument. Accordingly, it is the common practice of merchants to negotiate it, and by such assignment the property in the goods is held to pass to the indorsee of the bill of lading. *Wright v. Campbell*, 4 Burr. 204–6; 1 Black. 628. *Caldwell v. Ball*, 1 T. R. 205. *Hibbert v. Carter*, 1 id. 745. Nay, though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment made for a valuable consideration, and without notice to the assignee that the goods were not paid for, or that they were paid for by bills that would be dishonoured, has been held to pass them absolutely to his assignee, and deprive the consignee of his right to stop *in transitu*, which, as against the original consignee, he might have exercised. *Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Black. 357. See *Newsom v. Thornton*, 6 East, 17. *Salomons v. Nissen*, 2 T. R. 674. *Dick v. Lumsden*, Peake, N. P. C. 190. *Haille v. Smith*, 1 B. & P. 563. *Jenkyns v. Moharne*, 7 Man. & G. 678. But if the assignee of the bill of lading have not acted *bonâ fide* — for instance, if he knew that the consignee was insolvent, and assisted to defraud the consignor of the price of his goods (*Cuming v. Brown*, 9 East, 506), he stands in the same situation as the consignee, and the consignor retains his right to stop *in transitu*; and if there be any condition, either in the bill of lading or in the indorsement thereof, *ex. gr.* if the goods are to be delivered provided E. F. pay a certain draft, all subsequent indorsees take subject to that condition, and have no title until it is complied with. *Barrow v. Coles*, 3 Camp. 92.

This form of transferring the property in the goods by an assignment of the bill of lading remains to the shipper as long as the goods are in the hands of any agent of his, and he may alter their destination while they are on board: thus, if the captain sign a bill of lading for the delivery of the goods to A. or his assigns, and the shipper afterwards transmit a bill of lading to B., making them deliverable to him, B. will be entitled to them if nothing further had been done to vest the property in A. *Mitchell v. Ede*, 11 Ad. & E. 888.

The above observations regarding the negotiation of the bill of lading by a consignee apply to the case of consignment of goods to a purchaser, for where they were consigned to a factor his power of altering the property in them by indorsement of the bill of lading was less extensive; since it was thought, that though he might bind his principal by a sale of the bill of lading, because a factor's usual employment is to sell, yet he could not by a pledge thereof, for that is not within the scope of his authority (*Newsom v. Thornton*, 6 East, 17. *Martini v. Coles*, 1 M. & S. 140. *Shiply v. Kymer*, id. 484. *Solly v. Rathbone*, 2 id. 298. *Cockran v. Irlam*, id. 301); and though stats. 6 Geo. 4, c. 94, and 5 & 6 Vic. c. 39, have now given effect to his pledge also, yet they have not given it in all cases the same effect as if the goods were his own property. By those statutes the subject is at present regulated. *See post*, Bill of Sale, p. 494; Pledge; Principal and Agent.

Every bill of lading for any goods, merchandise or effects, to be exported or carried coastwise, is liable to a sixpenny stamp. 5 & 6 Vic. c. 79, sch. *See* 14 & 15 Vic. c. 18. Any person who makes or signs any bill of lading engrossed, printed, or written, or partly engrossed or written, and partly printed, upon vellum, parchment, or paper, not properly stamped, is liable to forfeit 50*l*. 5 & 6 Vic. c. 79, s. 21.

[2] This act is entitled "An Act to amend the Law relating to Bills of Lading," and recites, "that by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but, nevertheless, all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and that it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ*

(D) *Without Prejudice, however, to the Right of Stoppage* in Transitu, *or Claim of Freight.*

Without prejudice, however, to the right of stoppage *in transitu*, or claim of freight.

Sect. 2. "Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

(E) *The Bill of Lading in the Hands of an Indorsee for Value*[1] *is conclusive Evidence of Shipment of Goods.*

The bill of lading in the hands of an indorsee for value is conclusive evidence of shipment of goods.

Sect. 3. "Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been, in fact, laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

(F) *Construction of.*

(*a*) *Exception of "Act of God."*[2]

(*b*) „ „ *"Dangers of the Seas."*[3]

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fide holder for value, should not be questioned by the master or other person signing the same on account of the goods not having been laden as aforesaid."

The statute has put an end to the great inconvenience which existed under the old system, from the fact that the beneficial interest in the goods and the rights of action in respect of the carriage were in these cases vested in different persons. M. & P. on Shipping, 227.

[1] When goods are at sea, the delivery of the bill of lading, after its indorsement, is a delivery of the goods themselves (*Mitchell v. Ede*, 11 Ad. & E. 888), for it is not possible in this case to make any nearer approach to an actual delivery. 1 Ves. sen. 362.

[2] Where goods had been placed in a boat which was towed by a steamer, and the steamer stopped in the ordinary course pursued on the voyage, and the tide thereupon forced the boat against the steamer so as to cause a leak, through which the goods were damaged, the court held that it did not arise from the act of God. *Oakley v. The Portsmouth and Ryde Steam-Packet Company*, 11 Ex. 618.

[3] Where the ship was so damaged as to be unable to proceed, but the goods are not injured, the case is not within the exception of dangers and accidents of the seas and navigation. *Cannan v. Meaburn*, 1 Bing. 243.

This exception in a charterparty does not extend to a merely temporary impediment to the completion of the voyage, such as an inability to enter port for want of sufficient water. Consequently the shipowner is liable for the non-completion of the voyage under these circumstances, even although it would not have been safe for the ship to remain outside the port until the period of the year at which the water would be sufficient. *Schilizzi v. Derry*, 4 E. & B. 872.

This exception does not excuse the charterer for not loading the vessel, although, owing to sea-perils, the ship did not arrive at the port of loading until the season for loading in that particular trade was over. The proximate cause of the impossibility of loading being in this case not the dangers of the navigation, but the fact that the season was over when the ship arrived. *Hurst v. Owen*, 18 C. B. 144.

Where a ship arrived at the port of London and was taken into the Commercial Docks to discharge her cargo, and while she was being unloaded, and after the discharge of all the crew except the mate, she fell over, owing to the breaking of some tackle by which she had been fastened to a loaded lighter lying outside of her, and the water got in and damaged the goods still on board; this was held to be a loss within the bill of lading of "all and every the dangers and accidents of the seas and navigation." *Laune v. Douglas*, 15 Mee. & W. 746. *See* further, *post*, Charterparty; Insurance (Marine).

The shipowner will, it appears, be liable in case of a loss by gross negligence, notwithstanding one of the perils excepted may have been an operative cause of the mischief. *See* M. & P. Ship. 231. It has been held, that a stipulation in a bill of lading

(*c*) *Exception of "Robbers and Dangers of Rivers," &c.*[1]
(*d*) *Condition as to Payment of Freight.*[2]
(G) *Right to Sue.*[3] *See also* Carriers.

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that the shipowner was "not to be accountable for leakage or breakage," did not exempt him from liability for a loss from those means which arose from gross negligence. *Phipps v. Clark*, 2 C. B. (N. S.) 156. See *Alston v. Herring*, 11 Ex. 822.

When the owners of a general ship undertake to receive goods and carry them safely, the shippers undertake that they will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed by the shipowner may not, by inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a hazardous character. *Blass v. Maitland*, 6 S. & B. 470. *Hutchinson v. Ginson*, 5 C. B. (N. S.) 149.

[1] In *De Rothschild v. The Royal Mail Steam-Packet Co.* (7 Ex. 734), the defendants undertook to convey certain boxes of gold-dust from the coast of the Pacific across the Isthmus of Panama to London, "the act of God, the Queen's enemies, robbers, fire, accidents from machinery, boilers, steam, dangers of the sea, roads, and rivers, of whatsoever nature or kind, excepted;" the court held that the word "robbers," looking at the other words with which it was associated, and to the nature of the transit, means robbers by force, and that it did not protect the defendant from liability for the loss of one of the boxes, which was stolen from a railway truck between Southampton and London. The court said that the "dangers of roads" might be gleaned from the context to mean marine roads, where vessels lie at anchor; but, even if they extended to roads at land, they could apply to such dangers only as were immediately caused by the condition of the roads, such, for instance, as the rocking of carriages.

[2] Where a cargo was accepted by the indorsee of a bill of lading, under which the goods were deliverable to order, "against payment of the agreed freight and other conditions, as per charterparty," it was held that these were circumstances from which the jury might imply a contract on his part to pay the demurrage stipulated for in the charterparty, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. *Segener v. Smith*, 15 C. B. 285. But where the bill of lading made the goods deliverable to the indorsee, "or assigns, paying freight for the goods, as per the said charterparty," it was held that he did not by accepting the goods at the destination make himself liable to pay demurrage in the port of loading, according to the rate stipulated for in the charterparty, although there was an express stipulation for a lien on the goods for such demurrage. *Smith v. Traveking*, 4 E. & B. 945; 5 id. 589.

Where a bill of lading expressed that the goods were deliverable to "order or assigns, he or they paying freight for the said goods five-eighths of a penny sterling per pound, with five per cent primage and average accustomed," and by the usual custom at the port of delivery, three months' interest or discount was deducted from freights, payable under bills of lading on goods, such as those in question, it was held that the assignee of the bills of lading, who had received the goods, was only liable to pay the freight less the discount, and that the custom was binding, and did not contradict the bill of lading. *Browne v. Byrne*, 3 E. & B. 703. *Moeller v. Young*, 5 id. 755. *See* also *Tobin v. Crawford*, 5 Mee. & W. 235; 9 id. 716. *Amos v. Temperley*, 8 Mee. & W. 798.

[3] The consignee is, in most cases the party who ought to sue, because the consignor, in entering into the arrangement with the carrier, usually acts as agent for the consignee. The vendee must sue if he have directed the goods to be delivered, either to a carrier generally or to the particular carrier in question. *Dawes v. Peck*, 8 T. R. 330. *Dutton v. Solomonson*, 3 B. & P. 582. *Coats v. Chaplin*, 3 Q. B. 483. The question of ownership is material in inquiring as to the right party to sue, since where the property passed to the vendee by delivery to the carrier, it is in general to be inferred that the contract was made with the vendee; that is to say, that the vendor, in making the contract with the carrier, acted as the agent of the vendee. Where the property in the goods does not pass to the vendee, the provisions of the Statute of Frauds not being complied with, this inference does not arise, and the vendor is the person who ought to sue. *Coombs v. Bristol and Exeter Railway Co.* 3 H. & N. 510. *See post*, Carrier. But it is important to consider the owner of the bill of lading; for although it was said that if goods be consigned by bill of lading to A., he is *primâ facie* the owner, and the party to sue if they are lost; but that if the bill be special to deliver to A. for the use of B., the latter should sue. This does not mean that the consignor may not sue when it appears clearly that the contract was entered into with him, in which case the ownership of the goods is immaterial; or where the contract, having been made in the ordinary way, there are no facts to show that he was acting as agent for the consignee. *Largent v. Morris*, 2 B. & A. 277. See *Dunlop v. Lambert*, 6 Clark & Fin. 600. *Van Casteel v. Booker*, 2 Ex. 706. *Ogle v. Atkinson*, 5 Taunt. 759. *Wait v. Baker*, 2 Ex. 1. *Mitchell v. Ede*, 11 Ad. & E. 888. *Turner v. Liverpool Dock Co.* 6 Ex. 543. *Jenkyns v. Brown*, 14 Q. B. 496. *Brown v. Hare*, 3 H. & N. 484; 4 id. 822.

BILL of Peace.[1]

BILL of Sale. *See ante*, Bankruptcy, p. 141; Bargain and Sale, p. 373; *post*, Execution; Gift; Sheriff; Vendor and Purchaser.

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(A) *Bills of Sale must be Filed*, p. 499.
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I. Its Nature, Construction, and Effect.

(A) *What it is.*[2]
(B) *Stamp on.*[3]
(C) *Assignment of future Effects must be perfected by Seizure.*

Congreve v. Evetts, 10 Ex. 298.

The title to future acquired chattels granted by a bill of sale is perfected upon seizure by the grantee.[4]

Small, by indenture, assigned to the plaintiff, amongst other things, his crops of grain upon his farm, as a security for money lent. By the indenture it was declared and agreed, that it should be lawful for the plaintiff at any time to seize and take possession of the crops and other effects thereby bargained and sold, and all such crops and other effects which should or might be substituted in lieu of the crops thereby assigned, or which should from time to time be found

[1] This is a procedure in equity to secure protection from repeated litigation, or from unjust legal proceedings. Story, 853. *See* Smith's Equity, 333; 1 Madd. 231.

[2] A bill of sale is a contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; but it would seem that any regular assignment of personal chattels, and even a mere note or memorandum, may not improperly be denominated a bill of sale, whether the transaction is absolute or conditional. Where a *bonâ fide* sale has taken place for valuable consideration, and possession of the chattels sold is thereupon taken, there is obviously no advantage in a conveyance by deed. A mortgage may, even where there is no transfer of possession, be validly made without deed, and even without writing, and certainly a pledge which necessarily implies transfer of possession may be so made; and although a memorandum in writing is desirable, with a view to the furnishing of evidence of the terms of the transaction, these objects may be attained without a deed under seal. Where no consideration passes, but a gift is made of the goods, a deed or absolute delivery is necessary. And in the case of a grant by way of security, the adoption of a deed admits of the introduction of the necessary covenant. *See* Millar and Coll on Bills of Sale, p. 24. *Post*, Gift.

[3] Bills of sale for the conveyance of property upon a purchase mortgage or transfer of a mortgage, or upon a conveyance of the mortgaged property, are subject to certain stamp-duties, regulated by 13 & 14 Vic. c. 97, consisting of an *ad valorem* duty upon the amount of the consideration paid, and of an additional duty, called the "progressive duty," which is chargeable only where the instrument contains 2160 words or upwards.

As a protection to the revenue, the purchase-money or consideration must be truly expressed and set forth in words at length in or upon the principal or only instrument of conveyance, under penalties. 13 & 14 Vic. c. 97; and see *Gingell v. Purkins*, 4 Ex. 720; 19 L. J. Ex. 129.

[4] See *Petch v. Tutin*, 15 Mee. & W. 110. *Hope v. Haley*, 25 L. J. Q. B. 155; 20 Jur. 486. *Chidell v. Galsworthy*, 6 C. B. (N. S.) 471.

When, on the face of an assignment of personalty, it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired and substituted for that which was originally assigned, it will, if the words are capable of such a construction, be so applied. Where the deed was found capable of such a construction,

on or about the farm, and the same to sell and dispose of, and out of the proceeds pay all costs, and retain all monies due to the plaintiff. On the 21st of February, 1849, a sum of 1297*l.* 18*s.* 7*d.* being then due to him, the plaintiff seized and took possession of some crops of grain, then growing on the farm, and which had been sown subsequently to the execution of the indenture.

In Trinity Term, 1848, the defendant recovered a judgment against S., and on the 22d of February, 1849, a writ of *fi. fa.*, indorsed to levy 310*l.* 19*s.* 3*d.* was issued on such judgment, and delivered to the sheriff for execution, who, on the same day, seized the said crops. On the 8th of March, 1849, S. petitioned the Insolvent Court under the 7 & 8 Vic. c. 96. The official assignee, in the first instance, claimed the crops, and a bill was filed by him in the Court of Chancery to restrain the plaintiff from selling them, which bill was dismissed upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to the crops. The sheriff afterwards sold the crops for 294*l.*, which came to the hands of the defendant. The plaintiff sued the defendant for the same. *Cur. ad. vult.*

Parke, B. "There are two questions in this case. The first, supposing that Mr. Small, the debtor, had not become insolvent, the plaintiff had a good title to the growing crops as against the execution-creditor. The second,

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though rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed. *Carr v. Allatt*, 27 L. J. Ex. 385.

Without seizure or some new act, no property in goods acquired after the bill of sale passes to the grantee thereunder. In *Lunn v. Thornton* (1 C. B. 379; 14 L. J. C. P. 161) the plaintiff, by a deed poll for a valuable consideration, bargained, sold, and delivered unto the defendant all his goods, furniture, plate, linen, china, stock, and implements in trade, and other effects whatsoever then remaining and being, or which should at any time thereafter remain or be in, upon, or about his dwelling-house at S.; and also all other his effects elsewhere: the defendant subsequently seized all the goods on the plaintiff's premises, including goods acquired since the execution of the deed. The plaintiff brought trover, insisting that the grant could only operate upon goods which he had actually or potentially at the time the grant was made.

Per Tindal, C. J. "It is not a question in the present case whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods of the plaintiff as they should be acquired by him, and brought on the premises in satisfaction of the debt, but whether by law a deed of bargain and sale of goods could pass the property in goods which were not in existence, or, at all events, which were not belonging to the grantor at the time of the execution of the deed." The court held that the mere act of bringing the goods on the premises was not a new act done by the grantor, indicating his intention that all goods should pass under the former bill of sale, and that no property in the goods passed to the defendant.

By a bill of sale made in 1855, R. B., in consideration of 400*l.* advanced by J. T., assigned to J. T. all the crops of corn, &c. growing on his farm at B., or upon any other farm which he might at any time during the continuation of the security thereafter occupy; and also implements of husbandry, &c., tenant rights, and all the rights which he might be entitled to on quitting his then or any other taken farm; and all other his personal property. The deed provided, that for the more effectually securing to J. T. payment of the money, R. B. irrevocably appointed J. T., her executors, &c., his lawful attorney or attornies, in his or their name or names to make and perfect any assignment, transfer, or delivery of any goods or chattels, &c., or any other personal estate or property not legally passing by the effect of the assignment therein made, and to which R. B. should, before the satisfaction of that security, become beneficially possessed of or entitled to; and it contained a power for J. T., her executors, &c., to break doors and take possession of any of the effects of R. B., of which he was then possessed, or which he should thereafter acquire, and to occupy and possess any of the lands of R. B. for the purpose of selling any growing crops. After the execution of the deed, and while the debt was unpaid, R. B. took another farm. In 1857, crops growing on the farm of B., and also crops standing on the farm taken by R. B. after the bill of sale, and farming stock and other goods of R. B., some of which had been acquired since the bill of sale, were seized by the executor of J. T. under the bill of sale. The court held, that the deed operated to authorise the seizure of future property; and that by seizure a good title was acquired to the crops standing on the new farm, as well as to those upon the old farm. *Allatt v. Carr*, 6 W. R. 578. *Chidell v. Galsworthy*, 6 C. B. (N. S.) 471.

whether his having become insolvent makes any difference. Under the bill of sale it was conceded on both sides that, though the then growing crops passed on the execution of the deed, yet the future crops did not. As to those, the plaintiff was authorised to seize and take possession of all or any that might be substituted for those then existing, and to sell and dispose of them, and pay the costs, &c., and apply the residue in payment of the debt secured by the bill of sale. The plaintiff contended that, having actually taken possession of the growing crops before the delivery of the writ, he was lawfully in possession of them, and could bring an action against any one for taking them, and that his title ought to prevail against that of the defendant; and we think that he was so entitled. If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even any equitable title, to any specific goods; but when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of the chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take any he pleases for the payment of his debt by the sale of it, the effect, after actual possession by the creditor, is the same." Judgment for the plaintiff.

(D) *Effect of Discrepancy between Indenture and Schedule.*[1]

(E) *Form of a Bill of Sale.*[2]

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[1] Where a bill of sale assigned "all the household goods and furniture, of every kind and description whatsoever, in the house No. 2 Meadow Place, more particularly mentioned and set forth in an inventory or schedule, of even date therewith, and given up to C. D. on the execution thereof," the inventory did not specify all the goods in the house: — It was held that the bill of sale only operated as an assignment of the goods specified in the inventory. *Wood v. Rowcliffe*, 6 Ex. 407; 20 L. J. Ex. 285. See *Sutton v. Bath*, 1 Fos. & Fin. 152. *Baker v. Richardson*, 6 W. R. 663.

By a bill of sale, "all the power-looms and other effects and things belonging thereto, now being in, upon, or about the mill, particularly set forth in the schedule," were assigned to the defendant. The schedule was as follows: — "Looms made by S." The healds, reeds, &c., were attached to the looms when used, and were necessary for the purpose of weaving, but formed no part of the looms as they came from the maker. The court held that the healds, reeds, &c., which were on the premises at the execution of the bill of sale, passed to the defendant. *Cort v. Sagar*, 3 H. & N. 370; 27 L. J. Ex. 378.

[2] The following precedent is of

A Bill of Sale of Effects in a Dwelling-House as Security for Money Lent.

This Indenture, made on the day of 186 , between A. B. [*grantor*], of, &c., of the one part, and C. D. [*grantee*], of, &c., of the other part. Whereas the said A. B. hath applied to the said C. D. to advance to him the sum of £ which he, the said C. D., hath agreed to do, upon having the repayment of the same, together with interest thereon, after the rate of £ per cent per annum secured to him in manner hereinafter expressed. Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the sum of £ to the said A. B., paid by the said C. D. at or immediately before the execution of these presents (the receipt whereof the said A. B. doth hereby acknowledge, and of and from the same doth release and discharge the said C. D., his executors and administrators), he, the said A. B., doth, by these presents (a copy whereof is intended to be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days from the date hereof, in pursuance of the provisions of an act passed in the 17th and 18th years of the reign of her present Majesty, intituled "An Act for preventing Frauds upon Creditors by secret Bills of Sale of Personal Chattels"), grant and assign unto the said C. D., his executors, administrators, and assigns, all and singular the goods, chattels, furniture, fixtures, utensils and effects, comprised as specified in the schedule hereunder written and hereunto annexed, and now being in or about the dwelling-house of the said A. B., known as No Street, in the parish of in the county of ; and all the estate and interest of the said A. B. therein respectively. To have and to hold all and singular the said goods, chattels, and premises, hereinbefore expressed, to be hereby assigned unto the said C. D., his executors, administrators, and assigns, subject nevertheless to the proviso for redemption hereinafter contained. Provided always, and it is hereby agreed and declared, that in case A. B., his heirs,

executors, administrators, or assigns, shall, upon demand being made, by notice in writing to that effect, under the hand or hands of the said C. D., his executors, administrators, or assigns, being served upon the said A. B., his executors, administrators, or assigns, or delivered at his or their last usual or last-known place of residence in England, pay or cause to be paid to the said C. D., his executors, administrators, or assigns, the sum of £ together with interest for the same in the meantime, after the rate of per cent per annum, without any deduction, and also all such sums of money, with the interest thereon, as shall have been paid by and be due and owing to the said C. D., his executors, administrators, or assigns, for the insurance of the said goods, chattels, and premises, under the provisions hereinafter contained; then, and in such case, the said C. D., his executors, administrators, or assigns, shall, upon the request and at the cost and charges of the said A. B., his executors, administrators, or assigns, re-assign unto the said A. B., his executors, administrators, or assigns, the said goods, chattels, and premises hereinbefore expressed to be hereby assigned, and make, do, and execute all acts, deeds, and things necessary to enable them or him to cause a memorandum of satisfaction to be written on the copy of these presents, intended to be so filed as aforesaid. Provided also, that until default shall be made in payment of the moneys intended to be hereby secured, or of the interest thereon, or of some part thereof respectively, it shall be lawful for the said A. B., his executors, administrators, or assigns, to have and retain the possession and use of the said goods, chattels, and premises, and every part thereof, without any let, hindrance, or interruption whatsoever from the said C. D., his executors, administrators, or assigns. Provided also, and it is hereby agreed and declared, that in case the said A. B., his executors or administrators, shall make default in payment of the said sum of £ or the interest thereon, or of the sums of money or interest which may be so due and owing for insurance as aforesaid, or of any part thereof respectively, upon demand being made, in manner aforesaid, it shall be lawful for the said C. D., his executors, administrators, or assigns, or his or their agent or agents, at any time or times thereafter, while any money shall remain due upon the security of these presents, to enter into and upon the said dwelling-house, or any dwelling-house, messuage, or tenement, for the time being occupied by the said A. B., his executors, administrators, or assigns, in which any of the said goods, chattels, and premises shall be, and to seize, and take, and keep possession of the same, or any part thereof. And immediately upon entering into and taking such possession as aforesaid, or at any time thereafter, at their or his discretion, without any further consent on the part of the said A. B., his executors, administrators, or assigns, to sell and dispose of the said goods, chattels, and premises hereinbefore expressed to be hereby assigned, or any part thereof, by public auction or private contract, and either together or in lots, and subject to such conditions, and in such manner, as the said C. D., his executors, administrators, or assigns shall think fit, with full power to buy-in and rescind any contract for sale, and to re-sell, without being responsible for any loss arising therefrom. And for all or any of the purposes aforesaid to do, enter into, and execute all such acts, contracts, and assurances, as he or they shall think proper. And it is hereby declared and agreed, that the receipt or receipts, in writing, of the said C. D., his executors, administrators, or assigns, for the purchase-moneys of the said goods, chattels, and premises, or any part thereof, shall effectually discharge the purchaser or purchasers, or other the person or persons buying the same, from all responsibility in respect of the application thereof; and that such purchaser or purchasers, person or persons, shall not be obliged to inquire whether such default has been made, or such notice given, as hereinbefore mentioned, or into any matter or thing connected with the propriety or regularity of any sale or sales made by the said C. D., his executors, administrators, or assigns, and shall not be affected by express notice that the same are or is improper or irregular. And it is hereby further declared and agreed, that the said C. D., his executors, administrators, or assigns, shall receive and take the moneys arising from such sale or sales as aforesaid, and stand possessed thereof. In trust, in the first place, to reimburse himself or themselves, and pay and discharge all costs, charges, and expenses incurred in making such sale or sales, or otherwise in relation thereto. And in the second place, to retain the said sum of £ and all interest due thereon, or so much thereof as shall then remain due and owing, together with all such sums of money as shall have been paid by and be then due and owing to the said C. D., his executors, administrators, or assigns, for the insurance of the said goods and chattels and premises under the provisions hereinafter contained, with interest thereon as herein mentioned. And lastly, to pay the surplus (if any) of the moneys so to arise as aforesaid to A. B., his executors, administrators, or assigns. Provided always, and it is hereby agreed and declared, that the said C. D., his executors, administrators, or assigns, shall not be answerable for any involuntary losses which may happen in or about the exercise of the aforesaid powers or trusts, or any of them. And the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, or assigns, that he will immediately, upon demand being made by notice in writing to that effect, under the hand or hands of the said C. D., his executors, administrators, or assigns, being served upon him the said A. B., his executors or administrators, or delivered at his or their usual or

last-known place of residence in England, pay or cause to be paid to the said C. D., his executors, administrators, or assigns, the sum of £ with interest thereon after the rate of £ per cent per annum, to be computed from the day of the date of these presents, without any deduction. And that in the meantime, and so long as the same sum or any part thereof shall remain unpaid, the said A. B., his heirs, executors, administrators, or assigns, will pay to the said C. D., his executors, administrators, or assigns, interest for the said sum of £ or for so much thereof as shall for the time being remain unpaid, at the rate of £ per cent per annum, by equal half-yearly payments, on the day of and the day of in every year, without any deduction; and also, in case the said sum of £ or any part thereof, shall be paid at an intermediate time between such half-yearly days of payment, will pay therewith a proportional part of such interest up to such time of payment. And moreover, that the said A. B. will not, during the continuance of this security, remove or take away, or suffer to be removed or taken away, the said goods, chattels, and premises hereinbefore expressed to be hereby assigned, or any of them, from his said present dwelling-house, except to remove and take the same to another place of residence to be occupied by him; and in case of such change of residence will give to the said C. D., his executors, administrators, or assigns, one calendar month's notice in writing of his intention so to remove and take away the same, together with a full address and description of such new place of residence. And further, that the said A. B., his executors, administrators, and assigns will, during the continuance of the security, keep all the said goods, chattels, and premises hereinbefore expressed to be hereby assigned insured against loss or damage by fire in the sum of £ at the least, in some office or offices in London or Westminster, and will punctually pay all premiums and sums of money necessary for such purpose, and will at any time on demand produce to the said C. D., his executors, administrators, or assigns, the policy or policies of such insurance, and the receipt for every such payment. And that if default shall be made in keeping the said goods, chattels, and premises so insured, or in producing such policy or policies of insurance or receipt as aforesaid, it shall be lawful for the said C. D., his executors, administrators, or assigns, to insure and keep insured all or any of the said goods, chattels and premises, in any sum not exceeding the sum of £ and the said A. B., his heirs, executors, administrators, or assigns will repay to the said C. D., his executors, administrators, or assigns, every sum of money expended for that purpose by him or them, with interest thereon at the rate aforesaid, from the time of the same respectively having been so expended. And that until such repayment the same shall be a charge upon the said goods, chattels, and premises hereinbefore expressed to be hereby assigned. And also that the said A. B. now hath good right and full power and authority to assign the said goods, chattels, and premises hereinbefore expressed to be hereby assigned in manner aforesaid. And that he the said A. B., his executors and administrators, and every person having or rightfully claiming any estate, right, title, or interest at law or in equity in or to the said goods, chattels, and premises, or any part thereof, will from time to time, and at all times hereafter (until sale under the powers hereinbefore contained, at the cost and charges of the said A. B., his executors or administrators, and after such sale at the cost and charges of the person or persons for the time being requiring the same) make, do, and execute all such further acts, deeds, and assurances in the law for more perfectly assuring all or any of the said goods, chattels, and premises unto the said C. D., his executors, administrators, and assigns, and enabling him and them to obtain and retain possession of the same, as by him or them shall be reasonably required. In witness, &c.

THE SCHEDULE ABOVE REFERRED TO.

17 & 18 Vic. 1854.

Names, &c. of the Persons making or giving the Bill of Sale, or of the Person divested of Property.	Name, &c. of the Person to whom made or given.	Whether Bill of Sale, Assignment, Transfer, or what other Assurance, and whether absolute or conditional, and Number.	Date of Execution.	Date of Filing.	Sum for which made or given.	Where and how Payable.

II. Registration of Bill of Sale.[1]

(A) *Bills of Sale must be Filed.*[2]

Bills of sale are void against creditors, unless the same or a copy are filed within twenty-one days.

By 17 & 18 Vic. c. 36, s. 1, "every bill of sale of personal chattels[3] made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trust, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed, or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an

[1] Bill and affidavit must be filed at the same time. *Grindell v. Brandon*, 6 C. B. 698. Want of registration does not nullify it if the goods were actually in the possession of assignee at the time of execution. 1 F. & F. 686.

[2] The interpretation clause of the above act, 17 & 18 Vic. c. 36, is as follows:—Sect. 7. "In construing this act, the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such constructions; that is to say, The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt; but shall not include the following documents; that is to say, assignments for the benefit of creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel, or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts, or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants, orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorising or purporting to authorise, either by inducements or by delivery, the possession of such documents, to transfer or receive goods thereby represented.

"The expression 'personal chattels' shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery, and shall not include chattels, interests in real estate, nor shares or interests in the stocks, funds, or securities of any government, or in the capital or property of any incorporated or joint-stock company, nor choses in action, nor any stock or produce upon any farm or lands in which, by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving such bill of sale.

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

This act does not extend to Scotland or Ireland.

The exception of marriage settlements does not apply to a post-nuptial settlement made in consideration of natural love and affection. *Fowler v. Foster*, 23 Jur. 99.

[3] An instrument, if essentially a bill of sale, must be registered, notwithstanding it may import to be a license of the grantee to the grantor to use the goods for a certain time. Thus, where the only evidence of a sale of goods was contained in an instrument which recited the sale of certain furniture by A. to B., and purported to be a demise at a certain quarterly rent, with a proviso entitling B. to enter and take possession if the rent should be unpaid, or if execution should issue against the goods of A., it was held that the instrument was a bill of sale, and required registration. *Phillips v. Gibbons*, 5 W. R. 527; 29 L. T. 91.

A document which is only a receipt for the purchase-money of chattels, and not intended to operate as a record of a sale, does not require registration under the act. *Thompson v. Barrett*, 25 L. J. Q. B. 268.

Where the grantor, having brought certain machinery, in the nature of trade fixtures, on his mill, to which he affixed the greater part of the machinery by screws and nuts, in consideration of an advance of money by B., executed to him an assignment of the machinery so brought on the premises; and also, by another part of the same instrument, charged as a further security an equity of redemption on the freehold; the court held that the instrument was a bill of sale of personal chattels within 17 & 18 Vic. c. 36, and that, as it had not been registered under the statute, it was void as against the grantor's assignees in bankruptcy. "It appears to us," said *Erle, J.*, "that although they were, in one sense, fixtures, being affixed to the soil, yet they were within the statute which, by sect. 7, interprets personal chattels to mean fixtures capable of complete transfer by delivery. It appears by the case, that these were machines affixed only for the purposes of trade, and therefore trade fixtures; and the bill of sale to the defendant, under which he makes title, treats them as machinery of which the bankrupt had a right of sale, distinct from the land. In *Hellawell v. Eastwood* (6 Ex. 295), the question whether the trading machinery there described, which

affidavit[1] of the time of such bill of sale being made or given, and a description of the residence[2] and occupation[3] of the person[4] making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have been issued, and of every attesting witness[5] to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days[6] after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of

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was annexed to the soil, was liable to be distrained, was answered in the affirmative, on the ground that the purpose of the annexation was not the permanent improvement of the holding, but the more complete use, temporarily, of the machinery, which was a chattel; and that the intention of the party in the annexation was not material to be considered for deciding whether it became parcel of the reality. According to that decision, we hold this machinery to have been a personal chattel within the statute, notwithstanding the annexation to the soil." *Waterfall v. Penistone*, 4 W. R. Q. B. 726.

In *Hewer v. Cox* (6 Jur. N. S. 1339), the grantors carried on the business of printers, at New Street, Blackfriars, in the city of London. They were described in the bill of sale and affidavit as residing in New Street, Blackfriars, in the county of Middlesex, printers. The description was held to be sufficient, on the ground thus expressed by *Hill, J.*:—"The maxim, *Falsa demonstratio non nocet*, applies; a subsequent erroneous addition to something already described with sufficient certainty would not vitiate it; and here the addition of 'in the county of Middlesex,' could not mislead a person of common sense and understanding. I therefore think it would be frustrating the intention of the act, and carrying the act further than was intended, if we were to hold this description insufficient."

If the place be where the attesting witness carries on or is engaged in his business, it is a sufficient description of his residence to satisfy the statute. *Attenborough v. Thompson*, 2 H. & N. 559; 27 L. J. Ex. 23. *England v. Blackwell*, 27 L. J. Q. B. 124.

[1] Where the affidavit was in this form, "The paper writing hereunto annexed is a true copy of a bill of sale, bearing date, &c., and made between," &c., following the description in the bill of sale, which was sufficiently specific, the affidavit was held to satisfy the statute. *Wilcoxon v. Searbey*, 29 L. J. Ex. 154; 1 L. T. (N. S.) 481.

The affidavit must contain a description of the address and occupation of the grantor, &c. This defect is not cured by the description in the bill of sale itself being sufficient. *Hallon v. English*, 25 L. J. Q. B. 161; 21 Jur. 294.

[2] The description of an attesting witness as "clerk to of 73 Basinghall Street," has been held sufficient. *Allen v. Thompson*, 1 H. & N. 15; 4 W. R. 506.

[3] If the affidavit does not, either in itself or by a reference to the bill of sale, contain any description of the occupation of the grantor, the statute will not be complied with, and the bill of sale will be void under the act. *Picard v. Bretz*, 5 H. & N. 9; 29 L. J. Ex. 118.

The style "gentleman" is no description. If the person to be described has any occupation, he must be described as of that occupation, and the substitution of the word "gentleman" has no effect in curing the defect. But a person without any calling or occupation, although he may at a former period have had one, may be described as "gentleman." See *Bath v. Sutton*, 27 L. J. Ex. 388. *Morewood v. South Yorkshire Railway, &c. Co.* 28 L. J. Ex. 114. It has been held that a mere description of the grantor as "gentleman," when he was a clerk in the Audit Office, at Somerset House, was a fatal defect, because he ought to have been so described. *Allen v. Thompson*, 1 H. & N. 15. *Beales v. Tennant*, 1 L. T. 295; 29 L. J. Q. B. 188.

A description of a clerk to an attorney as "gentleman" is an insufficient description of the attesting witness. *Tuton v. Sanoner*, 3 H. & N. 280; 27 L. J. Ex. 293. *Beales v. Tennant*, 23 Jur. Q. B. 628. *Dryden v. Hope*, 9 W. R. 18; 3 L. T. (N. S.) 280.

[4] Where the grantor bore the same name as his father, it was held that it was not necessary that he should be described as "the younger" in the bill of sale and affidavit. *Foulger v. Taylor*, 35 L. T. 57.

[5] The affidavit of the attesting witness will not be vitiated on the ground that it does not positively state that the deponent was the attesting witness, if it appear that he was so from the affidavit, in such a manner that a reasonable person could not be mistaken as to his character. *Boutill v. Roublet*, 28 L. J. Q. B. 240; 23 Jur. 548.

[6] A bill of sale is not invalid for not having been filed, if the effects comprised in it were seized before the expiration of the time within which it might have been so filed. It was therefore held, that where a bill of sale was given on the 27th of June, and a writ of *fi. fa.* was issued under which the sheriff seized on the 5th of July, the person claiming under it was not prevented from setting it up and asserting that the effects were his, though at the time of the seizure it had not been filed. *Marples v. Hartley*, 30 L. J. Q. B. 92; 7 Jur. N. S. 446; 3 L. T. (N. S.) 774; 9 W. R. 334. *Holroyd v. Marshall*, 29 L. J. Ch. 655.

the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any court of law or equity, authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever,[1] so far as regards the property in, or right to the possession of, any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued, under or in the execution of which such bill of sale shall have been made or given, as the case may be."

(B) *Defeasance must be written on same Paper or Parchment.*[2]

(C) *Examination of Register, and obtaining of Copies.*[3]

[1] In an interpleader issue to try the right of the plaintiff, as assignee under a bill of sale, to goods claimed by the defendant as execution creditor, the defendant cannot set up, as a bar to the plaintiff's claim, the title of a third party under a prior bill of sale, void as against the defendant for want of registration, but valid against the grantor. *Edwards v. English*, 26 L. J. Q. B. 193; 29 L. T. 89.

[2] By the 17 & 18 Vic. c. 36, "if such bill of sale shall be made or given, subject to any defeasance or condition, or declaration of trust, not contained in the body thereof, such defeasance or condition, or declaration of trust, shall, for the purposes of this act, be taken as a part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes as against the same persons, and as regards the same property and effects, as if such bill of sale, or a copy thereof, had not been filed according to the provisions of this act."

[3] By the 3d sect. of 17 & 18 Vic. c. 36, "the said officer of the said Court of Queen's Bench shall cause every bill of sale and every such schedule and inventory as aforesaid, and every such copy filed in his said office, under the provisions of this act, to be numbered, and shall keep a book or books in his said office in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same; or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favour the same shall have been given, together with the number and the dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable, according to the form contained in the schedule to this act; which said book or books, and every bill of sale or copy thereof filed in the said office, may be searched and viewed by all persons at all reasonable times, paying to the officer for every search against one person the sum of 6*d.* and no more; and that in addition to the last-mentioned book, the said officer of the said Court of Queen's Bench shall keep another book or index, in which he shall cause to be fairly inserted, as and when such bills of sale are filed in manner aforesaid, the name, addition, and description of the person making or giving the same, or of the person against whom such process shall have issued, as the case may be, and also of the person to whom or in whose favour the same shall have been given, but containing no further particulars thereof, which last-mentioned book or index all persons shall be permitted to search for themselves, paying to the officer for such last-mentioned search the sum of 1*s.*

By the 4th sect. "the said officer shall be entitled to receive for his trouble in filing and entering every such bill of sale, or a copy thereof as aforesaid, the sum of 1*s.*, and no more; and such officer shall render a like account to the Commissioners of Her Majesty's Treasury; and the said commissioners shall have the like powers in every particular with respect to such account, and the amount of remuneration of such officer, and with respect to any surplus of the fees received by him, as is provided by the 13 & 14 Vic. c. 75, with respect to the officers of the Court of Common Pleas therein mentioned."

Sect. 5. "Any person shall be entitled to have an office copy or an extract of every

(D) *Entry of Satisfaction.*[1]

(E) *Registration does not prevent Operation of Clause of Bankruptcy Act as to reputed Ownership.*

BADGER v. SHAW, 29 L. J. Q. B. 73; 24 Jur. 377.

Registration does not prevent goods remaining in possession of grantor at time of his bankruptcy being claimed by his assignees, under the clause of the Bankruptcy Act relating to reputed ownership.

Bankrupts were, by consent and permission of the plaintiffs at the time of their bankruptcy, in possession of certain goods, which they had before mortgaged to the plaintiffs, and the mortgage deed had been duly registered under 17 & 18 Vic. c. 36, s. 1. The assignees laying claim to the goods, the grantee relied upon the registration as preventing the operation of the clause of the Bankruptcy Act respecting reputed ownership. 12 & 13 Vic. c. 106, s. 125, *ante*, p. 223.

Cockburn, C. J. "It seems to me that the Bills of Sale Act was passed for the purpose of giving protection to creditors, and was not intended to throw any additional impediments in their way. When we look at the language of the two statutes, it would seem that there was a distinction between the apparent possession referred to in sect. 1 of the Bills of Sale Act, and explained in sect. 7, and the reputed ownership referred to in sect. 125 of the Bankrupt Act. The two acts were not passed *eodem intuitu;* there are no formal words altering the effect of the Bankrupt Act, and we should do great mischief if we were to make any alteration in the law as now existing on the doctrine of reputed ownerships. I should be very sorry if we were to put such a construction upon the two statutes as would establish the proposition contended for by the plaintiffs. There must, therefore, be judgment for the defendants."[2]

BIRTH. *See post*, Concealment of Birth.

(A) *Proof of*[3].

(B) *Right to Search Register and have Certified Extracts.*[4]

BISHOP.[5] *See* Ecclesiastical Law.

BLACK Leg. As to whether calling a person one is slander, see *Barnett v. Allen*, 27 L. J. Ex. 412.

BLANK Acceptance. *See ante*, Bills and Notes, p. 400.

BLANK Transfers. *See* 6 Mee. & W. 200; 28 L. J. Ch. 285; *post*, Contract; Will.

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bill of sale, or a copy thereof, filed as aforesaid, upon paying for the same at the like rate as for office copies of judgments in the said Court of Queen's Bench."

A certified copy, under 14 & 15 Vic. c. 99, s. 14, of the entry in the book, is evidence not only of the filing of the bill of sale, and of the date of the execution and filing of it, but also of the filing and time of filing the affidavit. *Grindel v. Brenden*, 33 L. T. 224. *Bath v. Sutton*, 27 L. J. Ex. 388; 28 id. C. P. 333.

[1] By the 17 & 18 Vic. c. 36, s. 6, "it shall be lawful for any judge of the Court of Queen's Bench to order a memorandum of satisfaction to be written upon any bill of sale or copy thereof respectively as aforesaid, if it shall appear to him that the debt, if any, for which such bill of sale is given as security, shall have been satisfied or discharged."

[2] See *Stansfield v. Cubitt*, 4 De G. & J. 222; 27 L. J. Ch. 266. *Re Daniel, ex-parte Ashby*, 25 L. T. 188. *Re A. O'Conner*, 27 id. 27.

[3] In general, the most convenient mode of proving a birth (or a death, or a marriage), is by the production of a certified copy of the entry in the books of the Registrar-General: "all certified copies of entries purporting to be sealed or stamped with the seal of the said registered office, being receivable as evidence of the birth, death, or marriage, to which the same relates." 6 & 7 Will. c. 86, s. 38. Or copies from the parish register.

The fact of a birth may be proved by parol, notwithstanding it may have been registered. 1 Tayl. Ev. 375, 3d ed. Memorandums of a deceased parent are good evidence of the birth (T. Ray. 84; 7 East, 290); but not of the *place*. 8 East, 542; 1 De Gex & J. 40.

[4] Any person is entitled, upon payment of a small fee, to search the register of births, and to have certified copies of any entries. 6 & 7 Wm. 4, c. 86. And under the act 3 & 4 Vic. c. 92, which provides for certain non-parochial registers in the custody of the Registrar-General, every person is entitled, on the payment of certain fees, but upon personal application only, to inspect the registers and the lists of the same, and to have certified extracts of such registers as he may require. *See* s. 5. A certified copy or extract from the register is subject to a stamp-duty of one penny, to be paid by the person requiring the copy. 23 Vic. c. 15, sch. And *see post*, Registers.

[5] A bishop is constituted by election, confirmation, consecration, and installation. He is elected by the chapter of his cathedral church, by virtue of a license from the Crown.

BLINDNESS.[1]

BOARD and Lodging.[2]

BOARD of Health. *See* Health, Board of.

BOARD of Trade.[3] *See* Bye-Laws; Railways; Shipping.

BOARD of Works. *See* Metropolis Management Act.

See 25 Hen. 8, c. 20; 1 Eliz. c. 1, ss. 7, 10.

By the 25 Hen. 8, c. 20, it is enacted, that at every future avoidance of a bishopric the king may send the dean and chapter his usual license to proceed to election, called his *congé d'élire*, which is always to be accompanied by a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may, by letters patent, appoint such person as he pleases. This election or nomination must be signified by the king's letters patent to the archbishop of the province, requiring him to confirm, invest, and consecrate the person so elected; which he is bound to perform immediately, without any application to the see of Rome. After which, the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*; that is, the loss of all civil rights, with forfeiture of lands, goods and chattels, and imprisonment during the royal pleasure. *See* 3 Steph. Com. p. 2.

As to the bishoprics created by Hen. 8, namely, Chester, Gloucester, Peterborough, Bristol, and Oxford, it is said in Co. Lit. by Hargrave, 134 a, n. (5), that they are donative. But it seems to be the practice as to all these to issue a *congé d'élire*. See *Reg. v. Abp. of Canterbury*, 11 Q. B. 513; 17 L. J. Q. B. 252. And in the case of Gloucester and Bristol, now united, it is expressly directed that there shall be an election by the dean and chapter of each alternately. Order in Council, 5 Oct. 1836. No *congé d'élire* is issued with respect to the Irish bishoprics. *Bishop of St. David's v. Lucy*, 1 Salk. 136.

A bishop is the chief of the clergy within a diocese, but is subordinate to the archbishop of the province, to whom he is sworn to pay due obedience. Among the principal powers which he exercises are those of ordaining priests and deacons (*see* 59 Geo. 3, c. 60; 3 & 4 Vic. c. 33; 15 & 16 Vic. c. 52, s. 2), consecrating churches, and the inspecting the manners of the people and clergy (see *Re Dean of York*, 2 Q. B. 1), for which purpose he may visit at pleasure every part of his diocese. He is also an ecclesiastical judge (*see*, as to the local limits of his jurisdiction, 10 & 11 Vic. c. 98; 20 Vic. c. 10. See *Powell v. Hibbert*, 15 Q. B. 129); but his chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law. *See* 37 Hen. 8, c. 17. In case of complaint, however, against a clerk in holy orders for any ecclesiastical offence under the Church Discipline Act, 3 & 4 Vic. c. 86, the bishop, or if he is patron, the archbishop (*Ex-parte Denison*, 4 E. & B. 292; 24 L. J. Q. B. 34), if, after a preliminary inquiry before commissioners, there appears sufficient ground for proceeding farther, is to hold a court to hear the cause, assisted by three assessors, of whom the dean of his cathedral, or one of his archdeacons, or his chancellor, must be one; and a serjeant-at-law, or an advocate who has practised five years in the court of the archbishop of the province, or a barrister of seven years' standing, another. The bishop may either determine the cause himself, or may send it to the court of appeal for the province, there to be determined. In either case an appeal lies ultimately to the Queen in council. Where the bishop has himself given judgment, there is an appeal in the first instance to the court of appeal for the province. 3 & 4 Vic. c. 86, s. 15. It is also the business of a bishop to institute and to direct induction to all ecclesiastical livings in his diocese, and to license curates and regulate their salaries. 1 & 2 Vic. c. 106, s. 77. *See* also 3 & 4 Vic. c. 33.

Bishoprics, and also archbishoprics, may become void by death, deprivation for any very gross and notorious crime, and also by resignation. *See* 19 & 20 Vic. c. 115. A bishop must resign to his metropolitan, but the archbishop can resign to none but the king himself. 3 Steph. Com. 15, 4th ed.

By 6 & 7 Vic. c. 62, provisions are made for the performance of the episcopal functions in the case of the incapacity of any archbishop or bishop.

When any spiritual person is made a bishop, all the preferments of which he was before possessed become in general upon his consecration void, and the sovereign may present to them by his prerogative royal. See *Basset v. Gee*, Cro. Eliz. 790. *Att.-Gen. v. Bishop of London*, 4 Mod. 210. *Grocers' Co. v. Abp. of Canterbury*, 2 W. Black. 770.

[1] *Semb.* suffices to prove handwriting of attesting witness who has become blind. *Wood v. Drury*, 1 Ld. Raym. 734. *Pedlar v. Paige*, 1 M. & Rob. 258. In *Crouch v. Jenks*, 2 id. 262. *See* 1 De Gex & J. 34.

[2] A contract for is not an interest in or concerning lands within the stat. of Frauds. *Wright v. Stovers*, 29 L. J. Q. B. 161.

[3] The Board of Trade is a Committee of the Privy Council. In the 17 & 18 Vic. c. 104, s. 2, it is defined as "The Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade of foreign plantations."

BODLEIAN Library.[1]

BONA Fides, determinable by Jury.[2] *See* Sale; Vendors and Purchasers.

BONA Notabilia.[3]

BOND.

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[1] *Qy.* Whether ancient deeds or grants entered in books of are evidence? Bunb. 189; 3 Taunt. 91; 4 Scott, 83; 1 Tay. 432.

[2] The question of *bona fides* ought to be determined by the jury. *Wedge v. Berkeley*, 6 Ad. & E. 663; 1 Nev. & P. 665. *Moore v. Magrath*, 2 Cowp. 9. *Grey v. Dinnen*, 2 Jebb. & Sy. 265. *Coxhead v. Richards*, 2 C. B. 584. *Hazeldine v. Grove*, 3 Q. B. 1007. *Hughes v. Buckland*, 15 Mee. & W. 346. *Horn v. Thornborough*, 3 Ex. 846; 6 D. & L. 651. *Douglas v. Ewing*, 6 Ir. L. R. (N. S.) 395.

But in actions against magistrates for acts done in the execution of their office the judge must decide whether notice of action is necessary, and the question of *bona fides* must, consequently, be determined by him, and not by the jury. *Kirby v. Simpson*, 23 L. J. M. C. 165. *Arnold v. Hamel*, 9 Ex. 404.

[3] Before the institution of the Probate Courts, under the 20 & 21 Vic. c. 79, it was necessary that a will should be proved in the court of the bishop or ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lie. But, if there were effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, it was necessary that the will should be proved in the Prerogative Court of the archbishop of that province. *See* Wms. Exors. pt. 1, b. 4, ch. 2. The doctrine of *bona notabilia* is now determined by the abolition of the old jurisdictions. 20 & 21 Vic. c. 79, s. 5.

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I. Nature of.[1]

[1] A bond, or obligation, is a deed, whereby a person obliges himself, his heirs, executors, and administrators, to pay to another person a certain sum of money, or do a certain act, on an appointed day. The party binding himself is called the obligor, and the obligee is the person to whom the money is to be paid: but bonds generally contain a condition, that, on payment of the sum mentioned therein, or in the event of the obligor performing a certain act on the day mentioned, the bond shall be void; and the obligor in such bond shall subject himself to a penalty in case the condition is not performed. Perk. *Fait*, 119; Co. Lit. 172, a.; Bac. Abr. Obligation; Cruise, Dig. IV. 99; Yelv. 194. This instrument is distinguishable from an indenture, which is *inter partes*, by its being obligatory only on the *obligor*, and is therefore polled or shaven smooth at the edges. Lit. 370, 371, 372; Co. Lit. 55, 229, a.; Plowd. 134, 421. If a bond be merely for the payment of money without any condition, it is called a simple or single bond or bill. 2 Black. Com. 340. *Morrant v. Gough*, 7 B. & C. 211. It is, however, usually accompanied with a condition or defeasance, in which the sum to be paid or the act to be performed is expressly and specifically mentioned, with the time limited for that purpose; and if the condition be broken, the bond becomes forfeited and absolute. In this case it is called a conditional bond. Hurlstone on Bonds, 1. A bond given for a simple contract debt merges it, whatever may have been the intention of the parties. *Price v. Moulton*, 10 C. B. 561; 15 Jur. 228; 20 L. J. C. P. 102. But if a banker take from his customer and a surety a bond conditioned for the payment of sums already advanced and to be advanced, the debt of the customer is not merged in the bond, and he may still be sued for the balance of his account, independently of the bond. *Holmes v. Bell*, 3 Man. & G. 213; 3 Scott, N. R. 479. *See* also *Norfolk Railway Co. v.*

II. Form of.

(A) *Technical Words not Necessary.*[1]

(B) *Date not Requisite.*[2]

(C) *Must be in English.*[3]

(D) *Must Bind in a Sum of Money.*[4]

(E) *Must be on Paper or Parchment.*[5]

(F) *Must be Sealed.*[6]

Ball v. Dunsterville, 4 T. R. 313.

The sealing of a joint bond by one of two partners, but in the presence and with the sanction of the other, is binding.

On the general issue pleaded to a bill of sale, it appeared that the defendants were partners in the transaction, and that one only had executed the transfer, but that the other defendant was present during such execution, and sanctioned the act of his co-partners. On a verdict passing for the plaintiff, a rule *nisi* for a new trial was obtained, and the defendant's counsel insisted that, independently of the presence of both parties, it was essential to a valid execution that the seal should be placed on the wax by each, or as many times as there were parties to the deed. But the court disallowed the objection, considering that the presence of the defendant, who did not execute, was sufficient to show an acknowledgment and adoption of the deed on his part. Rule discharged.

See W. Jones, 268; 7 T. R. 207; 2 East, 142; 4 Esp. 220; Holt, N. P. C. 141.

(G) *Need not be Signed.*[7]

(H) *Must be Delivered.*[8]

Macnamara, 3 Ex. 628. A bond is not "goods" or chattels within the 13th Eliz. c. 5, as to fraudulent alienations. *Sims v. Thomas*, 4 Per. & D. 233; 12 Ad. & E. 536.

[1] As a bond is, in the eye of the law, only an acknowledgment of a debt, it is not necessary that any technical words should be used in such an instrument, if it can be collected from the circumstances and tenor of the language that the obligor intended to hold himself bound to the obligee. 2 Roll. Abr. 146, E. 37. Hence a letter of attorney (3 Mod. 153; S. C. Comb. 87) and an acknowledgment written on a page of a book, whereto a seal was affixed (Cro. Eliz. 613), have been respectively holden to constitute good bonds; so the words, "I, A. B., of, &c. do owe C. 10*l.*," "do promise to pay to," or "have borrowed of C.," when under seal, have been held sufficient, as clearly denoting an acknowledgment of a debt. Shep. Touch. 368. *Hollingworth v. Ascue*, Cro. Eliz. 355. *Watson v. Snaed*, 1 Vent. 238. *Sawyer v. Mawgridge*, 11 Mod. 218. *Bond v. Moyle*, 2 Vent. 106.

[2] The date is not an essential part of the bond, the day of delivery being the time of its first becoming operative (*see* Cro. Eliz. 773; 2 Lev. 348; 1 Salk. 141; 1 Brownl. 104; 1 Lev. 196; 5 Mod. 282; 3 Keb. 332; 2 Co. 4; 6 Mod. 244; 2 Ld. Raym. 1076); and it may be shown, without prejudice to the instrument, that it was executed at a different time from that which it purports to bear date (*see* 4 East, 477); and even when delivered before the date it runs from the delivery.

[3] Since the 4th Geo. 2, c. 28, s. 1, a bond must be written in the English language.

[4] It must bind the obligor in a *sum of money*. *Loggins v. Titherton*, Yelv. 225. But where the words in the obligatory part were "the sum of 7700," omitting the word "pounds," it was held that such omission could be supplied by intendment from looking at the condition. *Coles v. Hulme*, 8 B. & C. 568. *See* as to omission of word "pounds," 2 East, P. C. 251; 1 Leach, 175.

[5] It is essential to the nature of a bond, in common with other deeds, that it be written or printed on paper or parchment; and it will not be a valid instrument if the materials used consist of wood, stone, leather, or cloth. The reason assigned for this practice is the superior durability of paper or parchment contrasted with the more perishable nature of other materials. Co. Lit. 35, b. 229, a; Com. Dig. Fait. A. 1; 2 Roll. Abr. 31, l. 40; Bro. Abr. Oblig. 30, 67; F. N. B. 122. It may be written in pencil. 5 B. & C. 234.

[6] A bond must be sealed, though it is not material by what seal the impression is made. Perkins, 132. Shep. Touch. 57. And if a person execute, as the joint act of himself and another, without the consent of that other, it will be good as the several bond of the party executing. *Elliott v. Davis*, 2 B. & P. 338. In the case of a bond executed in a foreign country, where, according to custom, no seal is requisite, the obligee, before he can recover thereon in this country, must give evidence of such custom. *Adam v. Kerr*, 1 B. & P. 360.

[7] It is not absolutely requisite that the bond should be signed, though it is usual. *Cromwell v. Grunsden*, 2 Salk. 462.

[8] But a bond must be delivered; that is to say, there must be some act or word from

(I) *Bond void in Law for Imperfection; how treated in Equity.*[1]

III. Of Joint and Several Bonds.[2]

IV. Description of the Obligee.

Langdon v. Goole, 3 Lev. 21; Lambert v. Branthwaite, 2 Stra. 945.

The *solvendum* demonstrates to whom the obligor is bound, though the obligee's name be omitted in the preceding part of the instrument.[3]

Debt on bond by administrator of J. G. On oyer, the obligatory part of the instrument was set forth as follows:—"Know all men, that I, P. G., do stand bound (not saying to whom) in the sum of, &c., and to be paid to the said J. G. the elder's executors, for which payment to be made, I bind me, my heirs and executors (without saying to whom)." On demurrer it was objected,

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which the intention of the obligor to put the bond in the possession of the obligee can be inferred. Co. Lit. 36, a. A delivery to a third person for the use of the obligee is a sufficient delivery. *Doe d. Garnons v. Knight*, 5 B. & C. 671. It may, however, be delivered to a third person as escrow, where there is an express agreement to that effect. *Murray v. Earl of Stair*, 2 B. & C. 82. *See* Escrow, 25 L. J. Ex. 246; 26 id. Q. B. 36.

But if A. enters into a bond to B., which he delivers to C. for the use of B., though this immediately, upon the execution and delivery, becomes the deed of A., yet if, after it is presented to B., he disagrees to it *in pais*, the obligation by such refusal loses its force. *Taw's case*, Dyer, 167, n.; Roll. Abr. 148; 1 Salk. 301, 360, 266.

[1] An instrument purporting to be a bond executed by the obligor, with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party; but a bond void in law may be enforced as an agreement in equity, subject to the effect in equity of the circumstances under which it was made. *Squire v. Whittor*, 1 H. L. Ca. 333: 12 Jur. 125.

[2] 1st. *Several obligees.* It is a rule that a party cannot be bound to several persons in one obligation to pay them separately. Hence, a bond of 200*l.* to two, to pay 100*l.* to the one and the residue to the other, is void. Dy. 350, pl. 20; Hob. 172; 2 Brownl. 207; Yelv. 177: *sed vide* 1 Saund. 153, 154, n. And where the following expressions were used in a bond, "Be it known that I, A., do acknowledge myself to owe and be indebted to B. and C. in the sum of 91*l.* 12*s.* 8*d.*, for which payment to be made I bind myself to B. in 100*l.*;" it was doubted by the court whether B. alone could bring the action, or both should join (*Foxhall v. Sands*, Cro. Jac. 291); but it is conceived that both should have been made parties to the action, and that the words "for which payment to be made I bind myself in 100*l.*" ought to have been rejected as surplusage (*see* Cro. Eliz. 886); for the former was the obligatory part of the instrument; and the general rule here applies, that in an action upon a contract, whether expressed or implied, by parol or under seal, or of record, the action must be brought in the name of the parties in whom the legal interest in such contract is vested (*see post*, Contract; Parties to Actions); and therefore the legal interest and cause of action being in B. and C. jointly, all the obligees should have been included in the suit for the recovery of the 91*l.* 12*s.* 8*d.* It is also a clear principle, that if an obligation be made to three to pay money to one of them, they must all join in the action, for they are but as one obligee. Yelv. 177.

Where a bond is made to A. to pay him or a third person a sum of money for the *benefit* of the latter, the action must be brought in the name of A., and the third person cannot sue, or even release the demand. 2 Inst. 673; 1 Lev. 265; 3 id. 139. But upon a single bond or deed poll, reciting that the obligor had received of A. 40*l.* for the use of C. and D., equally to be divided, to be repaid at such time as should be thought best for the profit of C. and D., it was decided that C. and D. might maintain separate actions for their respective moieties. Cro. Eliz. 729; *see post*, Covenant.

When one or more of several obligees die, the legal interest is vested in the survivor, and in suing upon such bond the executor or administrator of the deceased cannot be joined, nor can he sue separately, though the deceased alone might be entitled to the *beneficial* interest in the obligation, and the executor must resort to a court of equity, to obtain from the survivor the testator's share of the sum recovered. 1 East, 497; Salk. 444; Ld. Raym. 340.

A release by one of several obligors will operate as a bar to all (2 Roll. Abr. 410, 147); and a release to one of several obligers may be pleaded in bar by the others, if the bond be joint, or joint and several. 2 Roll. Abr. 412, p. 5; 1 Inst. 232, a.

[3] And if A. acknowledges himself to be indebted to B. in the sum of 10*l.* to be paid on a specified day, and binds himself and his heirs in the same bond in 20*l.*, but does not mention to whom he is bound, yet the obligation is valid, for it shall be intended that he is bound to B., to whom he acknowledged before the 10*l.* to be due. *Franklin v. Turner*, 2 Roll. Abr. 148.

Where A. binds himself in a sum to B., *solvendum* to C. to the use of B., a payment to C. is a payment to B., and an action upon it must be brought by B., and not by C. Sid. 238; Vent. 34; *see post*, p. 511, Assignment of Bonds.

for the defendant, that this was no obligation to J. G. as described in the declaration, for the money is to be paid to J. G. the elder's executors, so that if the defendant be bound at all, he is bound to the executors of J. G.; and then the plaintiff, being his executor, should have sued in his own name, and not as executor, upon an obligation made to his testator. But the whole court held that the judgment ought to be given for the plaintiff, for an obligation cannot be made to executors in the lifetime of the testator, because he cannot have an executor during his life. And this obligation was sealed and delivered to the testator, and it shall not be void if by any means it can be made good. Judgment for plaintiff.

V. The Penalty.[1]

VI. Insertion of the Words "Heirs, Executors," etc. in Bond.

(A) *Heir to be Bound must be mentioned.*

Barber v. Fox, 2 Saund. 136. Hunt v. Swain, 1 Lev. 165; S. C. 1 Sid. 248.

The heir is only liable when expressly named in the bond.[2]

Declaration in *assumpsit*, stating that the father of the defendant became bound to the plaintiff by bond, with a penalty conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and heir on the bond, the defend-

[1] The sum inserted in the bond as a penalty to secure the performance of the condition is generally double the amount of the sum intended to be secured by the instrument; and as it is considered to be a compensation for the breach of the contract, the reservation of a greater sum is allowed, and was not usurious within the statute of Anne, because it was in the power of the borrower to avoid the payment of the money reserved as a penalty, by paying the principal at the day appointed. 5 Co. 69; Cro. Jac. 509.

After forfeiture of the bond, the penalty was the legal debt (*Thompson v. Hunt*, 3 Lev. 368); and upon payment of the penalty and costs the court would order the obligee to acknowledge satisfaction on the roll. *Wilde v. Clarkson*, 6 T. R. 303. *Shutt v. Procter*, 2 Marsh. 226); and this notwithstanding the obligee might have sustained damage exceeding that amount. This, however, does not interfere with the practice of allowing interest on a judgment on a bond. *M'Clure v. Dunkin*, 1 East, 436. So also, if the penalty be contained in any other instrument than a bond, damages may be recovered beyond it. 1 Wms. Saund. 58 b, n. c.

Formerly, on the forfeiture of a bond, or on its becoming single, the whole penalty was recoverable at law; but the courts of equity, at an early period, interposed, and would not permit the obligee to take more than in conscience he was entitled to receive, viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, or the actual damages sustained by the non-performance of other conditions. And a similar practice having gradually obtained a footing in the courts of law, by the stat. 4 & 5 Anne, c. 16, it was enacted, "that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit be commenced thereon, shall be a satisfaction and discharge" (*see post*, p. 525, Staying Proceedings); and when the condition is for the performance of any covenants or agreements, in any indenture, deed, or writing contained, breaches must be assigned, and the real damages assessed by a jury. *See post*, p. 523, Suggestion of Breaches, under 8 & 9 Wm. 3, c. 11, s. 8. In consequence of these beneficial enactments, the stat. 8 and 9 Wm. 3, being compulsory upon the plaintiff, there are but few instances where the whole of the amount of the penalty can be recovered, and the practice of obtaining relief by the circuitous mode of applying to a court of equity is now rendered unnecessary. *See* Staying Proceedings, *post*, p. 525.

[2] And, therefore, in *Crossenny v. Honor*, in Chancery (1 Vern. 180), where a bill was brought by the obligee on a bond against the heir of the obligor, alleging that he, having assets by descent, ought to satisfy the bond, the defendant demurred, because the plaintiff had not expressly alleged *that the heir was bound in the bond*, and the demurrer was allowed. *See* also 1 Ves. 212. But, if an ancestor bind himself and his heirs, it will be a lien on his heirs, who, in default of personal assets, will be bound to discharge the obligation, provided he have sufficient real assets of the obligor by descent. A bond is a collateral, not a direct, charge on the land; and, properly speaking, it is not an incumbrance upon the realty, for it does not follow the land like a recognisance and a judgment; and even if the heir-at-law aliens the land, the obligee in the bond

ant, in consideration of forbearance, promised to pay the plaintiff the debt, after *non assumpsit* pleaded, and verdict for the plaintiff. A motion was made in arrest of judgment, on the ground that there was not a consideration; for it did not appear that the defendant's ancestor had bound himself and his heirs; and if the heir was not bound expressly by name, he was not bound at all. Judgment arrested.

See *Dyke v. Sweeting*, Willes, 585.

(B) *Executors or Administrators need not be mentioned.*[1]

VII. Parties to.

(A) *All Persons having Legal Capacity may be.*[2]

(B) *Married Women, when.*[3]

(C) *Infants, when.*[4]

(D) *Lunatics.*[5]

(E) *Alien-Enemy.*[6]

(F) *Corporations.*[7]

(G) *Executors, &c.*[8]

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by which the heir is bound can have his remedy only against the person of the heir to the amount of the value of the land (stat. 3 W. & M. c. 14, s. 5); for he cannot follow it when it is in the possession of a *bonâ fide* purchaser. Bull. N. P. 175.

To bind the heir, however, it is not sufficient that he is named in the condition, he must also be named in the obligatory part. *Barber v. Fox*, 2 Saund. 136. As to Proceedings against Heir, *see post*, p. 528.

[1] But in general an executor or administrator is entitled to the full benefit of an obligation made to the deceased, though not named; and it is a well-established rule, that executors so completely represent the person of the testator, that if a man enter into a bond his executors are bound, though they are not mentioned in any part of the instrument (1 Inst. 292; 2 Roll. 149, l. 50; Dyer, 23 a; Shep. Touchst. 369); and the same rule obtains as to an administrator. 2 Roll. 149, l. 55; 2 Wms. Exors. 1226.

[2] All persons having legal capacity to contract in general, may bind themselves in bonds and obligations. 5 Co. 119; 4 id. 124; Roll. Abr. 340.

[3] The bond of a married woman is void in law, unless her husband be *civiliter mortuus*, as by transportation or legal presumption of death. Bac. Abr. Oblig. D. But if she have separate estate she would be liable in equity (17 Ves. 366. *Stewart v. Kirkwall*, 3 Madd. 387); and so in that case her executors would be liable at law, if after the death of her husband she had promised to pay. *Lee v. Muggridge*, 5 Taunt. 36.

[4] An infant can only bind himself in a bond if it be a single bill for the exact amount due for necessaries (1 Lev. 186; Co. Lit. 172); yet, if there be any penalty or condition for the payment of interest, the bond will be void. *Fisher v. Mowbray*, 8 East, 330; *Doct. & Stud.* 113; 1 Sid. 112; 1 Salk. 279. And the contract being void, it is incapable of confirmation by him when of age, for confirmation implies the existence of the particular thing to be confirmed; therefore, if he wish to restore his liability, he must re-execute the bond, not as having satisfied the former contract, but as having made a new one. *Baylis v. Dineley*, 3 M. & S. 477. *See post*, Infant, and *ante*, p. 420.

[5] Lunacy is no defence to an action on a bond unless after office found, or it can be shown that the lunatic has been fraudulently taken advantage of by the obligee. *Bagster v. Earl of Portsmouth*, 5 B. & C. 170. *Brown v. Joddrell*, 1 M. & M. 105. But a privy in blood, as the heir, or privies in representation, as the executor or administrator, may take advantage of this defence. *Beverley's case*, 4 Co. 124. *See* 9 Ves. 478.

[6] An alien-enemy under safe-conduct may be the obligee of a bond, and sue thereon. *Wells v. Williams*, 1 Ld. Raym. 282; 1 Salk. 46; Lutw. 15. *See* vol. i. p. 285, Aliens.

[7] Sole corporations, as bishops, prebendaries, parsons, vicars, &c. cannot be obligees in their ecclesiastical character; and therefore a bond made to such persons shall enure to them in their natural capacities (*see* 4 Co. 65; Cro. Eliz. 464); but a corporation aggregate may take bonds, &c. in its political capacity, which shall go in succession, such corporation being always in existence. *See* Dyer, 48, a; Cro. Eliz. 464; Co. Lit. 9, a; 46 b; Hob. 64; Roll. Abr. 515. Grant on Corporations.

[8] Executors or administrators, by entering into a bond, are personally liable, though they make it expressly *as executors*, and though they have fully administered the testator's assets. *See* 5 Moore, 282; S. C. 2 B. & B. 460; 1 T. R. 487; 2 H. Black. 618; 6 id. 591. *See post*, Executors and Administrators.

(H) *Surety and other Party giving a Bond ought to be informed of Legal Effect.*[1]

(I) *Partner in general cannot be Bound by.*[2]

(J) *Effect of an Incompetent Person becoming a Party.*[3]

VIII. Alteration of.

(A) *If by Obligee, will render Void.*[4]

(B) Aliter *if by Obligor or a Stranger.*[5]

(C) *If Immaterial will not affect.*[6]

(D) *May be made by Consent of Parties, though fresh Stamp will be required.*[7]

IX. Cancellation of.[8]

X. Assignment of.

(A) *How far Recognised by Courts of Law.*

Legh v. Legh, 1 B. & P. 447.

The courts of law will recognise the assignment of a bond so far, that if the original obligee release the debt after no-

On showing cause against a rule for leave to set aside a plea of release to an action on a bond, it appeared that the bond had been assigned to J. L. as a security for money advanced to the original obligee, and of which assignment the defendant had had due notice; after such notice the obligee released the bond, and an action having been brought in the name of the obligee by J. L., the defendant pleaded the release in bar.

Per Cur. The conduct of this defendant has been against good faith; and

[1] A party joining as surety in a bond ought to be informed of all the particulars of his obligation. *Squire v. Whitton*, 1 H. L. C. 333; 12 Jur. 125. And a nephew provided for by his aunt's will obtained from her a post-obit bond. It was set aside, as he had not proved that she knew the effect of the bond was to make her will irrevocable. *Cooke v. Lamotte*, 15 Beav. 234; 21 L. J. Ch 371.

[2] The authority of one partner to bind the firm is confined to cases of simple contract; he cannot, therefore, bind it by bond, unless express power to that effect be given, or he be present at the execution and delivery of the deed. *Harrison v. Jackson*, 7 T. R. 207; and *Thomson v. Frere*, 10 East, 418. *Ball v. Dunsterville*, *ante*, p. 507.

[3] If an infant, *feme covert*, or other incompetent persons, bind themselves in bonds, together with a stranger, who is under none of these disabilities, it shall bind the stranger, though it be void as to the infant, &c. *See* Roll. Rep. 41.

[4] If the obligee, after the execution of a bond, alter it in a material point, although the original writing may still be legible, the bond is void at law (*Pigott's case*, 11 Co. 27); and this, even if the obligor afterwards assent to the alteration, and pay money on the bond. *Adams v. Bateson*, 3 M. & P. 339. But where, to an action on a bond, a plea of a material addition to the condition after execution did not state how it was made, or that it was in writing, it was held bad on demurrer. *Harden v. Clifton*, 1 Q. B. 522; 1 Gale & D. 22. *Davidson v. Cooper*, 11 Mee. & W. 778. *See* also *Matson v. Booth*, 5 M. & S. 223.

[5] But a bond is not void if altered by the obligor (Shep. Touch. 69), or by a stranger, and the original contents can be proved. *Henfree v. Bromley*, 6 East, 309. 2 Smith, 400. *Waugh v. Bussell*, 5 Taunt. 707.

[6] If the alteration be in an immaterial part, the bond will not be affected in its validity. See *Henfree v. Bromley*, and *Waugh v. Bussell*, *supra*.

[7] With the assent of the parties, a bond may of course be altered, and the altered bond will be perfectly valid (*Hudson v. Revett*, 2 M. & P. 692. *Saunderson v. Symonds*, 1 B. & P. 426; 1 Anst. 229); but if the alteration be material, it is in fact a new bond and requires a fresh stamp. *Bathe v. Taylor*, 15 East, 416.

[8] A bond may be cancelled by the obligor tearing off the seal *animo cancellandi;* and if the bond be joint, or joint and several, tearing off the seal of one of the obligors will cancel it as to the rest. *Collins v. Prosser*, 1 B. & C. 682. *Cross v. Powel*, Cro. Eliz. 483; Shep. Touch. 70. And the production of a bond out of the hands of the assignees of a bankrupt, who was the principal obligor in a cancelled state, is evidence that it was cancelled with the consent of the obligee. *Alsager v. Close*, 10 Mee. & W. 576; 12 L. J. Ex. 50. But a bond can only be cancelled by consent of the obligee. *Ex parte Smith*, 3 Mont. D. & D. 378. And tearing off the seal of one obligor in a several bond does not vitiate the instrument as to the other obligors. *Collins v. Prosser*, 1 B. & C. 682. *See* also 5 Co. 19; 1 East, 497; 3 Taunt. 87; Cro. Eliz. 120; 2 B. & P. 270; 5 Co. 103; 6 East, 506; 2 M. & S. 363.

tice to the obligor of the assignment, as to set the release aside.[1]

the only question is, whether the defendant must not seek relief in a court of equity. The defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the court. Most clearly it was in breach of good faith to pay the money to the assignor, and take a release from him: there are many instances in which the court has set aside a release given to prejudice a real plaintiff. All these cases depend on circumstances. *See* 1 Camp. 392; 4 B. & A. 419; 9 East, 470; 7 T. R. 670, a; Dougl. 407; 7 Taunt. 48; 4 Moore, 192; 1 Chit. Rep. 390, 391, n.; 1 Salk. 160; *post*, Choses in Action; Release.

DANGERFIELD v. THOMAS, 1 Per. & D. 287.

To a plea, that the bond vested in the assignees of the plaintiff, a bankrupt, he may reply that he assigned the bond to a creditor as security for his debt, and the action is brought for his benefit.

In debt on bond. *Plea*, averring the bankruptcy of the plaintiff and appointment of assignees, who, by reason of the premises, became entitled to the bond debt. *Replication*, that the plaintiff had, by indenture, assigned the bond as a further security for a debt, with a proviso for redemption; and that the action was brought for the benefit of such creditor. On special demurrer,—

The court held the replication good, the bond being of less amount than the balance due on the debt, for the security of which it had been assigned, and so no benefit to arise to the bankrupt's estate, and no other available security: the transfer of the plaintiff's interest in the bond, although only stated to be a further security, was complete.

(B) *Effect of on Voluntary Bond.*

PAYNE v. MORTIMER, 1 Gifford, 118; 5 Jur. N. S. 307; 28 L. J. Ch. 437; affirmed on appeal, 5 Jur. 55, 749; 28 L. J. Ch. 716.

But a bond voluntary as to the person in whose favour it was originally given, ceases to be voluntary in the hands of a transferree for value.[2]

In this case Mr. Mortimer, whose assets the court was called upon to dispose of, had, in 1842, entered into a covenant for the payment of 5000*l.*, after his death, for certain purposes. This was contained in his daughter's settlement, which was in consideration and in contemplation of her marriage, which took place in the same year, and was, therefore, for valuable consideration. In the same year, but after the marriage, he executed a voluntary bond for securing a large sum of money, to be paid upon or soon after his death, for the benefit of some of his children. There was no valuable consideration for this bond, but the transaction was a fair one. Two of the sons beneficially interested in the bond assigned their portions under it for valuable consideration, and the assignees of these portions claimed to rank equally in equity with the covenant debt against the assets of Mr. Mortimer, who died insolvent in 1857.

Per Cur. This is a question whether a voluntary bond assigned for value ought, in the administration of assets, to stand upon the same footing as a bond originally given for value? We are of opinion that it ought.

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[1] A bond, being a mere chose in action, cannot be assigned so as to give the assignee a right to sue upon it in his own name. But sometimes such power is given in the case of particular bonds to the assignee by statute; as in the case of bail bonds by 23 Hen. 6, c. 10, s. 5; replevin bonds, by West. 2 (13 Edw. 1), c. 2; India bonds, by 51 Geo. 3, c. 94; administration bonds, by 20 & 21 Vic. c. 77, s. 83; railway bonds, by 8 & 9 Vic. c. 16, s. 46. *See* also, as to bond payable to holder, *Georgier v. Micville*, 3 B. & C. 45. It has been held that a bond, though it be not assignable in point of interest, yet is a contract that the assignee shall receive the money to his own use. *The Parishes of Caistor and Eccles*, 1 Ld. Raym. 683; 1 Salk. 68. And, therefore, that an assignee of a money bond may support an action for money had and received against the obligor, who by indorsement agreed to pay its contents to any assignee. *Fenner v. Meares*, 2 Black. R. 1269. Probably this would not now be considered law.

[2] And *semble* bonds are within the equity of the 5 & 6 Wm. 4, c. 41, which makes securities valid in the hands of *bonâ fide* holders, without notice that the consideration was a gaming debt. *Hawker v. Hallewell*, 3 Sm. & G. 194; 2 Jur. N. S. 537; affirmed on appeal, 25 L. J. Ch. 558.—L. J.

XI. Recitals, Effect of.

(A) *Party to estopped from Denying.*[1]

(B) *May Restrain the Condition.*[2]

(C) *But not the Obligatory Part.*[3]

XII. Contracts Controlling or Varying the Bond.

Lainson v. Tremere, 3 Nev. & M. 603.

The amount stated in a bond cannot be varied, though to secure performance of another deed, where the sum is different.

The obligor executed a bond conditioned for payment of the rent of 170*l.* according to the terms of a lease, &c., in which, when set out on oyer, it appeared that the rent was only 140*l.*

Per Cur. If the condition of a bond contain a general obligation, the party is not estopped; but if it have reference to a particular thing, he is estopped from saying that there is no such thing. Thus, an obligor is estopped from denying that there is such a lease as is recited in the bond. Where a bond, reciting a lease with a reservation of 170*l.* rent, is conditioned for payment of 170*l.* rent, the defendant is estopped from setting out a lease which contained a reservation of 140*l.* a-year rent, with an averment of the payment of that rent, because that virtually was a denial that any such lease as that recited in the bond existed.

XIII. Memoranda on, Effect of.[4]

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[1] Where a statement is made in the recital it will operate against the parties to the instrument, and they are estopped from denying it. *Horton v. Westminster Improvement Commissioners*, 7 Ex. 780; 21 L. J. Ex. 297. *Carpenter v. Buller*, 8 Mee. & W. 209. *Shelley v. Wright*, Willes, 9. *Soames v. Nemers*, 3 Nev. & M. 603. *Hosier v. Searle*, 2 B. & P. 299; 1 Roll. R. 408; 2 Co. 33 b., 1 Wms. Saunders, 215, n. (2). But in an action by another party not founded on the instrument, a party thereto may dispute the facts so admitted; and may produce evidence to show that the admission was inconsiderately made. *Carpenter v. Buller*, 8 Mee. & W. 209.

[2] Recitals will restrain the condition, and the intention of the parties will be looked at, especially in the case of sureties. *Pearsall v. Summersett*, 4 Taunt. 593. *Payler v. Homersham*, 4 M. & S. 425. *Lord Arlington v. Merricke*, 2 Saund. 412. *Wardens of St. Saviour's, Southwark, v. Bostock*, 2 N. R. 175. *Liverpool Waterworks Company v. Atkinson*, 6 East, 507. *African Company v. Mason*, 1 Stra. 227. But where the recital of a bond conditioned for the performance of the duties of an office referred to a particular statute, it will not restrain the condition from extending to other duties imposed by a subsequent statute in force at the time when the bond was given. *Farr v. Hollis*, 9 B. & C. 315.

[3] Where a bond was in the penal sum of 1000*l.*, and the condition recited that the obligor and his sureties were to enter into a bond in the penal sum of 500*l.*, it was held that the liability was not restricted to the 500*l.* *Ingleby v. Mouseley*, 3 M. & S. 488. *Sansom v. Bell*, 2 Camp. 39.

[4] An indorsement on the bond by the obligee will in equity generally control it. Thus, where certain Old Pier Bonds were issued for 100*l.* each, at 5*l.* per cent interest, with the exception of eight, upon which a memorandum was written, before or at the time of their execution, whereby the obligee (under his hand merely) agreed to accept interest at 4*l.* per cent only, it was held that the jury were right in coming to the conclusion that the indorsement was part of the bond, at least in equity. *Keele v. Wheeler*, 8 Scott, N. R. 323; 7 Man. & G. 665; 13 L. J. C. P. 170. Also where the words, "This bond is never to appear against A. — Witness, C. D.," were found in the bond, A. being the obligor, and C. D. the obligees, such indorsement having been made eleven years after the bond was given by C. & D.: — *Held*, that without saying that the indorsement amounted to a release, there was an equity, under the circumstances, against enforcing the bond. *Major v. Major*, 1 Drew, 165. *See* also *Shore v. Shore*, 2 Phil. 378; 17 L. J. Ch. 59. *Brook v. Smith*, Moore, 679. *Burgh v. Preston*, 8 T. R. 483. *Hurst v. Jennings*, 5 B. & C. 659. But where A. bequeathed to B. 700*l.*, part of 1200*l.*, which B. owed him on a bond, and he afterwards revoked his bequest, but made an indorsement on the bond that he forgave B. the 700*l.*, and afterwards the executors of A. brought an action against B. for the whole 1200*l.*, upon which B. filed a bill to restrain, offering to pay 500*l.*, the court refused the injunction, on the ground that B. had given no consideration for the indorsement. *Tafnell v. Constable*, 8 Sim. 69. It would seem, however, that the slightest consideration would have been sufficient to support the indorsement. And where the obligor gave a memorandum, that, if the interest on the money were regularly paid, it was not his intention to call in the amount for four years from the date thereof: — *Held*, that it amounted to a binding undertaking; and that, by acceptance of the interest after the stated days without objection, it was to be taken as a regular payment. *Norton v.*

XIV. Construction of.[1]

XV. Forfeiture of.

(A) *What is.*

Skinners' Company v. Jones, 3 Bing. N. S. 481; S. C. 4 Scott, 271.

A bond is forfeited by the non-payment of interest at the time named, and the acceptance of interest does not waive the forfeiture.

In an action on a bond it appeared that the defendant, with one H., entered into a joint and several bond, with a penalty conditioned for repayment by H. of a sum of money lent at the end of three years, and for payment of interest on the 1st of March in each year. In 1833 the interest was not paid until the 30th March; after which the defendant became a bankrupt and obtained his certificate.

The court held, that the certificate was a bar to an action against the defendant for a subsequent default by H. in not paying the principal, as the bond was forfeited by the non-payment of interest on the appointed day, before the bankruptcy, and the forfeiture could not be purged by the subsequent payment; consequently, the penalty became the debt in law, and was provable under the commission.

Melville v. Doidge, 6 C. B. 450; 18 L. J. C. P. 7; 12 Jur. 922.

In what case there will be a forfeiture of a bond for the good conduct of a clerk to a bank.[2]

C. entered into the service of the plaintiffs, who were bankers at B. The defendant became surety for him to the bankers in a bond for the faithful discharge of his duties, and he covenanted to make good all losses which might accrue to the bankers through the negligence, &c., of C. A customer of the bank, who lived twelve miles from B., requested the bank to send some one over to receive his rents on a certain day. C. was sent over, who received the cash from D., but lost it as he went home. In an action against the sureties by the bank to recover the amount lost, the jury found that it was not the custom of the bank to send over and receive money from their customers in the country:

Wood (Chancery), 1 Russ. & Mylne, 178.

But a letter written by the agent of a bond creditor to the principal obligor, giving him eighteen months further time to pay the bond debt, on condition of his paying off at once the interest due, and keeping down the interest to accrue in future:— *Held*, to be a mere promise without consideration, and therefore not binding. *Tucker v. Laing*, 2 Kay & J. 745.

[1] The ordinary rules of construction apply to bonds. The obligatory part will be taken most strongly against the obligor, and the condition being for his benefit, most strongly in his favour. Shep. Touch. 375. *Coles v. Hulme*, 8 B. & C. 568. Words inconsistent with the manifest intention of the parties will be rejected, and sometimes those requisite to carry out such intention supplied. The court will also, to carry out the intention of the parties, disjoin and transpose words. 1 Saund. 66, a. n. (1). *Wells v. Wright*, 2 Mod. 285; 1 Lev. 77. *Wells v. Treguson*, 2 Salk. 463. Where a bond, which, on the face of it, appears to be a simple money bond, is given to secure a time certain, with interest, it must be construed, so far at least as regards a surety, as given to secure the then existing debt, and not to cover floating balances. *Walker v. Hardman*, 4 Clark & Fin. 258; 11 Bligh, 299. *See* also *Pease v. Hirst*, 10 B. & C. 122. But otherwise when there is evidence that it was given as a continuing security. *Henniker v. Wigg*, 4 Q. B. 792; D. & M. 160; 7 Jur. 1058. And where the members of a brewing firm executed a joint and several bond to the bankers of the firm, conditioned to be void if the brewers paid the balance due at any time to the bankers, *when thereupon requested, such request to be in writing, and to be sent to the brewers*, it was held, on the bankruptcy of one of the obligors, that a request must have been made before the bankruptcy to entitle the bankers to prove. *Ex-parte Flintoff*, 3 Mont. D. & D. 726; 8 Jur. 766. Where the condition of the bond, after reciting that one A. B. had filed a bill in Chancery against several persons and the now defendant, was that the now defendant should pay all such costs as the Court of Chancery should award to *all* the defendants: — *Held*, that the construction of the condition was that the defendant should pay the costs awarded to all the defendants except himself. *Vesey v. Mantell*, 9 Mee. & W. 323. *See* also *Noel v. Rochfort*, 1 Bligh, 483. *Lawes v. Shaw*, D. & M. 714; 5 Q. B. 322; 8 Jur. 461.

[2] And where, on a bond conditioned for the due payment by the chief clerk of a railway company of all monies received by him on account of the company, it appeared that he had allowed the other clerks to be in arrear, and made up the deficiency one day by appropriating to it a portion of the monies received on the following day, but had, in fact, paid over the sum equal to the amount

—*Held*, that the money was received by C. in the course of his employment of bank clerk, and that a receipt by him was a receipt by the bank; and, consequently, that plaintiffs were entitled to recover.

(B) *What is not a Forfeiture.*

LICHFIELD UNION v. GREENE, 1 H. & N. 884; 3 Jur. N. S. 247; 26 L. J. Ex. Ch. 140.

What is not a forfeiture of a bond for the good conduct of the treasurer of a poor-law board.

The treasurer of a poor-law board entered, together with sureties, into a bond that he should faithfully discharge the duties of his office. One of these duties was to pay orders for money which should be drawn upon him by the guardians. He was a banker issuing his own notes. On Friday, he paid orders drawn upon him by the guardians, partly in cash and partly in his own notes; and again on Monday forenoon paid similar orders in a similar way, and also gave in exchange for their order, in favour of persons in London, a common banker's draft upon London, which was dishonoured. The bank stopped payment on the Monday afternoon.

Held, that the sureties were discharged, because, as to the notes given on Friday, the guardians having kept them during Saturday, conclusively elected to treat the orders as paid; as to all the notes, the guardians who were entitled to receive cash elected to take them instead; and as to the banker's draft, the guardians received it for their own convenience.

XVI. AS TO THE CONSIDERATION.

(A) *Want of no Objection to, but Illegality of Vitiates.*

FALLOWES v. TAYLOR, 7 T. R. 477.

Want of consideration is no objection to a bond, but any illegality vitiates it.[1]

Per Lord Kenyon, C. J. The *want* of a consideration to a bond affords no ground of objection; but if there be anything *illegal* in the consideration, the defendant is entitled to plead it in bar to the action.

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received on each day up to the time of his dismissal:—*Held*, a breach of the condition. *London and Brighton Railway Company v. Goodwin*, 6 R. Ca. 177; 3 Ex. 736; 18 L. J. Ex. 337. A bond given by a collector and his trustees to the Commissioners of Land and Assessed Taxes, under 43 Geo. 3, c. 99, is broken if the taxes collected in any one year are not duly paid up by the collector to the account of that year. *Gynne v. Burnell*, 7 Clark & Fin. 572; 10 C. B. 35; 14 Jur. 1137; 1 Scott, N. R. 711. And where A. became surety for a treasurer of a poor-law union, and entered into a bond which was conditioned for the duly paying over to the guardians, upon his removal from office, of the balances, monies, &c., which should be in his possession by virtue of the office; the treasurer was also a corn-dealer, and as such had dealings in corn with the overseers of several townships, who were farmers, and whose duty it was to pay over to him the monies which were required from their respective townships by the guardians. He was in the habit of receiving corn from them, debiting himself with the amount, and crediting them with the amount due from them for rates. His accounts were duly audited, and at the last audit, after his removal from office, it was found that a balance of 239*l.* 1*s.* 10*d.* was due to the guardians:—*Held*, in an action against the surety, that as between the treasurer and the overseers money had, in effect, passed, and that the surety was liable. *Belford Union v. Pattison* (in error), 1 H. & N. 523; 3 Jur. N. S. 116; 25 L. J. Ex. 91; affirming judgment of Exchequer, 11 Ex. 623; 25 L. J. Ex. 91.

But in an action on a bond, conditioned for the honest and faithful service of a banker's clerk, and for well and faithfully accounting for all monies, &c., which should come to his hands; and it was proved that, on a certain day, the clerk (one of the defendants) made an erroneous balance-sheet, failing to exhibit (as it ought to have done) a surplus of 100*l.*, but it was not proved that that sum ever came to the hands of the clerk; it was also proved that on a certain day the clerk, having received from a customer 113*l.* entered it in the books of the bank 213*l.*, thus exhibiting on that day in his balance-sheet a false and unaccounted-for surplus:—*Held*, that these facts did not entitle the plaintiff to recover. *Jephson v. Hawkins*, 2 Scott, N. R. 605; 2 Man. & G. 366.

[1] There is a remarkable distinction in this respect between bonds and other instru-

(B) *Future Illicit Cohabitation bad.*

WALKER v. PERKINS, 3 Burr. 1568; S. C. 1 Black. 517.

A bond given in consideration of future illicit cohabitation is illegal and void.[1]

Debt on bond against an administrator. It appeared that the bond contained the following recital: that whereas the intestate and plaintiff had agreed to live together, and that the former had agreed to find her meat, drink, washing, and lodging, &c., and to leave her an annuity of 60*l.* a-year, if he quitted her, or she outlived him; and if they had any child he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity. The defendant pleaded that this was an agreement between the plaintiff and his intestate "to live together in a state of fornication," and that a bond made in pursuance and support of an agreement "to live together in fornication" was void in law. In reply to this plea the plaintiff alleged, that she was a virgin, and was seduced by the intestate; and in consideration thereof this bond was given to her by the intestate; and that it was *præmium pudicitiæ*. To this replication the defendant demurred. For the plaintiff it was contended,

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ments under seal, and simple or parol contracts. The general rule is, that it is essential to the validity of the former that it should be founded on a legal consideration, and that if it be merely voluntary or gratuitous, the agreement is *nudum pactum;* but where a security is under seal it is binding on the party by whom it is executed, although there was no consideration for making it. The reason for this difference is, that simple contracts are often entered into by men unadvisedly and without sufficient deliberation, and therefore the law has provided that such agreements shall not bind without consideration; but when the agreement is under seal there is more time for reflection; and, as it has been observed with great simplicity, but at the same time with equal truth, when a man executes a bond, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and, lastly, he delivers the instrument as his deed, which is the consummation of his resolution. *Harrington v. Stratton*, Plowd. 308. Thus it is that securities of this description are adjudged to be binding, without examining for what cause or consideration they were made. See *Bunn v. Guy*, 4 East, 200; 2 Bl. Com. 446; Fonbl. on Equity, 2d ed. 347, n. f. And although the courts of equity will, under certain circumstances, postpone the payment of a voluntary bond, as where it interferes with the rights of creditors, yet it will not relieve the party from his obligation, unless he can impeach the transaction by express evidence of fraud (Fonbl. on Eq. 339); hence, where a second bond had been given in consideration of the surrender of a voluntary bond, such substituted bond is good as against creditors, unless the transaction be with a view to defraud creditors; by an insolvent person, for instance, endeavouring to substitute a valid for an invalid security. *Ex-parte Berry*, 19 Ves. 218.

Consistently with these cases it has become a settled principle that an obligor is precluded from showing a condition or consideration contrary to what is expressed in the instrument. But to this rule an exception is always made where the consideration is illegal. See *Buckler v. Millard*, 2 Vent. 107. *Collins v. Blantern*, 2 Wils. 347. And when fraud is imputed, the party who complains of the fraud may prove any consideration, however contrary to the averment in the condition or recital in the bond, to show the fraudulent nature of the transaction. Bull. N. P. 173. *Filmer v. Gott*, 4 Bro. Parl. Ca. 234, 2d ed. The exclusion of matters *dehors* the deed does not apply to such cases; the true meaning of that rule is, that matter inconsistent with, or contrary to, the deed, cannot be alleged, but matter consistent with the deed may; the bond in the present case is for the payment of money: the plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not inconsistent with, or contradictory to, the condition of the bond: this rule of pleading applies to the cases of simony, duress, coverture, infancy, &c. "Argument for defendant, in 2 Wils. 347. Since the case of *Pole v. Harrobin*, E. 22, G. 3, B. R., it has been generally understood that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond:" *per Lord Ellenborough, C. J.*, in *Paxton v. Popham*, 9 East, 421–2.

[1] Although the adequacy of the consideration to a bond cannot be impugned by extrinsic evidence, yet we have seen in the immediately preceding notes that an *illegal* consideration (whether its illegality arises from the provision of the common or the statute law) may be pleaded in bar.

At common law, any contract is invalid which violates the precepts of religion or morality, or the rules of public decency. Thus, a bond conditioned that the obligor shall kill J. S. is void. Co. Lit. 206, b; *ante*, p. 401.

that the condition consisted of two parts — one, "to live together in a state of debauchery;" the other, "to leave her an annuity;" the former part was void, the latter good. The suit may therefore be supported upon the virtuous part — the paying her the annuity; for it is agreed in the case of *Chesman et ux. v. Nainby*, 2 Ld. Raym. 1459; and 2 Stra. 744; that the position laid down in Hobart, 14 (in the case of *Norton v. Simmes*) "that the common law, having made that void that is against law, lets the rest stand;" and that where a bond is conditioned to do some things agreeable to common law, and others disagreeable to it, the breach may be assigned upon that part which is good. And here *præmium pudicitiæ* is a sufficient consideration. *Lord Mansfield.* "It is the price of prostitution, *præmium prostitutionis;* for if she becomes virtuous, she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void." Judgment for the defendant. *See* 2 Ves. 160; 5 id. 293.

(C) *But past Illicit Cohabitation good.*[1]

(D) *Must not be in Restraint of Trade.*[2]

(E) „ *Restraint of Marriage.*

LOW v. PEERS, 4 Burr. 2225.

Bonds operating in restraint of marriage are void.[3]

The defendant gave to the plaintiff a promise of marriage, under seal, in these words: "Hereby I promise Mrs. Catherine Low, that I will not marry any person beside herself; if I do, I agree to give her 1000*l.* — N. Peers." Defendant having married another person was sued on this covenant, and plaintiff had a verdict; but judgment was arrested, for it was not a covenant absolutely to marry, but to restrain the defendant from marrying any other person, though the plaintiff was not bound to marry him; and being thus restrictive of marriage, was adjudged void. *See* 2 Vern. 102, 215; 2 *Eq. Ca. Abr.* 248; 1 Atk. 287; 2 id. 538, 540; 10 Ves. jun. 429; 10 East, 22; 3 M. & S. 463.

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[1] But a bond executed by way of reparation for the injury, and to put an end to the illegal intercourse, is good. *Turner v. Vaughan*, 2 Wils. 339. *Priest v. Parrott*, 2 Ves. 166. Though it is otherwise in an agreement not *under seal*, unless in consideration of seduction. 4 B. & A. 652. The circumstance of the obligor having been married at the time of his cohabitation with the obligee will make no difference, as the court will not distinguish between the different degrees of immorality. *Nye v. Mosely*, 6 B. & C. 133. And whether or not at the time the bond was given there was an intention to continue the cohabitation is a question for the jury. *Friend v. Harrison*, 2 C. & P. 584. *See* 3 Per. & D. 282; 9 Mee. & W. 496; 12 L. J. Ex. 86; 15 id. Q. B. 141.

[2] It is a very ancient part of the policy of the law to discourage restraints on trade, as being injurious to the public. But no judge has carried his abhorrence so far as is reported of *Hull, J.*, in the Year-book, 2 Hen. 5. There a dyer was bound that he should not use his craft for two years, and *Hull* held that the bond was against the common law; "and by G—d," said he, "if the plaintiff were here, he should go to prison till he had paid a fine to the king." *Mitchell v. Reynolds*, 1 P. Wms. 181. It is, however, still law that all bonds *in general restraint* of trade are illegal, as being contrary to public policy, beneficial to neither party, and merely oppressive (*Mitchell v. Reynolds*, 1 P. Wms. 181), though a limited restraint for good consideration is valid. It is a question for the court and not for the jury. 11 Moore, 103; 11 Mee. & W. 665. It does not appear that there is any settled rule as to within what distance the restraint may be extended; but within ten or twenty miles, or within the city of Westminster or bills of mortality, have been severally held to be legal. *Davis v. Mason*, 5 T. R. 118. *Hayward v. Going*, 2 Chit. R. 407. *Clarke v. Colmer*, Ca. Temp. Hard. 53; 7 Mod. 230. *Bunn v. Guy*, 4 East, 190. *See post*, Contracts. *Ante*, Bills and Notes, p. 400; and 3 Y. & J. 330; 14 Mee. & W. 191.

In calculating the distance, the proper method of admeasurement is by the nearest way of access. *Leigh v. Hind*, 9 B. & C. 774. See *Mallan v. May*, 11 Mee. & W. 665; S. C. 13 id. 653. *Elves v. Crofts*, 10 C. B. 241; 19 L. J. C. P. 389.

A bond that obligor should purchase certain articles of certain persons is void in restraint of trade. *Thompson v. Harvey*, 1 Show. 2; Comb. 121; Holt, 674. *Holcombe v. Hewson*, 2 Camp. 391. *Cooper v. Twibill*, 3 Camp. 285, 286. *Turner v. Evans*, 2 E. & B. 512; 22 L. J. Q. B. 412. *See* 17 Ves. 346, as to an injunction.

[3] So bonds given to refund part of a marriage portion are void, as a fraud on the contracting parties. *Turton v. Benson*, 1 Stra. 240. *See post*, Contracts; Marriage, Restraint of, &c. *Ante*, Bills and Notes, p. 400.

(F) *Must not be to Procure Marriage.*

Or given to procure marriage.[1]

HALL v. KEENE, 3 Lev. 411; S. C. Show. P. C. 76; Bro. P. C. 144.

Debt on bond conditioned to pay the plaintiff 500*l.* within three months after A. B. should marry Lady Oyle, a lady of large property. The defendant, the executor of A. B., pleaded that the latter was never married to Lady O. Issue being taken upon this point, the jury found for the plaintiff; and on a bill filed by the defendant in Chancery, the *Lord Chancellor* thought the bond valid, and refused to grant relief; but upon appeal to the House of Lords, that tribunal was of opinion that all such contracts concerning marriage were of dangerous consequence, and not to be allowed, and reversed the decree of the Chancellor.

(G) *Nor to do any Act Illegal at Common Law or by Statute.*[2]

(H) *Mode of taking Advantage of Illegality.*[3]

(I) *Must not be Impossible or Repugnant.*[4]

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[1] The civil law allowed the *proxenetæ*, or match-makers, to receive a reward for their pains (1 Bro. *Civil Law*, 79); and *Lord Somers* decreed in favour of a bond for procuring a marriage, the procuring of a marriage being a good consideration at law for an *assumpsit* (see *Grisley v. Lowther*, Hob. 10. *Hull v. Potter*, 3 Lev. 411; but see *Collins v. Blantern*, 2 Wils. 347); but his decree was reversed in the House of Lords (*Potter v. Kean*, or *Hall*, Show. Cas. Parl. 76, noticed 3 P. Wms. 76 & 392); and it is now clearly settled, that equity will relieve against bonds given for the procuring of a marriage (*Drury v. Hook*, 1 Vern. 412. *Arundel v. Trevilian*, Ch. Rep. 87. *Hall v. Potter*, 3 Lev. 411; Sho. P. C. 76. *Granville v. Fenning*, 3 Ch. Rep. 18; Toth. 26. *Cole v. Gibson*, 1 Ves. 507. *Smith v. Aykwell*, 3 Atk. 566); and not only decree such bonds to be delivered up, but also a sum paid to be refunded. *Smith v. Bruning*, 2 Vern. 392; 3 P. Wms. 394. *Shirly v. Martin*, mentioned in n. 1 to *Roberts v. Roberts*, 3 P. Wms. 74, and noticed 1 Fonbl. Eq. 265. Such bonds tend to introduce improvident marriages; and every contract relating to marriage ought to be free and open (*Roberts v. Roberts*, 3 P. Wms. 76. *Debenham v. Or*, 1 Ves. 277); and on this ground, though the match be a proper one, yet the court sets the bond aside. But where the obligor has sought relief costs have not been given. 1 Ves. 277. A bond given for assisting a clandestine marriage has been set aside, though given voluntarily after the marriage, and without any previous agreement for the same. *Williamson v. Gibson*, 2 Sch. & Lef. 357. *See* Smith's Equity, 62, 63. Story's id. ss. 272–280; 1 Madd. 125; 2 Spence, 105.

[2] Where a bond is given for the performance of any illegal act, as to compound a criminal prosecution (*Collins v. Blantern*, 2 Wils. 344); to withhold evidence (*Mason v. Watkins*, 2 Vent. 109); to restrain an officer in the execution of his duty (*Norton v. Simmes*, Hob. 12); to secure the payment of the price of goods to be used in an illegal traffic (*Lightfoot v. Tennant*, 1 B. & P. 551); to commit a trespass (Shep. Touch. 372), and the like. Also a bond given in lieu of another security, founded upon an illegal consideration, of which the obligee had notice, is void (*Amory v. Merryweather*, 2 B. & C. 573); but *aliter* if the obligee had no notice. *Cuthbert v. Haley*, 8 T. R. 390. But a bond conditioned to be void if the obligor (on the obligee's agreeing not to prosecute him) should remove certain public nuisances is good. *Fallowes v. Taylor*, 7 T. R. 475. So a bond to save harmless from an illegal act already done. *Hackett v. Tilley*, 11 Mod. 93. *See* also *Iles v. Boxall*, 2 B. & P. 98. *The African Company v. Torrane*, 6 T. R. 588. *Jones v. Woollam*, 5 B. & A. 769. And if some part of the condition be void for illegality, the bond may be good for the others. *Annandale v. Harris*, 2 P. Wms. 432. *Priest v. Parrott*, 2 Ves. 166. *See ante*, p. 436.

The above instances in which the bond is void are in consequence of the condition being illegal at common law, but it is the same if the condition be illegal by statute. See *Trevor's case*, 12 Co. 78. *Woodward v. Foxe*, 3 Lev. 289; 2 Salk. 468. *Law v. Law*, 3 P. Wms. 391. *Fletcher v. Lord Sondes*, 3 Bing. 530. *Legh v. Lewis*, 1 East, 391; 3 B. & P. 231. *See* also Bribery; Gaming; Lottery; Offices; Ransom; Simony; Stock-Jobbing, &c. If a bond be conditioned not to do what was lawful to do, and a statute subsequently compels him to do it, the obligation is released. 1 Salk. 198; 1 Ld. Raym. 321. Platt on Covenants, 588.

[3] Illegality in the consideration of a bond must be pleaded specially, and the effect of the instrument cannot be avoided on the ground of the illegality merely appearing in evidence, or upon the face of the condition; and the defendant, it is said, cannot, under such circumstances, demur. 1 Saund. 2956. He may, however, in his plea, disclose the true nature of the transaction, notwithstanding the terms of the condition. *Collins v. Blantern*, 2 Wils. 347. *Greville v. Atkins*, 9 B. & C. 462. But in equity an obligor cannot set up an objection to the validity of his own obligation upon grounds which he suppressed at the time, and against which the obligee could have protected himself if then divulged. *Hawker v. Hallewell*, 3 Sm. & G. 194; 2 Jur. N. S. 537; 25 L. J. Ch. 553.

[4] The condition must not be impossible

(J) *But may be Improbable.*[1]

(K) *Must not be Insensible.*[2]

XVII. Discharge of Obligor.

(A) *By Release.*

Sellers v. Bickford, 8 Taunt. 31; S. C. 1 Moore, 460.

A release of a bond, or a dispensation with its conditions, must be by deed.[3]

This was an action on a bond. The condition recited that in consideration of the assignment by the defendant to the plaintiff of the lease and goodwill of a certain shop and business, the defendant should not carry on, nor procure to be carried on, a certain business, on his account, or for his use, within a certain distance from the shop, &c., assigned. *Breach*, that the defendant had, contrary, &c., carried on the said business within the prescribed distance. *Plea*, that the defendant did, by the leave and license of the plaintiff, carry on the said business within the prescribed limits. Demurrer and joinder. It was contended for the plaintiff, that this plea was insufficient, as a parol license before breach could not effect a discharge from the condition in the bond. The court, without hesitation, on the authority of *Thompson v. Brown* (1 B. Moore, 358; S. C. 7 Taunt. 656), gave judgment for plaintiff. *See* Com. Dig. Assumpsit, G; 6 Rep. 44; 9 id. 77; Palmer, 110; Styles, 8; 3 Lev. 234; Cro. Eliz. 697; 2 T. R. 425; 3 id. 590; 8 East, 344.

(B) *Effect of Covenant not to Sue.*[4]

(C) *Discharge by giving Collateral Security.*

Dore v. Walley, 2 Ex. 198.

Where collateral security is given, the *quo animo* is a question for the jury.

Action to recover contribution for money paid upon a bond, on which plaintiff and defendant were co-sureties. Before the execution of the bond, one

or repugnant, for if so, the condition will be void, and the bond become merely a single bill, as if no condition had originally been attached. *Barrett v. Fletcher*, Brownlow, 104. *Da Costa v. Davis*, 1 B. & P. 242; Shep. Touch. 372, 373. *Roberts v. Harnage*, 2 Salk. 660. And so also where after execution the condition becomes impossible without default of the obligee. 1 Salk. 198; 1 Ld. Raym. 321; 6 Q. B. 107. But where it becomes impossible by the act of the obligee (*Beswick v. Swindells*, 3 Nev. & M. 378; 3 Ad. & E. 866); or where the obligor has the option of performing one of two acts, and one becomes impossible by the act of God or of the obligee, the bond will be void. *Duvergier v. Fellowes*, 2 M. & P. 411. Where, however, an impossible condition is incorporated with the obligatory part of the bond, the whole instrument is void. Com. Dig. D. 2; Add. *Cont.* 1123; Platt on Covenants, 569; 28 L. J. Q. B. 275.

[1] If the condition be merely improbable, however unlikely, the bond is good. 1 Salk. 173; 2 M. & P. 411.

[2] When the condition is so uncertain or insensible that its meaning cannot be ascertained by the ordinary rules of construction and grammar, it will be void, and the obligation will remain binding (2 Buls. 133); but every endeavour will be made by the court to give effect to the meaning of the parties. *Langdon v. Goole*, 3 Lev. 22. *Wills v. Wright*, 2 Mod. 285. *Doe v. Carew*, 2 Q. B. 317.

[3] And where two or more are jointly, or jointly and severally bound, a release to one will operate as a discharge to the others. *Clayton v. Kynaston*, 1 Ld. Raym. 420; 2 Salk. 575; *Dean v. Newhall*, 8 T. R. 168. So a release by one obligee is a release by all. *Bayly v. Lloyd*, 7 Mod. 250. But where a release has been obtained by fraud, such fraud may be replied (*Crab v. D'Æth*, 7 T. R. 670, n.), or the court will summarily set aside the plea. *Legh v. Legh*, 1 B. & P. 447; and see *Britton v. Perrott*, 2 C. & M. 597. *Manning v. Cox*, 7 Moore, 617. But where a release has been given to one of several obligors, it cannot be pleaded by the obligee that it was given on the understanding that it was not to affect his right against the others, for the legal effect of the release under seal cannot be altered by a parol agreement. 2 M. & S. 434. *See* Release.

[4] A covenant not to sue is only a personal release, and operates as such by construction merely, to avoid certainty of action. *Dean v. Newhall*, 8 T. R. 168. *Fitzgerald v. Trant*, 11 Mod. 254. *Hutton v. Eyre*, 6 Taunt. 289. Therefore, a covenant not to sue one of two or more joint obligors is not a release of the others (*Lacy v. Kynaston*, 1 Ld. Raym. 690; 2 Salk. 575. *Kearsley v. Cole*, 16 Mee. & W. 129. *Davidson v. M'Gregor*, 8 id. 755, 768. *Walmesly v. Cooper*, 11 Ad. & E. 216); and to operate as a release it must be *perpetual*. *Aloff v. Scrimshaw*, 2 Salk. 573; 1 Show. 46. *See* also Roll. Abr. 939, pl. 2. *Ford v. Beech*, 11 Q. B. 853. *Fowell v. Forest*, 2 Saund. 48.

Dodd, had borrowed 200*l.*, and had given to the lender a promissory note for 200*l.* by way of security, to which the plaintiff was party as his surety. To meet that note the obligee of the bond had agreed to advance 250*l.* to Dodd, on plaintiff and defendant joining as sureties in the bond in question. Before the plaintiff would execute the bond, she insisted that the note for 200*l.* should be given up, and that Dodd should give her another note for 250*l.* Defendant was not aware of this. It was contended, on the part of the defendant, that this action would not lie:—*Held*, that the question was, whether the note for 250*l.* was given as a mere collateral security, or whether there was such an arrangement as to extinguish the liability of the defendant as co-surety, and that this question was one of fact for the jury.

(D) *By giving Time.*[1]

(E) *By Operation of Law in the Appointment of Executors.*

CHEETHAM v. WARD, 1 B. & P. 630. S. P. DORCHESTER v. WEBB, W. Jones, 345.

The appointment of an obligor, or one of several obligors in a bond, as executor of the obligee, discharges the debt.[2]

To an action on a bond by the executors of one A. B., the defendant pleaded that C. D., one of the plaintiffs, and executor of the said A. B., was a joint and several obligor with him, the said defendant, in the said bond; and that A. B. had by his last will appointed the said C. D. to be one of his executors of his said last will, and died without having revoked the same; and that the said C. D. duly proved, &c., whereby he the said defendant was, together with the said C. D., absolutely released from his obligation. General demurrer and joinder. In the course of the argument, a case was cited from the year-book, 21 Edw. 4, 81 b.; S. C. Bro. Abr. Executors, pl. 118; in which it appeared that it was decided by *Brian, C. J.*, in answer to a question by the prothonotary, that if an obligee in a joint and several bond make one of them his executor, and die, such appointment operates in discharge of all the obligors. The court thought that authority decisive of the present case, and gave judgment for the defendant. *See* Cro. Car. 373; 1 Salk. 303; 11 Vin. Abr. 398; 8 Co. 136.

RAWLINSON v. SHAW, 3 T. R. 557. S. P. DORCHESTER v. WEBB, W. Jones, 345.

But where an obligor makes an obligee his executor, acceptance of the office by the obligee is essential to discharge the obligation.[3]

To an action of *assumpsit* on promises by the testator, the defendant pleaded that the testator appointed the plaintiff and the defendant executors of his last will and testament, and died without revoking or altering the same. *Replication*, that the plaintiff had not proved the will, nor taken on him the burthen, the said appointment, nor administered to the goods, &c. of the deceased. On demurrer to the replication it was urged for the defendant, that the argument to be drawn from the appointment of the plaintiff as executor, on the ground

[1] Where the obligee placed himself in such a position that he could not demand payment of the bond from the principal debtor until an agreement with third parties had been carried into effect:—*Held*, that this was such a giving of time to the principal as discharges the surety to a bond. *Cross v. Sprigg*, 2 Mac. & G. 113; 19 L. J. Ch. 528; 2 H. & S. 233; 14 Jur. 634. *See* Principal and Surety.

[2] Though it has been said the bare appointment is in itself a discharge, whether or not the obligor accepts such executorship. *Wankford v. Wankford*, 1 Salk. 299; Plowd. 184 b.; 1 Vent. 303; Co. Lit. 264 b. n. 1; 1 Wms. Exors. 943, *contra*. Also, if the obligee make the wife of one of two joint and several obligors his executrix, this will operate as a release of the debt if the will be proved. *Dorchester v. Webb, supra* in text. But otherwise if he make the executor of an obligor his own executor, as he would hold in a different right. (Id.) *See* also *Gleadow v. Atkin*, 2 C. & J. 548. Also Vin. Ab. Bar. & Feme, F. a. 1 Wms. Exors. 944.

The principle of this doctrine is, that a remedy suspended voluntarily by the act of the party is gone for ever. It is different if there be a suspension by operation of law. Thus, if the obligor take out administration to the obligee, on the death of the obligor the *administrator de bonis non* of the obligee may maintain an action against the executor of the obligor. *Locker v. Smith*, 1 Sid. 79. *Hudson v. Hudson*, 1 Atk. 461. *Nedham's case*, 8 Co. 136, b.; 1 Lev. 326.

[3] If one of several joint obligors make the obligee executor, and he administers and

that it operated as a suspension of his right of action, was nugatory, as the plaintiff had not formally renounced his right to act under such appointment. But the court said, that independently of the rule, that when a defendant pleads that another person is executor with him, an averment that the other has administered is essential. Great injustice would be done if a debtor had the power of acquitting himself of his debt, by merely appointing his creditor his executor, and the creditor had not the power of refusing the office. Judgment for plaintiff.

(F) *By Marriage.*

GAGE v. ACTON, Carth. 511.

In general, marriage of a *feme* obligee with the obligor operates as an extinction of the debt.[1]

Per Cur. All contracts and debts *in præsenti*, though they are to be performed or paid *in futuro*, are extinguished by the intermarriage; but there are some things which the law holds to be only suspended, and of which the operation will revive on the cause of interruption being dissolved. *See* Co. Lit. 264–5; 8 Rep. 136, a.

(G) *By Payment.*

HUSBAND v. DAVIS, 10 C. B. 645; 20 L. J. C. P. 118.

Payment of a bond debt to one of two trustees is a good discharge as to both.[2]

Debt on bond. In this case it was objected that payment to one of two trustees was insufficient.

Per Cur. It is a general rule that a man may pay a debt to one of several persons with whom he has contracted jointly. In the case of a banker it is not so; but that arises from the particular contract between him and his customer. We entertain no doubt about the question. *See* Lewin on Trustees, 237.

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has assets, the bond is discharged (*Cock v. Cross*, 2 Lev. 72); so if he make the executor of the obligee his executor and leave assets. Bac. Abr. Oblig. D. 4. Hurlstone on Bonds, 99. *Pidgeon v. Petts*, 2 Show. 401. *Wankford v. Wankford*, 1 Salk. 299. *See* also *Dorchester v. Webb*, 1 W. Jones, 345.

[1] And so if there be two obligees, and the obligor marry one of them. Co. Lit. 264, b.; 2 P. Wms. 242. But where a man in contemplation of marriage, and with a view to provide for his intended wife, gave her a bond conditioned for the payment of money after his death, the marriage was held to be no extinguishment. *Milbourn v. Ewart*, 5 T. R. 381. *Gage v. Acton*, 1 Ld. Raym. 515; Carth. 511; Comb. 67; 1 Salk. 326.

After a divorce, however, the debt would revive. *Acton v. Peirce*, 2 Vern. 480.

[2] If a particular day be named for payment, the money must be paid on or before that day. *Bigland v. Shelton*, 12 East, 436. *Hodgson v. Bell*, 7 T. R. 97; Com. Dig. Cond. (E); Bac. Abr. Cond. But an arrangement of accounts may amount to payment in some cases, and the actual payment of money is not always absolutely requisite (*Sturdy v. Arnaud*, 3 T. R. 599. *Everall v. Eyre*, 2 Bing. 166), though a payment within the stat. Anne, c. 16, s. 12, must be an actual payment, and even a *tender* and refusal is not sufficient to support it. *Dixon v. Parkes*, 1 Esp. 110. *Player v. Bandy*, 10 Mod. 26. It is, however, most probable that such a defence might be now pleaded as an equitable plea. Where no time is fixed for payment the bond is due at once, and will bear interest from its delivery. *Farquhar v. Morris*, 7 T. R. 124. *Southam v. Gibbs*, 3 Nev. & M. 158; Vin. Ab. Cond. (C) 6. But if payable *on demand*, or conditioned for the performance of a collateral act on demand, a demand is necessary before an action can be sustained. *Carter v. King*, 3 Camp. 459. But see *Kepp v. Wiggett*, 6 C. B. 280; 2 D. & L. 96; 17 L. J. C. P. 295. *Fitz-Hugh v. Dennington*, 2 Salk. 585, But if there is any duty to pay the money or do the act without an actual demand, the bringing the action will be a sufficient demand. *Copp v. Lancaster*, Cro. Eliz. 548; 2 Salk. 310; 1 Sand. 33, a. Where the condition mentions a place where the money is to be paid, it will be sufficient to make payment before action brought, though not at the place appointed. 4 Anne, c. 16, s. 12. No tender can, however, be made at such place before the last day (*Hawly v. Simpson*, Cro. Eliz. 14; Co. Lit. 211); but the obligor should give notice to the obligee of his intention to pay the money (id.): but see *Nurse v. Frampton* (1 Salk. 214) as to the obligee rendering such notice impossible. On a bond given by defendants as security to the plaintiffs, conditioned for the payment of 1000*l.* advanced by plaintiffs to L. W.:— *Held*, there being evidence to come to such conclusion that the bond was given as a continuing security, and was not discharged by sums paid in to the plaintiffs in his dealings with them as his bankers since the execution of the bond. *Henniker v. Wigg*, 4 Q. B. 792; 7 Jur. 1058.

(H) *By Change of Circumstances.*

London Assurance Corporation v. Bold, 6 Q. B. 514; 8 Jur. 1118; 14 L. J. Q. B. 50.

Where a party is surety for A., he cannot be held surety for some one in partnership with A.[1]

One Bold gave a bond to the plaintiffs conditioned for the due accounting for and payment of all monies received by B., their agent, on account of the plaintiffs. B. afterwards, with the knowledge of the plaintiffs and the defendant, took A. into partnership with him, as agents for the plaintiffs. The defendant entered into a similar bond to the plaintiffs conditioned for the due accounting, &c., of A. On default by B. and A.:—*Held*, that defendant was not liable within the meaning of the bond for monies received by A. and B. Where a party makes himself surety for A., he cannot be held surety for some one else who may be in partnership with A.

XVIII. Action on Bonds.

(A) *Parties to.*[2]

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[1] Payment by a third person, although the general agent of the defendant, without the knowledge of the defendant, is not payment by him. *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J. Ex. 13. And where the condition was for accounting to a copartnership of three, it was held that the obligation of the surety determines on the death of one. *Chapman v. Beckington*, 3 G. & D. 33; 3 Q. B. 703; 12 L. J. Q. B. 61. *See* 19 & 20 Vic. c. 97. So where A., B. & C., in partnership, gave a joint and several bond to a bank to cover advances to be made to them on a cash credit, in which bond mention was made of two estates of A., as part securities, A. died, and the bank continued, as before, its dealings with B. and C. At a certain period the payments made to the bank balanced the advances due at the time of the death of A.:—*Held*, that the separate liability of A.'s estates was thereby discharged, and that they were not liable for the advances made after his death. *Bank of Scotland v. Christie*, 8 Clark & Fin. 214. *Bamford and others v. Iles and others*, 3 Ex. 330; 18 L. J. M. C. 49. But where a defendant had given a bond to a railway company for the faithful service of a clerk, and during his service the company was dissolved and amalgamated with another by an act which provided that all bonds entered into with the dissolved company should remain good and effectual in favour of the new:—*Held*, that defendant continued liable for breaches after the amalgamation. *Eastern Union Railway Company v. Cochrane*, 9 Ex. 197; 23 L. J. Ex. 61; 17 Jur. 1103. *See* also *London, Brighton, &c. Railway Company v. Goodwin*, 6 Railw. Ca. 177; 3 Ex. 736; 18 L. J. Ex. 174. So where the appointment mentioned in the condition was for one year only, under the 5 & 6 Vic. c. 76, s. 58, it was held that the liability of the obligor could not extend to a holding under 6 & 7 Vic. c. 89, s. 6, which makes the office to be held during the pleasure of the council. *Cambridge (Mayor, &c.) v. Dennis*, El., Bl. & El. 660. *Anderson v. Thornton*, 3 Q. B. 271; 6 Jur. 1109. But otherwise when there is no law limiting the duration of the office to a year, so as to control the express stipulation in the bond (*Birmingham (Mayor, &c.) v. Wright*, 16 Q. B. 63; 15 Jur. 749; 20 L. J. Q. B. 214); nor will a mere change of salary (*Franks v. Edwards*, 8 Ex. 204; 22 L. J. Ex. 42); or in the tenure of the office, when the functions and duties of the office are not changed, absolve the obligor from liability. *Berwick (Mayor, &c.) v. Oswald*, 1 E. & B. 295: 22 L. J. Q. B. 129. And the appointment of collector of poor-rates for a parish, being a general one, a transfer of his duties from one district to another will not affect the obligation of the surety to his bond. *Portsea Island Union v. Whillier*, 6 Jur. N. S. 887; 29 L. J. Q. B. 150; 8 W. R. 493. But where, by the effect of statutes or otherwise, the duties and liabilities of the office are essentially changed, and the risk of the sureties increased, the obligation of the sureties will be discharged, notwithstanding the breach of duty relied on was a breach of the original duties of the office. *Pybus v. Gibb*, 6 E. & B. 902; 3 Jur. N. S. 315; 26 L. J. Q. B. 41. If, however, the words of the condition are wide enough to embrace the change of office relied on by the surety, he will not be discharged from obligation. *Clifton, Dartmouth, Hardness (Mayor, &c.) v. Silly*, 7 E. & B. 97; 3 Jur. N. S. 434; 26 L. J. Q. B. 90. *Oswald v. Berwick-upon-Tweed (Mayor, &c.)*, in error, 5 H. L. C. 856; 25 L. J. Q. B. 383; 2 Jur. N. S. 743.

[2] The action upon a bond must be instituted in the name of the party in whom the *legal interest is vested*, viz. the obligee or party to whom the obligor has bound himself; thus, if a bond be made to A. to pay him or a third person a sum of money for the benefit of the latter, the action must be in the name of A., and the third person cannot sue or be joined. It must, in general, be brought against the obligor or his executors or administrators, or if the heir be named, and he have assets, by descent against the heir, or if there be several, and the obligation only joint against them all, or if joint and several against them all jointly, or each separately, and if one of the

(B) *Proceedings on Bonds within* 8 *&* 9 *Wm.* 3, *c.* 11.

In proceedings under 8 & 9 Wm. 3, c. 11, the plaintiff must assign breaches.[1]

By 8 & 9 Wm. 3, c. 11, s. 8, it is enacted, that "in all actions in any court of record, upon any bond, or on any penal sum for non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff may assign as many breaches as he shall think fit, and the jury, upon trial of such action, shall assess not only such damages and costs of suit as have heretofore been usually done, but also damages for such of the breaches of covenants, &c. as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such-like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may[2] suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought to summon a jury to appear before the justices or justice of assize or Nisi Prius [or now, in cases within the 3 & 4 Wm. 4, c. 42, s. 16, before the sheriff of that county,] to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby, in which writ it shall be commanded to the said justices or justice, &c. that he or they shall make return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants after such judgment entered, and before any execution executed, *shall pay into the court* where the action shall be brought, to the use of the plaintiff, &c. such damage so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a *stay of execution* of the said judgment shall be entered upon record; or if by reason of any execution executed the plaintiff, &c. shall be fully paid or satisfied all such damages so to be assessed, together with his costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record. But, notwithstanding in such case such judgment shall remain, continue, and be as a *further security* to answer to the plaintiff, &c. such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff, &c. may have a *scire facias* upon the said judgment against the defendant, or against his terre-tenant, or his executors or administrators, suggesting other breaches of the said covenants

On judgment by default or on demurrer, &c. breaches to be suggested.

Writ of inquiry may issue.

Payment may be made into court after judgment.

On satisfaction by execution, defendant is discharged.

Judgment to stand for further breaches.

Scire facias and further proceedings on.

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obligors in a joint bond die, the survivor alone must be sued; for if the executor or administrator be sued, he may either plead the survivorship in bar or give it in evidence under the general issue: but if it were several, or joint and several, the executor of the deceased may be sued in a separate action, but he cannot be made a defendant jointly without the survivor, because one is to be charged *de bonis testatoris* and the other *de bonis propriis*.

On an assignment of a railway bond under 8 & 9 Vic. c. 16, s. 46, the proper party to sue is the assignee. *Vertue v. East Anglian Railway Co.* 6 Railw. Ca. 252; 5 Ex. 208; 1 Pract. R. 302; 19 L. J. Ex. 235. The churchwardens and overseers for the time being may still sue upon bonds given under the 59 Geo. 3, c. 12, s. 7, for the due performance of the duties of assistant-overseer in a parish within the union, the effect of 7 & 8 Vic. c. 101, s. 16, being only to substitute in such cases the board of guardians for the vestry, as the body who are to direct to sue upon the bond. *Skelton v. Rushby*, 4 Ex. 545; 19 L. J. M. C. 29. An administration bond taken under the 22 & 23 Car. 2, c. 10, to the ordinary and his executors, &c. passes on the death of the ordinary to his executors, and not to his successor. *Howly v. Knight*, 14 Q. B. 240; 19 L. J. Q. B. 3. *Young v. Hughes*, 28 L. J. Ex. 161. And an action lies at the suit of A. against C. on a bond, by which C. acknowledges himself bound to A. in a sum of money, *to be paid to A. or B. White v. Hancock*, 2 C. B. 830; 15 L. J. C. P. 186.

[1] Before the passing of this statute a judgment on a bond entitled the plaintiff to recover the full penalty, without regard to the real damages he had sustained, unless restrained by a court of equity.

[2] "May," in this statute, means "must." *Hardy v. Bern*, 5 T. R. 636. *Roles v. Rosewell*, id. 538, 540. *Drage v. Brand*, 2 Wils. 377. *Goodwin v. Crowle*, 1 Cowp. 359. Mayne on Damages, 116.

or agreements, and to summon him or them respectively to show cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches or inquiry thereof, upon a writ to be awarded in manner as aforesaid, and that upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

(*a*) *What Bonds within* 8 *&* 9 *Wm.* 3, *c.* 11.[1]

(*b*) *Writ of Inquiry to be before Sheriff.*

Writ of inquiry is to be executed before sheriff, unless otherwise ordered by the court or judge.

The 3 & 4 Wm. 4, c. 42, s. 16, to prevent delay, enacts that all writs issued under the 8 & 9 Wm. 3, c. 11, "shall, *unless the court where such action is pending, or a judge of one of the said superior courts*, shall otherwise order, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such sheriff, instead of the justices or justice of assize or Nisi Prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the court from whence the same shall issue at a day certain in term or in vacation, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute on that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or Nisi Prius."[2]

(C) *To Bonds within* 4 *&* 5 *Anne, c.* 16, *s.* 12, Solvit post diem *may be given in Evidence.*

By 4 & 5 Anne, c. 16, s. 12, "where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance, on condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action."

(*a*) *What Bonds within the* 4 *&* 5 *Anne, c.* 16.[3]

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[1] The above statute, however, only applies to bonds with *special conditions*, and not to common money bonds, which are provided for by 4 & 5 Anne, c. 16. It extends, however, to the case where the bond, though on the face of it a common money bond, is executed contemporaneously with a separate deed, by which the bond is declared to be a security for all moneys then or thereafter to be due, &c. *Hurst v. Jennings*, 5 B. & C. 650. It applies also to annuity bonds (*Walcot v. Goulding*, 8 T. R. 126); Arbitration Bonds (*Welch v. Ireland*, 6 East, 613. *Hanbury v. Guest*, 14 id. 401); and for bonds conditioned for payment by instalments. *Smith v. Bond*, 10 Bing. 125. *James v. Thomas*, 5 B. & Ad. 40. *Van Sandau v.* ——, *one, &c.*, 1 B. & A. 214.

But it does not apply to post-obit bonds for the payment of a gross sum at one time (*Murray v. Earl of Stair*, 2 B. & C. 82); or to bail bonds (2 B. & P. 446); or to replevin bonds (2 Saund. 187, n. 2. *Middleton v. Bryan*, 3 M. & S. 155); or a bond to replace stock (*Smith v. Jackson*, 13 Price, 715); nor to bonds conditioned for payment by instalments when the whole is due on one default. *Smith v. Bond*, 10 Bing. 125.

[2] In questions of difficulty a judge will order the writ to be executed before the chief justice in town, or a judge of assize in the country. *Archbishop of Canterbury v. Burlington*, 1 Dowl. N. S. 285. On an inquiry to assess damages upon the suggestion of breaches, the defendant cannot set up any matter in excuse or justification. *Archbishop of Canterbury v. Robertson*, 1 C. & M. 690.

[3] We have seen that, by the common law, on breach of the condition, the whole penalty of the bond was recoverable by the obligee; and as the only mode of obtaining relief to bonds not within the 8 & 9 Wm. 3, c. 11, was by recourse to a court of equity;

(D) *Staying Proceedings on Bonds.*

In actions on bond within this statute, proceedings may be stayed on payment of the principal money due, the interest, and costs.[1]

By 4 & 5 Anne, c. 16, s. 13, "if at any time pending the action upon such bond with a penalty, the defendant shall bring into court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same."

(E) *Payment into Court in Actions on Bonds.*

In any action within the 4 & 5 Anne, c. 16, payment into court may be made with leave of the court.[2]

By 23 & 24 Vic. c. 126, s. 25, in any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain with a penalty, it shall be lawful for the defendant, by

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the above statute was passed to afford relief in law to common money bonds, and bonds not within the last-mentioned statute. As to the distinction between money bonds and bonds with special conditions, see *Smith v. Bond*, 10 Bing. 125; 2 Saund. 187, a. 2. The statute in the text, we have seen, applies to a bond for the payment of money by instalments (*Bridges v. Williamson*, 2 Stra. 814. *Bonafous v. Ribot*, 3 Burr. 1370); when all becomes due, no one defaults; to a post-obit bond (*Murray v. Earl of Stair*, 2 B. & C. 82. *Ex-parte Winchester*, 1 Atk. 118. *Perkins v. Kempland*, 2 Black. 1106. *Wylie v. Wilkes*, 2 Dougl. 519); but not to a bond payable on a contingency. *England v. Watson*, 9 Mee. & W. 333. *Robinson v. Brown*, 3 C. B. 54. A bond payable from the day of the date is within the meaning of the act, and interest is payable from that time. *Farquhar v. Morris*, 7 T. R. 124.

[1] Before the 4 Anne, in an action on a bond conditioned for the payment of money only, the courts would relieve from the penalty on payment of the principal, interest, and costs (*Ireland's case*, 6 Mod. 101; S. P. *Le Sage v. Pere*, 7 id. 114); and upon bringing the penalty into court (*Gregg's case*, 2 Salk. 597; S. P. *Anon.* 6 Mod. 11). But now, by the statute in the text, the penalty need not be brought into court; and the court will direct the master to compute interest as well as principal and costs, though no day of payment is named, and though interest be not reserved. *Farquhar v. Morris*, 7 T. R. 124.

A bond was conditioned to pay 165*l.*, by certain instalments, until the whole should be paid; but if default was made in paying any one, the obligation was to remain in force. An action having been brought upon the bond, in consequence of a default in payment of the second instalment, a judge ordered that, on payment of the 15*l.* and costs, proceedings should be stayed:—*Held*, that the judge had no power to make such order. *Nayler v. Mopsey*, 4 Dowl. P. C. 669. But in debt on bond, conditioned for the payment of an annuity or of money by instalments, the defendant may obtain a stay of proceedings on payment of the arrears and costs, provided he give the plaintiff judgment in the action as a security for the future payments (*Darby v. Wilkins*, 2 Stra. 957. *Bridges v. Williamson*, id. 814. *Bonafous v. Ribot*, *supra*); but not otherwise. *Van Sandau v. ——, one, &c.*, 1 B. & A. 214. *Tighe v. Crafter*, 2 Taunt. 387. But where the condition was for the payment of a sum in gross, and by a subsequent agreement that sum was to be paid by instalments, the court would not stay proceedings on the bond on payment of the instalment, but required the whole sum mentioned in the condition, with costs, to be paid in (*Bonafous v. Ribot*, *supra*); and the same where it was stated in the bond that the whole sum would be due on default in payment of one instalment. *Gowlett v. Hanforth*, 2 W. Black. 958. And where the bond was conditioned for payment of the principal money after six months' notice, and in the meantime for payment of interest on the usual quarter days, default having, by inadvertence, been made in payment of one quarter's interest, the obligee gave notice to pay the principal, and the next day brought actions on the bond against the several obligors:—*Held*, that the court had no power to stay the proceedings on payment of the interest due, and costs. *Wheelhouse v. Ladbrooke*, 3 H. & N. 291; 4 Jur. N. S. 417.

And replevin bonds are not an exception to the rule that on a bond the plaintiff cannot recover more than the penalty and costs of suit; therefore, proceedings in a suit on such bonds will be stayed on payment of the penalty and costs, notwithstanding the costs in the replevin suit must exceed the penalty. *Branscombe v. Scarborough*, 6 Q. B. 13; 13 L. J. Q. B. 247. But the court will not interpose under this statute where it is at all doubtful that the payment stipulated by the condition is not subject to a contingency. *Robinson v. Brown*, 3 C. B. 54.

[2] This section was considered necessary by it having been held that the 4 & 5 Anne, c. 16, s. 13, did not authorise the pleading of payment into court. *England v. Watson*, 9 Mee. & W. 333. *Bishop of London v. M'Niel*, 23 L. J. Ex. 111.

leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond.

(F) *Declaration.*

(*a*) *On Common Money Bonds.*[1]

(*b*) *On Bonds within* 8 *&* 9 *Wm.* 3, *c.* 11.[2]

(G) *Equitable Defence to.*[3]

XIX. Limitation to Actions.

(A) *Must be brought within Twenty Years.*

Actions on bonds must be brought within twenty years of cause of action.[4]

By 3 & 4 Wm. 4, c. 42, s. 3, it is enacted, "that all actions (amongst others) of covenant on debt upon any bond or other specialty shall be commenced within ten years after the then session of parliament, or within twenty years after the cause of such actions or suits, but not after."

(B) *Except when Parties are under Disabilities, as Infants, Married Women, &c.*

Except when parties are under disabilities; as infants, married women, &c.

By 3 & 4 Wm. 4, c. 42, s. 4, "if any person entitled to such action or suit shall be, at the time of the cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond seas, then such person shall be at liberty to bring the same action, so as they commence the same within such times after their being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of that act, have done; and that if any person against whom there shall be any such cause of action shall be at the time such cause of action accrued beyond the seas, then the person entitled to any such cause of action shall be at liberty to bring the same against such person within such times as are before limited, after the return of such person from the seas."

(C) *And except there has been an Acknowledgment.*

And except there has been an acknowledgment in writing.[5]

By 3 & 4 Wm. 4, c. 42, s. 5, "if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty or his

[1] On a common money bond it is sufficient to declare for the penalty, without assigning any breach. *Ashbee v. Pidduck*, 1 Mee. & W. 564; B. & L. 70.

[2] On a bond within the 8 & 9 Wm. 3, c. 11, the party may either declare for the penalty without assigning any breach, or he may set out the condition, and assign breaches in the declaration. 2 Saund. 187, a. b. *Webb v. James*, 8 Mee. & W. 645. The latter course is the more advisable, as in the event of a demurrer, or judgment by default, the breaches are admitted; whereas, if suggested on the record, they must be proved. *Barwise v. Russell*, 3 C. & P. 608. *Scott v. Staley*, 4 Bing. N. C. 724. *Quin v. King*, 1 Mee. & W. 42. If the former course be adopted, and the defendant set out the condition, and plead performance generally, the plaintiff must assign breaches in the replication. If the performance be pleaded with particularity, the plaintiff may merely take issue. *De la Rue v. Stewart*, 2 B. & P. (N. R.) 362. If, instead of performance, the defendant pleads some other plea or demurs, on which the plaintiff must take issue in fact or in law, he must then assign breaches on the record, according to the 8 & 9 Wm. 3, c. 11. *Lawes v. Shaw*, 5 Q. B. 322. *Webb v. James*, 8 Mee. & W. 645. *Rolles v. Rosswell*, 5 T. R. 537. *Hardy v. Bern*, 5 id. 637. *Walcott v. Goulding*, 8 id. 126; B. & L. 320.

[3] An equitable defence to an action on a bond is not good under 17 & 18 Vic. c. 125, s. 83, unless it discloses facts which would in equity entitle the defendant to a decree, such that the common-law judgment that the defendant go without day would do complete and final justice between the parties. *Wodehouse v. Farebrother*, 5 E. & B. 277; 1 Jur. N. S. 798; 25 L. J. Q. B. 18); and in an action on a bond conditioned for the good service of a collector; breach, his not accounting for several sums; an equitable plea, that the obligees have allowed the principal to commit prior faults, is not supported by proof of indulgence by their manager. *Clifton v. M'Cutcheon*, 1 F. & F. 345. *See post*, Equitable Defences.

[4] Before this statute, after a period of twenty years without demand, a bond was presumed to be satisfied. *Oswald v. Legh*, 1 T. R. 270. Though this presumption might be rebutted by facts. *Gleadow v. Atkin*, 2 C. & J. 548.

[5] This acknowledgment need not be made

agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing, &c. as aforesaid, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff in any such action may by way of application state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

(D) *On Reversal of Judgment for Plaintiff, New Action may be brought within a Year.*

On reversal of judgment for plaintiff, a new action may be commenced within a year.

By 3 & 4 Wm. 4, c. 42, s. 6, "if in any action judgment be given for the plaintiff, and the same be reversed by error or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any action the defendant shall be outlawed, and shall after reverse the outlawry, in all these cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

(E) *Meaning of "Parts beyond Seas."*

Meaning of term "beyond seas."

By 3 & 4 Wm. 4, c. 42, s. 7, "no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to either of them being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act." See *Fannin v. Anderson*, 7 Q. B. 811. *Lane v. Bennett*, 1 Mee. & W. 70.

(F) *Statute of Limitations runs from Breach.*

TACKEY v. HAWKINS, 4 C. B. 655; 16 L. J. C. P. 201.

The statute of limitations runs from breach of the condition, not from the execution of the bond.[1]

This was a rule to set aside the verdict for the plaintiff for misdirection. The declaration was in the usual form, not setting forth the condition.

Plea, that the cause of action did not accrue within twenty years.

Replication, taking issue on the plea. Upon the trial the bond was produced, and appeared to be a post-obit bond. And it was shown that the party named in it was dead within twenty years. The judge, upon this evidence, directed the jury, that if they believed the evidence it disproved the plea. Verdict for the plaintiff.

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to the person entitled, nor need it amount to a promise; an admission to a third person is sufficient (*Moodie v. Bannister*, 4 Drew, 433; 28 L. J. Ch. 881), but it must be in writing. *Forsyth v. Bristow*, 3 Ex. Rep. 348. And where a tenant for life of devised real estates, for many years, and up to his death, paid interest on the bond of the devisors, in which the heirs were bound:—*Held*, that such payment was within the meaning of the proviso in the above section, and kept the bond alive, not only as against the party making the payment, but also against all other parties liable on the bond. *Roddam v. Morley*, 1 De Gex & J. 1; 26 L. J. Ch. 438.

[1] A new cause of action arises on each successive breach, and plaintiff will, on a plea of the statute, be entitled to prove breaches within twenty years, and on such proof be entitled to a verdict on the plea, although it appear that there have also been breaches twenty years before the action. *Amott v. Holden*, 18 Q. B. 593; 17 Jur. 318; 22 L. J. Q. B. 14. *Blair v. Ormond*, 15 Jur. 1054; 20 L. J. Q. B. 444. The proper course in such case would be to confine the plea of the statute to breaches beyond twenty years. *Sanders v. Coward*, 15 Mee. & W. 48; 15 L. J. Ex. 97; 13 Mee. & W. 65; 13 L. J. Ex. 342.

Held, that the judge was right, as also the verdict, and that the result of the pleadings was, that the plaintiff went to trial on the issue whether the cause of action accrued within twenty years; and that he proved that it did accrue within twenty years.

XX. Bonds to the Crown.[1]

XXI. Proceedings against Heir and Devisee.

(A) *Heir is Liable to the Extent of Assets.*[2]

(B) *Even though he have Aliened the same before Action.*

Heir-at-law to be answerable for debts, although he may sell before action brought.[3]

By 1 Wm. 4, c. 47, s. 6, "in all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred, as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts, saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before action brought, shall not be liable to such execution."

(C) *What Heir may Plead.*

When an action is brought, heir may plead *riens per descent*.[4]

By 1 Wm. 4, c. 47, s. 7, "where any action of debt upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, anything therein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid: but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon

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[1] A bond given to the Crown under 33 Hen. 8, c. 39, s. 50, binds all the lands of the obligor over which he had disposing power at the time of its execution, and he cannot defeat the right of the Crown by a subsequent exercise of his power. *Ellis v. Reg.* in error, 6 Ex. 921; 20 L. J. Ex. 348; 15 Jur. 917; S. C. 4 Ex. 652; 19 L. J. Ex. 77. It may be treated as matter of record; may be looked at by the court as a record (id.); and the Crown may have a *scire facias* upon it. *Reg. v. Chambers*, 11 Mee. & W. 776. *See post*, Extents.

[2] As to the cases in which heir is bound, *see ante*, p. 509. The liability of the heir does not extend beyond the value of the lands descended. *Buckley v. Nightingale*, 1 Stra. 665. When the obligor has heirs, and lands from his father and his mother, both heirs shall be joined in the action. *Bushby v. Dixon*, 3 B. & C. 299. Also, if there be a devisee as well as heir, they should be joined together. If, according to the custom of gavel-kind in Kent, there be several heirs, they must, of course, all be joined. 2 W. Saund. 7, n.

[3] At common law the heir might have released himself from all liability by a *bonâ fide* alienation of the lands descended before action; and the above provision was passed to prevent creditors being deprived of their just rights in consequence.

[4] The heir may also plead any matter which might have been set up as a defence by the ancestor; or he may deny the character in which he is sued; or he may plead that he has paid debts of a superior or equal degree to the extent of the descended lands; and this whether the debts be due to himself or third persons. *Buckley v. Nightingale*, 1 Stra. 665; Com. Dig. P. 2, E. 3. If the heir plead a false plea or payment by a co-obligor, the plaintiff will be entitled to the whole debt and costs, irrespective of the quantity of assets. 2 W. Saund. 7 a. n. If the heirs do not plead *riens per descent*, or some plea denying the cause of action, he must confess the action, and then the quantity of assets. Plowd. 440. *Buckley v. Nightingale, supra;* B. & L. 348.

demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire if the lands, tenements, or hereditaments so descended."

The stat. 1 Wm. 4, c. 47, s. 8, provides, "that all and every the devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir-at-law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought." Devisees are liable in the same way as heirs.

(D) *In case of Infant Heir, Parol shall not Demur.*[1]

XXII. Stamp on.[2]

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[1] Formerly an infant heir might pray that the parol might demur, but the 11 Geo. 4, and 1 Wm. 4, c. 47, s. 10, took away such right. *See* Abatement, vol. i. p. 18.

[2] By the 13 & 14 Vic. c. 97, a duty is imposed on any bond in England, and personal bond in Scotland, given as a security for the payment of any definite and certain sum of money:—

Not exceeding		£ 50	£0	1	3
Exceeding	£ 50	100	0	2	6
„	100	150	0	3	9
„	150	200	0	5	0
„	200	250	0	6	3
„	250	300	0	7	6

(And not exceeding)

And when the same shall exceed 300*l.*, then for every 100*l.*, and also for any fractional part of 100*l.* 0 2 6

Bond in England or Ireland, and personal bond in Scotland, given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be:—

Where the money secured, or to be ultimately recoverable thereupon, *shall be limited not to exceed* a given sum,—

The same duty as on a bond for such limited sum.

And where there shall be no penalty of the bond, in such last-mentioned case, and and where the total amount of the money secured, or to be ultimately recoverable, shall be uncertain and without any limit,—

The same duty as on a bond for a sum equal to the amount of the penalty of such bond.

Such bond shall be available for such an amount only as the *ad valorem* duty denoted by any stamp or stamps thereon will extend to cover.

Bond in England or Ireland, and personal bond in Scotland, given as a security for the transfer or re-transfer of any share in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of any other company or corporation,—

The same ad valorem *duty as on a bond for a sum of money equal to the value of the stock or fund secured according to the average price thereof, on the day of the date of the bond, or on either of the ten days preceding; or if there shall not have been any known sale on any of such days, then on the latest day preceding on which there shall have been a known sale.*

Heritable bond in Scotland, for any of the purposes aforesaid. *See* Mortgage.

Bond in England or Ireland, and personal bond in Scotland, given as a security for the payment of any sum of money, or for the transfer or re-transfer of any share in any of the stocks or funds before mentioned which shall be secured also by a *mortgage or wadset*, or other instrument or writing hereinafter charged with, and which shall have paid the same duty as a mortgage or wadset, or for the performance of covenants contained in such mortgage or other instrument or writing, or for both those purposes, *provided such mortgage, wadset, or other instrument or writing shall bear even date with and be referred to in such bond;*—

Where the sum of money or the value of the stock or funds secured shall not exceed 800*l.*,—

The same ad valorem *duty as on a mortgage or wadset for securing the like amount.*

And where such sum of money or value shall exceed 800*l.* . . £1 1 0

Bond in England or Ireland, and personal or heritable bond in Scotland, given as an additional or further security for the payment of any sum or sums of money, or for the transfer or re-transfer of any share in any of the stocks or funds before mentioned, previously secured by a bond, mortgage, or other security therein referred to, and which have paid the proper *ad valorem* duty on bonds or mortgages imposed by law at the date thereof;—

Where the sum of money or the value of the stock or funds secured shall not exceed 1400*l.*,—

The same ad valorem *duty as on a bond or mortgage for securing the like sum or value.*

And where such sum of money, or the value of the stock or funds secured, shall exceed 1400*l.* . £1 15 0

Bond.—Any transfer or assignment, disposition, or assignation of any such bond as

aforesaid, and which shall have paid the proper *ad valorem* duty on bonds;—

Where the principal money or stock secured by the bond shall not exceed in amount or value in the whole the sum of 1400*l.*,—

The same duty as on a bond for the total amount or value of such principal money or stock.

And in every other case such transfer, assignment, disposition, or assignation, shall be chargeable with the duty of £1 15 0

And *see* Progressive Duty.

Bond in England or Ireland, and personal or heritable bond in Scotland, given as the only or principal security for the payment of any annuity upon the original creation and sale thereof,—

The same ad valorem *duty as on a conveyance upon sale in consideration of the sum or value given, or agreed to be given, for the purchase of such annuity.*

Bond in England or Ireland, and personal bond in Scotland, given as a collateral or auxiliary security for the payment of any annuity upon the original creation and sale thereof, where the same shall be granted, or conveyed, or secured by any other deed or instrument liable to and charged with the *ad valorem* duty imposed by law on conveyances upon the sale of any property;—

Where such *ad valorem* duty shall not exceed 20*s.*, such bond shall be chargeable with a stamp-duty of equal amount with the said *ad valorem* duty;—

And where such *ad valorem* duty shall exceed 20*s.*, such bond shall be chargeable with the duty of . £1 0 0

Bond in England or Ireland, and personal or heritable bond in Scotland, given as a security for the payment of any annuity (except upon the original creation and sale thereof), or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for any definite and certain term, so that the total amount of the money to be paid can be previously ascertained,—

The same ad valorem *duty as on a bond of the like nature for the payment of a sum of money equal to such total amount.*

Bond in England or Ireland, and personal or heritable bond in Scotland, given as a security for the payment of any annuity (except as aforesaid), or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life or any other indefinite period, so that the whole money to be paid cannot be previously ascertained;—

Where the annuity or sum secured shall not exceed 50*l.* per an. £1 0 0

And where the same shall exceed 50*l.* and not exceed 100*l.* per annum 2 0 0

And where the same shall exceed 100*l.* per annum, then for every 100*l.* per annum, and also for every fractional part of 100*l.* per annum £2 0 0

But where there shall be both a personal and heritable bond in Scotland, in separate deeds of the same date, for securing any such annuity or sums payable at stated periods, and the *ad valorem* duty above charged thereon shall amount to 2*l.* or upwards, the heritable bond shall be charged with the *ad valorem* duty, and the personal bond shall be charged only with a duty of 1 0 0

Bond of any kind or description given for any other purpose than aforesaid,—

The duty chargeable thereon by any act or acts now in force.

Provided always, and it is hereby declared, that no such bond as last mentioned shall be charged or chargeable under this or any other act or acts, with any greater amount of stamp-duty than the *ad valorem* duty hereinbefore charged upon a bond given for the payment of a definite and certain sum of money of the same amount as the penalty of such bond.

And in all the said several cases of bond, *see* Progressive Duty.

Progressive Duty: that is to say, where any deed or instrument of any description whatever chargeable with any stamp-duty either under this schedule or under any other act or acts now in force, together with any schedule receipt, or other matter put or indorsed thereon or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein over and above the first 1080 words, there shall be charged the further progressive duty following; (that is to say),

Where such deed or instrument shall be chargeable with any *ad valorem* stamp-duty or duties, not exceeding in the whole the sum of ten shillings, a further progressive duty equal to the amount of such *ad valorem* duty or duties.

And in every other case (except where any other progressive duty is by this schedule expressly charged thereon) a further progressive duty of £0 10 0

Provided always, that nothing herein contained shall extend to charge the said progressive duty in any case, in which express provision is made by any such act or acts as aforesaid for charging a certain duty on every skin, sheet, or piece of vellum, parchment or paper, in or upon which any deed or instrument shall be contained or written, or to charge with progressive duty any description of deed or instrument not chargeable with progressive duty under any act or acts now in force, or to charge any deed or instrument with any higher rates or amount of progressive duty than is now chargeable on a deed or instrument of the like description under any such act or acts as aforesaid.

In the above section the words "definite and certain sum" refer only to the principal

BOOKING-Office. *See* Carrier.

BOOKSELLER. *See* Copyright; Master and Servant.

BOOKS of Science.[1]

BOROUGH—Borough Rate. *See* Municipal Corporation.

BOROUGH English.[2]

CLEMENTS v. SCUDAMORE; 2 Ld. Raym. 1024; S. C. 1 Salk. 243; S. C. Holt. 124; S. C. 6 Mod. 120; S. C. P. Wms. 63.

Where lands would at common law descend to the issue of the eldest son, *jure representationis*, they will by the custom of borough English descend upon the issue of the youngest son.

In ejectment a special verdict was found: viz. A. had five sons, and the youngest son died in the lifetime of his father, leaving issue a daughter; after which the father purchased copyhold lands of the nature of borough-English, which, by custom, were descendible to the youngest son and his heirs. The father died seised, and the fourth son entered; and now the question was, whether the fourth son, or the daughter of the fifth son, should inherit these lands.

The Court were of opinion the daughter shall inherit by right of representation; for, by this custom, the youngest son is put in the place of the eldest at common law; and as at common law the issue of the eldest is pre-

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sum secured, and not to any interest, whether bygone or subsequent. *Barker v. Smark*, 7 Mee. & W. 590. *Frith v. Rotherham*, 15 id. 39. And a stamp sufficient to cover the principal sum recovered is sufficient, even when the bond is conditioned for the due payment of interest by instalments and premiums on a policy of insurance. *Prudential Mutual Association v. Curson*, 8 Ex. 97; 22 L. J. Ex. 85. A bond for replacing stock is properly stamped as on a bond for a sum of money equal to the value of the stock or fund secured, notwithstanding the giving it may be accompanied with a deposit of title-deeds, and an agreement for a mortgage which has no *ad valorem* stamp. *Blair v. Ormond*, 14 Q. B. 732; 14 Jur. 191; 19 L. J. Q. B. 228. And where a deed of partition stated on the face of it a nominal consideration only, and was stamped accordingly, though the consideration was in fact 600*l.*, and a bond had been given to secure that sum:—*Held*, that the bond was not void by reason of the improper stamp. *Henniker v. Henniker*, 1 El. & B. 54; 22 L. J. Q. B. 94; 17 Jur. 436. A bond conditioned for the quarterly payment of an annual rent reserved in an indenture of lease of market-tolls is not within either of the clauses in schedule, part i. of the 59 Geo. 3, c. 184, which imposes an *ad valorem* duty on bonds given as a security for the payment of any definite and certain sum of money; and on bonds given as a security for the payment of any sum or sums of money at stated periods (not being rent reserved or payable upon any lease), for any definite and certain term, so that the total amount of the money to be paid can be previously ascertained. *Attree v. Anscomb*, 2 M. & S. 88, overruled. *Winchester Corn-Exchange & Market-Place Company v. Gillingham*, 3 Gale & D. 567; 4 Q. B. 475; 7 Jur. 326; 12 L. J. Q. B. 159. *Providential Insurance v. Curzon*, 22 L. J. Ex. 85; 8 Ex. 97 *See* Tilsley, Stamps, 35.

If several persons are bound under one penalty for the performance of the same condition, one stamp is sufficient. *Bowen v. Ashley*. 1 N. R. 274. *Goodson v. Forbes*, 1 Marsh. 531,

Transfers of Bonds and Mortgages of Public Companies exempted from Stamp-Duty on Payment of a Composition.—By 16 & 17 Vic. c. 59, s. 14, after reciting that it would facilitate the transfer of the bonds and mortgages given by public companies under the provisions of acts of parliament as securities for money, which such companies are by the said acts expressly empowered or authorised to borrow, if the transfers or assignments of such bonds or mortgages were indorsed thereon, and were exempted from stamp-duty; and it is expedient to grant such exemption, in consideration of a composition stamp-duty being paid on such bonds and mortgages on the original making and issuing thereof, in lieu of the stamp-duty with which such transfers or assignments would be otherwise chargeable; it is enacted, that "where on the original making and issuing of any such bond or mortgage as aforesaid, and before any transfer or assignment thereof, the same shall be stamped with an amount of stamp-duty equal to three times the amount of the *ad valorem* stamp-duty chargeable thereon by law, and over and above the said *ad valorem* duty, then every transfer or assignment thereafter made of such bond or mortgage by indorsement thereon shall be deemed to be exempt from the stamp-duty which would otherwise be payable in respect of such transfer or assignment: Provided always, that nothing herein contained shall extend to exempt any such transfer or assignment from any stamp-duty to which it may be liable as a settlement of the money or stock secured by such bond or mortgage, or any portion thereof." *Blair v. Ormond*, 19 L. J. Q. B. 228; 14 Q. B. 732. Tilsley, Stamps, 35.

[1] Are not directly evidence, but may be referred to by scientific witnesses to refresh the memory, and are often used on cross-examinations (*Collins v. Thompson*, 5 C. & P. 73, 74); nor are they evidence of foreign law, 2 Tyr. 946, 947.

[2] *See* Robinson on Gavel-kind, by Norwood; A history of Gavel-kind, by Sandys: works of great learning and research.

ferred by right of representation, so by this custom shall the issue of the youngest. If a man, seised of lands of the custom of gavel-kind, have issue three sons, and one of the three dies, leaving issue a daughter, in the life of his father, this daughter shall inherit the part of her father, and yet she is not within the words of the custom, for she is no male, but the daughter of a male, and heir by representation. In the year 1560 there was a cause *Fane v. Barr*; it is entered Hilary, 1659; Rot. 779. The custom was, that the copyhold land of every tenant dying seised descended to the youngest son. A surrender was made to the use of A. and his heirs. A. died before admittance; and it was agreed his youngest son should inherit if A. had been admitted; but in this case A. being not admitted, it was adjudged the eldest son should inherit, and that is by reason of the strictness of the custom, which required a seisin and a dying seised. But, by the report I have of that case, the court said, it had been otherwise if this land had been found to be of the custom of borough-English or gavel-kind; for the law takes notice of these customs, but not of such special customs, which must be pleaded by him that would take advantage of them, and must be taken by the court to be as they are set forth by the pleading, and no otherwise. In the case at bar, the custom is expressly found to be descendible to the youngest son and his heirs, though the words "his heirs" are needless, for the law would imply all necessary incidents and consequences in the course of descents. If the father be disseised and die, the right of entry shall descend to the youngest son; if the youngest son die, the same right of entry shall descend to his daughter; and the youngest son, being heir by custom, shall have his age as if he were heir at common law. And the court denied the case of 1 Leon. 109, 208, and inclined against the opinion of Croke in 1 Cro. 410, and said, if a lease be made to H. and his heirs, for three lives, of lands of the nature of borough English, this descendible freehold shall go to the youngest son, though it is a new-created estate, for the custom is inherent in the land; and so it is of a rent, for it issues out of the land; and the introducing the same rules of descent in all cases relating to the same lands tends to quietness and certainty.[1]

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[1] Borough English (Saxon, *Borhoe Englise*) is a customary descent of lands, in some ancient boroughs and copyhold manors, that estates shall descend to the youngest son; or if the owner hath no issue, to his younger brother, as in *Edmonton*, &c. Kitch. 102. It is said that the original of this old custom proceeded from the lords of certain lands having the privilege of lying with the wives of their tenants the first night after marriage; wherefore the tenants obtained this custom, on purpose that their eldest sons (who might be their lords' bastards) should be incapable to inherit their estates. Præf. 3 Mod. Rep. But *see* Lit. 165, where the reason given for the custom is because the youngest is presumed in law to be the least able to provide for himself.

With respect to lands held in borough English, Littleton says, sect. 165, some boroughs have a custom, that if a man has issue many sons, and dies, the youngest shall inherit all the tenements which were his father's within the same borough, by force of the custom. 7 Vin. Abr. 560.

This custom extends to estates tail, and also to descendible freeholds; thus Lord Coke says (1 Inst. 110, b), "If lands of the nature of borough English be letten to a man and his heirs during the life of J. S., and the lessee dieth, the youngest son shall enjoy it."

But as borough English may be excluded by special custom, so may it be restrained; and therefore the customary descent may be confined to fee simple. *See* March. 56. The custom of borough English is, however, confined to lineal descents, and does not extend to collateral ones; so that where lands held in borough English descended to the youngest son, and he died without issue, it was resolved that they did not go to the younger brother; for the custom did not take place in the descent between brothers, but the eldest brother inherited. Lord Coke has, however, said that, by some customs, the youngest shall inherit. Rob. Gav. 93; Cro. Jac. 198; 1 Inst. 1106, n. 3. The custom is judicially noticed, and need not be pleaded or proved. 2 Ld. Raym. 1025; 4 Man. & G. 946: *per Tindal, C. J.*

If copyhold land of the tenure of borough English be surrendered to the use of another person and his heirs, and he dies before admittance, the right shall descend to the youngest son. *Baker v Dereham*, cited in *Blackburn v. Graves*, 1 Mod. 102, abridged, *post*, Copyhold; and *see* Noy. 106.

By the custom of borough English the widow shall have the whole of her husband's lands in dower, which is called her free bench; and this given to her the better to provide for the younger children. Co. Lit. 33, 111; F. N. B. 150.

BOTE. Saxon. A reparation for any damage done. Co. Lit. 127, n. *See* Common; Estovers.

BOTTOMRY. See *Respondentia;* Ship and Shipping.

BOUNDARIES. *See* Hearsay Evidence; Highway; Inclosure; Landlord and Tenant; Metropolis Local Management Act; Parish; Perambulations; Tithes; Turnpike.

Nicholls v. Parker, 14 East, 331. The King v. the Inhabitants of Hammersmith, Peake's *Ev.* Appendix, 33. Down v. Hole, cited 11 East, 331. Ireland v. Powell, Peake's *Ev.* Appendix, 13.

Hearsay evidence is admissible on a question of parochial or manorial boundaries.[1]

A question arose as to what was the boundary between the parishes of A. and B., or in other words, whether the common of C. was within the parish of A. or B. Evidence was admitted by *Le Blanc, J.*, of what old persons, when alive, had said concerning the boundaries, though not as to particular facts or transactions; and this, though the old persons were parishioners, and claimed rights of common on the waste, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations — at least, no litigation pending.

Clothier v. Chapman, cited 14 East, 331.

But evidence of reputation of a boundary between two private proprietors will be rejected.[2]

The defendant in this case offered in evidence the declarations of old persons, deceased, as to the ancient boundary of a waste belonging to a certain farm; but *Graham, B.*, rejected the evidence, and distinguished between the admission of evidence, where the question was as to the boundaries of a parish or manor, and as to the boundary between one private property and another.

BOUND Bailiff. *See* Arrest, vol. i. p. 519; Bail, *ante*, p. 74; *post*, Sheriff.

BRAWLING.[3] *See* Profanation.

[1] Boundaries are the utmost limit of land, whereby the same is known and ascertained. 4 Inst. 318. Courts of equity will grant commissions to ascertain boundaries. 1 Madd. Chan. Prac. 30. In such a bill it must be clearly shown that, without the assistance of the court, they cannot be found; and a foundation must be laid for this relief by showing, not merely that they are confused, but that the confusion has arisen from some misconduct of the defendant, or of those under whom he claims, of which the party has a right to complain, and which renders it incumbent on the defendant to co-operate with him in re-establishing them. Where it arose out of the unity of possession by the plaintiff's own tenants, and before the land came into the defendant's possession, and nothing was stated in the bill but the mere fact of confusion, the court refused to interfere. 1 J. & W. 484. So, the court refused to grant a commission to ascertain the boundaries of two rectories (3 Anst. 801); and also refused a commission to settle the boundaries of a parish, or of a manor, where all parties who might probably be interested were not before the court. 2 Anst. 386; id. 392.

On a commission granted to a prebendary to ascertain boundaries against his lessees, who were also owners of freehold, &c., within his prebend manor, it was holden that *quoad* the prebendal rights they constituted but one person, and he was, therefore, entitled to name as many commissioners as his lessees. 1 Swanst. 9. A commission was granted by consent to ascertain prebendal lands, become mixed with other freehold of the tenant by unity of possession, and to set out other lands where they could not be distinguished and ascertained. 2 Mer. 509. In wastes, where there are no boundaries, the boundaries are generally settled by a line drawn by the eye, from one spot to another visible object. 5 Dowl. 273.

[2] But where the boundaries of two farms were disputed, and it was shown that the boundary of the plaintiff's farm was the same as that of the hamlet, it was held admissible to ask what, according to reputation, was the boundary of the hamlet. *Thomas v. Jenkins*, 1 Nev. & P. 588. So a verdict is evidence of reputation where the plaintiff was a party to a former suit (*Evans v. Rees*, 2 Per. & D. 627; 10 Ad. & E. 151); so presentments (*Talbot v. Lewis*, 5 Tyr. 1), and ancient orders of sessions. *Duke of Newcastle v. Broxtowe*, 1 Nev. & M. 598; 4 B. & Adol. 273. *See ante*, vol. i. p. 81.

[3] This was an offence at common law

Suits for brawling and defamation against persons not in holy orders abolished in the ecclesiastical courts.

By 23 & 24 Vic. c. 32, "it shall not be lawful for any ecclesiastical court in England or Ireland to entertain or adjudicate upon any suit or cause of brawling commenced after the passing of this act against any person not being in holy orders, nor shall it be lawful for any ecclesiastical court in Ireland to entertain or adjudicate upon any suit or cause of defamation commenced as aforesaid; and in the case of every person committed or to be committed to gaol under any *writ de contumace capiendo*, issued in consequence of any proceedings before any ecclesiastical court in any cause or suit for defamation of character, or where such person is not in holy orders, for brawling, the judge of the ecclesiastical court before whom such proceedings shall have been had shall make an order upon the officer in whose custody such person shall be at any time hereafter for discharging such person out of custody; and such officer shall, on the receipt of such order, forthwith discharge such person, and it shall not be necessary for such person to take any oath of future obedience to his or their ordinary: Provided always, that such order shall not be made unless the costs lawfully incurred in any such suit shall have been previously paid into the registry of such ecclesiastical court: provided further, that where any such suit for brawling or defamation has been commenced before the passing of this act, and final judgment has not been given thereupon, or where final judgment has been given, but the defendant has not been taken under a writ *de contumace capiendo* pursuant to such judgment, the court, upon payment by the defendant of the costs of suit incurred by the promoter of the office of the judge to the time of the passing of this act, shall stay all further proceedings therein."

Penalty on person brawling; or committing a disturbance.

By sect. 2, "any person who shall be guilty of riotous, violent, or indecent behaviour, in England or Ireland, in any cathedral church, parish, or district chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified under the provisions of the 18 & 19 Vic. c. 81, intituled 'An Act to amend the Law concerning the Certifying and Registering of Places of Religious Worship in England," whether during the celebration of divine service or at any other time, or in any churchyard or burial-ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral church or chapel, or in any churchyard or burial-ground, shall, on conviction thereof before two justices of the peace, be liable to a penalty of not more than 5*l.* for every such offence, or may, if the justices before whom he shall be convicted, think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months."

(*Wentmouth v. Collins*, Ld. Raym. 850; 4 B. & C. 313), and is thus defined by 5 & 6 Edw. 6, c. 4, s. 1:—"If any person shall by words only, quarrel, chide, or brawl, in any church or churchyards, it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two (*sed vide* 1 Hagg. Rep. 181) lawful witnesses, *to suspend every person so offending*, if he be a layman, from the entrance of the church, and if he be a clerk, from the ministration of his office, for so long a time as the said ordinary shall think meet, according to the fault." Therefore a party may now proceed, either upon the statute or on the ancient law. The court will consider time and place in cases of "chiding, quarrelling, and brawling." That may be "chiding," or "brawling," in the church, which would not be so in the vestry. The vestry is a place for parish business, and the court would not interfere further than might be necessary for the preservation of due order and decorum. 1 Hagg. Rep. 184, 185. Suspension of a parishioner *ab ingressu ecclesiæ* prescribed by 5 & 6 Edw. 6, c. 4, was limited to a month only under certain circumstances (*Clinton v. Hatchard*, 1 Add. Rep. 96); and in another case (*Canning v. Sawkins*, 2 Phil. Rep. 282) for brawling in a chancel, to three weeks, with notification in the church of such suspension in the latter case, and costs in both. In *Cox v. Gooday* (2 Hagg. Rep. 138), a clergyman was suspended for a fortnight for words spoken during divine service, by way of admonition of a passionate tenor, though expressed without any tone of passion. Costs were prayed, but the report does not notice whether they were granted. In *Large v. Alton* (Cro. Jac. 462), a prohibition was prayed upon the statute, because that costs were given in the spiritual court; but it was denied by the court, the costs being there for the expenses of the suit: otherwise if it had been for damages. As to evidence of brawling, *see* 3 Phil. Rep. 120.

By sect. 3, "every such offender in the premises after the said misdemeanor so committed, immediately and forthwith may be apprehended and taken by any constable or churchwarden of the parish or place where the said offence shall be committed, and taken before a justice of the peace of the county or place where the said offence shall have been so committed, to be dealt with according to law." Offenders may be immediately taken before a magistrate.

By sect. 4, "any person convicted as aforesaid, who shall think himself aggrieved by such conviction, may forthwith appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction, for the county, riding, division, city, or borough wherein the cause of complaint shall have arisen; provided such person shall enter into a recognisance with two sufficient sureties before the convicting justices, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such recognisance being entered into, the justices shall liberate such person, and the court at such sessions shall hear and determine matters of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment." Persons aggrieved may appeal.

By sect. 5, "the stat. 5 & 6 Edw. 6, c. 4, is hereby repealed, so far as relates to persons not in holy orders." Repeal of 5 & 6 Edw. 6, c. 4, as to persons not in orders.

By sect. 6, "nothing hereinbefore contained shall be taken to repeal or alter the stat. 1 Mary, sess. 2 & 3; or the stat. 1 Eliz. c. 2; or the stat. 1 Wm. & M. c. 18, s. 18." 1 Mary, ss. 2 & 3; 1 Eliz. c. 2; 1 Wm. & Mary, c. 18, s. 18, not repealed.

By sect. 7, "provided also, that nothing herein contained shall limit, restrain, or abolish the power possessed by the ordinary over the fabric of any church, or over the churchyard or burial-ground connected therewith." Not to limit power of ordinary over fabric of church.

BREAD. The acts relating to the sale of bread are 3 Geo. 4, c. 106 (local and personal), and 6 & 7 Wm. 4, c. 37. *See* Church; Churchwardens.

BRIBERY.[1] *See* also Election, Bribery at.

BRIDGES. *See* County; Highways; Nuisance.

BROKERS. For the law of Brokers in relation to their rights and duties, *see* Principal and Agent.

By 6 Anne, c. 16, s. 4, "all persons that shall act as broker within the city of London and liberties thereof, shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under Admission of brokers in the city of London, how regulated.[2]

[1] Bribery is the receiving or offering any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. *See* 1 Hawk. P. C. c. 67, ss. 1, 2; 4 Black. Com. 139; 3 Inst. 149. Hence it is criminal to promise money to any man who has a vote in the election of the members of a corporation, and upon a prosecution for the offence it is sufficient to allege generally that such a party had a right to vote (*Rex v. Plympton*, 2 Ld. Raym. 1377); or a public minister (*R. v. Vaughan*, 4 Burr. 2494); or to attempt to bribe a judge (id.); or a juryman (*Young's case*, cited *R. v. Higgins*, 2 East, 14); or officer of customs or excise (24 Geo. 3, c. 47, s. 32); or any in an official situation corruptly to use his power or interest. 1 East, P. C. 183; 4 Burr. 2494.

[2] For the form of bond required by the city, see *Kemble v. Atkins*, Holt, N. P. 427, 441; 7 Taunt. 260. If a broker be not duly licensed he cannot recover his commission. *Cope v. Rowlands*, 2 Mee. & W. 149. *Pidgeon v. Burslem*, 18 L. J. Ex. 193.

Brokerage only relates to money and goods, and not to contracts for work and labour. *Milford v. Hughes*, 16 Mee. & W. 174. It follows, therefore, that though a stockbroker is within the statute (*Clarke v. Powell*, 4 B. & Ad. 846. *Cope v. Rowlands*, 2 Mee. & W. 149), shipbrokers (*Gibbons v. Rule*, 4 Bing. 301) and auctioneers (*Wilkes v. Ellis*, 2 H. Bl. 555) are not so.

such restrictions and limitations for their honest and good behaviour as that court shall think fit and reasonable, and shall, upon such their admission, pay to the chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of forty shillings; and shall also yearly pay to the said uses the sum of forty shillings upon the 20th day of September in every year."

Penalty for acting without admission.

By sect. 5, a penalty of 25*l.* was imposed for every offence on a person acting as broker without admission, but this section is now repealed by the 57 Geo. 3, c. 60, s. 2 (local and personal), which raises the penalty for every such offence to 100*l.*, to be recovered by action in the name of the chamberlain.

BROTHEL.[1]

BUBBLE Act, 6 Geo. 1, c. 18. *See post*, Companies; Conspiracy; Insurance; Public Companies.

BUGGERY. *See* Sodomy.

BUILDING Acts. The acts on this subject now in force are the 14 Geo. 3, c. 78, ss. 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, which relate exclusively to the regulations of the engines, turncocks, insurance offices, &c., in case of fire, and cannot, therefore, be strictly considered as part of the statute law relating to buildings, the 7 & 8 Vic. c. 84, ss. 54, 55, 56, 57, 58, 59, 60, 61, 62, 63; the 18 & 19 Vic. c. 84; and the 24 & 25 Vic. c. 37.[2]

Buildings near dangerous businesses.

By 7 & 8 Vic. c. 84, s. 54,[3] it is enacted, "for the purpose of making provision concerning businesses dangerous in respect of fire or explosion, that with regard to the following businesses; (that is to say,) the manufacture of gunpowder or of detonating powder, or of matches ignitable by friction or otherwise, or other substances liable to sudden explosion, inflammation, or ignition, or of vitriol, or of turpentine, or of naphtha, or of varnish, or of fireworks, or painted table-covers, and any other manufacture dangerous on account of the liability of the materials or substances employed therein to cause sudden fire or explosion, so far as relates to the erection of buildings in the neighbourhood of the place where any such business is carried on, and so far as relates to the carrying on of any such business in the neighbourhood of public ways or buildings, that it shall not be lawful hereafter to erect any building of any class

Distance from buildings.

nearer than fifty feet from any building which shall be in use for any such dangerous business; but if a building already existing within fifty feet from

[1] We have seen (*ante*, p. 386) that the keeping a bawdy-house is a common nuisance, and an indictable offence.

If the house be not of this description, but be disorderly in other respects, it may equally be the subject of an indictment. And, therefore, where an indictment for keeping a disorderly house for the purposes of cock-fighting, boxing, &c., was in the ordinary form of an indictment for keeping a bawdy-house, except that instead of "drinking, tippling, and whoring," it substituted the words, "fighting of cocks, boxing, playing at cudgels," it was holden to be good upon motion in arrest of judgment. *R. v. Higginson*, 2 Burr. 1232. Any person who shall appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the owner thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof. 25 Geo. 2, c. 36, s. 8. Keeping a disorderly house is a misdemeanor punishable with fine or imprisonment, with or without hard labour (3 Geo. 4, c. 114), or both. Such indictment cannot be removed by *certiorari*. *Rex v. Sanders*, 15 L. J. 158, M.

See 25 Geo. 2, c. 36, s. 5; 58 Geo. 3, c. 70, s. 17.

[2] The numerous cases upon the expired and repealed acts affords little or no information as to the provisions in the recent statutes; references are only given to those having an immediate application to the different sections.

[3] This act, although printed among the public general statutes, is an act of a local and personal nature, and ought to have been so classed. *Richards v. East*, 15 Mee. & W. 244; 15 L. J. Ex. 163. In an action of trespass, non-compliance with the requisites of these statutes cannot be given in evidence under not guilty. (Id.) Nor can a party compel the reinstatement of his premises by *mandamus*; his remedy is by action. *Reg. v. Ponsford*, 1 D. & L. 116; 12 L. J. Q. B. 313. As to the authority of official referees under 7 & 8 Vic. c. 84, s. 5, see *Reg. v. Ingham*, 21 L. J. M. C. 125.

any such building be hereafter pulled down, burnt, or destroyed by tempest, such building may be rebuilt; and that it shall not be lawful for any person to establish or newly carry on any such business, either in any building or vault or in the open air, at a less distance than forty feet from any public way, or than fifty feet from any other building, or any vacant ground belonging to any other person than his landlord; and that if any such business be now carried on in any situation within such distances, then from the expiration of the period of twenty years next after the passing of this act it shall not be lawful to carry on such business in any such situations; and that if any person erect any building in the neighbourhood of any such business contrary to this act, then, on conviction thereof before two justices, he shall forfeit a sum not exceeding fifty pounds for every day during which such building shall so remain near to such dangerous business; or if any person establish anew any such business, or carry on any such business contrary to this act, then, on conviction thereof before two justices, such person shall be liable to forfeit for every day during which such business shall be so carried on a sum not exceeding fifty pounds, as the said justices shall determine; and that it shall be lawful for the justices also to award to the prosecutor such costs as shall be deemed reasonable; and that if the offender either fail or refuse to pay such penalty and costs immediately upon such conviction, then they may be levied by distress of the goods and chattels of the person convicted, or if there be no such distress, then such person shall be committed to the common gaol or house of correction for any time not exceeding six months, at the discretion of such justices, and that by warrant under the hands and seals of two or more justices of the peace."

Prohibition after twenty years.

Penalty of fifty pounds.

By sect. 55, "for the purpose of making provision concerning businesses offensive or noxious it is enacted, with regard to the following businesses; (that is to say), blood-boiler, bone-boiler, fellmonger, slaughterer of cattle, sheep, or horses, soap-boiler, tallow-melter, tripe-boiler, and any other like business offensive or noxious, so far as relates to the erection of buildings in the neighbourhood of any such business, and so far as relates to the carrying on of any such business in the neighbourhood of any public way, or of other buildings of the first or dwelling-house class, that it shall not be lawful hereafter to erect any buildings of the first or dwelling-house class nearer to than fifty feet from any building which shall be in use for any such offensive or noxious business; but if a building already existing within fifty feet be hereafter burnt, pulled down, or destroyed by tempest, such building may be rebuilt; and that it shall not be lawful for any person to establish or newly carry on any such business, either in any building or vault or in the open air, at a less distance than fifty feet from any public way, or than fifty feet from any other such buildings of the first or dwelling-house class; and that if any such business be now carried on in any situation within such distances, then, from the expiration of the period of thirty years next after the passing of this act, it shall cease to be lawful to continue to carry on such business in such situation, save as is hereinafter provided; and that if any person erect any building in the neighbourhood of any such business contrary to this act, then, on conviction thereof before two justices, he shall forfeit a sum not exceeding fifty pounds for every day during which such building shall remain near to such offensive or noxious business; or if any person establish anew any such business, or carry on any such business contrary to this act, then, on conviction thereof before two justices, such person is hereby made liable to forfeit for every day during which such business shall be carried on a sum not exceeding fifty pounds, as the said justices shall determine, and that it shall be lawful for the justices also to award to the prosecutor such costs as shall be deemed reasonable; and that if the offender either fail or refuse to pay such penalty and costs immediately after such conviction, then they may be levied by distress of the goods and chattels of the person convicted; or if there be no such distress, then such person shall be committed to the common gaol or house of correction for any term not exceeding six months, at the discretion of

Buildings near noxious and offensive businesses.

Distance from buildings.

Prohibition after thirty years.

Penalty of fifty pounds.

such justices, and that by warrant under the hands and seals of two or more justices of the peace."

When penalty may be mitigated.

By sect. 56, "provided always, and be it enacted, with regard to any such offensive or noxious business, whether such business be now carried on at a less distance than fifty feet from any public way, or than fifty feet from any other building, or be hereafter carried on at a greater distance, yet so to cause danger or annoyance, so far as relates to the mitigation of any penalty or punishment for unlawfully carrying on thereof, that every such penalty hereinbefore imposed shall be enforcable only at a special sessions of the peace summoned for that purpose, or on an appeal, as hereinafter provided, or on a trial as hereinafter provided; and that notwithstanding the said term of thirty years shall have expired, if any party charged with carrying on such business show that in carrying on such business all the means then known to be available for mitigating the effect of such business in any such respect have been adopted, then it shall be lawful for such justices to receive evidence thereof, and, according to such evidence, to mitigate the penalty as to them shall seem fit: Provided further, with regard to such offensive or noxious business, so far as relates to the adoption of means to mitigate the injurious effects thereof, that, notwithstanding the said period of thirty years shall have expired, if it shall appear to the justices, whether at petty sessions as aforesaid, or on appeal, or on trial by jury as hereinafter provided, that the party carrying on any such business shall have made due endeavours to carry on the same with a view to mitigate, so far as possible, the effects of such business, then, although he has not adopted all the best means available for the purpose, that it shall be lawful for such justices assembled and they are hereby empowered to suspend the execution of their order or determination, upon condition that within a reasonable time, to be named, the party convicted do adopt such other or better means as to the said justices shall seem fit, or before passing final sentence, without consulting the prosecutor, to make such order touching the carrying on of such business as shall be by the said court thought expedient for preventing the nuisance in future: Provided always, that if the matter in respect of which such penalty shall be incurred come before any superior court, it shall be lawful for such court to exercise such power of mitigating such penalty, or of suspending the execution of any judgment, order, or determination in the matter, or to make such order touching the carrying on of such business as to the court shall seem fit in the case."

Use of means to mitigate effects of business.

Superior court may mitigate penalty.

Conviction and appeal as to certain trades not before specified.

By sect. 57 it is enacted, with "regard to any business, offensive, noxious, or dangerous, and with regard to any building erected or continued within any such distance as aforesaid, from any such business dangerous, noxious, or offensive, so far as relates to a conviction in respect of any such business, and to an appeal from such conviction, that if any person be dissatisfied with the decision of such justices, and if, within four days after such decision, notice be given to the party appealed against by or on behalf of such person, of his intention to appeal, and if he enter into a recognisance, with two sufficient securities, conditioned to try such appeal, and to abide the order of the court, and to pay to the party appealed against such costs (if any) as shall be awarded against him, and it shall be lawful for such party so dissatisfied to appeal against such conviction to the justices of the peace at their general quarter sessions of the peace, to be holden within four months after such conviction for the place in which such premises shall be situated; and that if the premises be situate within the city of London and liberties thereof, then the appeal must be to the quarter sessions thereof, or if the premises be situate in the counties of Middlesex, Kent, or Surrey, or in the city and liberties of Westminster, or in the liberties of her Majesty's Tower of London, then to the quarter sessions thereof respectively, as the case shall be; and that if within the above-mentioned period such appellant shall have entered into such recognisance as herein required, and if within one month thereafter he give notice of the grounds of such appeal, it shall be lawful for such parties, and they are hereby empowered, to proceed to hear and examine on oath into the

causes and matters of such appeal (which oath they are hereby empowered to administer) and to determine the same, and to award such costs, to be paid by the said parties, as they may think proper; and the order, judgment, and determination of the said justices shall be binding and conclusive upon all parties."

Trial by jury at quarter sessions.

By sect. 58, "provided always, and be it enacted, that if before conviction by two such justices, the party complained against desire to have the matter tried by a jury, and enter into a recognisance to try such matter without delay, and to pay all costs of trial if a verdict be found against him, then such matter may be tried at the next practicable quarter sessions, or wheresoever the court shall appoint, and that thereupon, on the application of such party, it shall be lawful for the said court of quarter sessions, and they are hereby authorised and required, to issue their warrant or precept to the sheriff or other proper officer (as the case may be), requiring him to return a competent number of persons qualified to serve on juries according to the provisions of the 6 Geo. 4, c. 50; and that it shall be lawful for the said court of quarter sessions, and they are hereby authorised and empowered, by precept from time to time as occasion may require, to call before them respectively every person who shall be thought proper or necessary to be examined as a witness before them on oath concerning the premises; and that if the said court think fit, it shall be lawful for them, and they are hereby empowered, to authorise the said jury to view the place in question in such manner as they shall direct, and to command the attendance of such jury, and of all such witnesses and parties as shall be necessary and proper until such affairs for which they are summoned shall be concluded; and that the said jury shall inquire and try, and determine by their verdict, whether the business in question be offensive or noxious, and whether the party in question have done any act whereby the penalty hereby imposed in respect thereof has been incurred; and, subject to the power hereinbefore conferred of mitigating such penalty, or suspending their judgment, order, or determination thereon, or making such order touching the carrying on of the business aforesaid, the said court of quarter sessions shall give judgment according to such verdict, and shall award the penalty (if any) incurred by the defendant, and shall and may (if they see fit) award to either of the parties such costs as they may deem reasonable; which verdict, and the judgment, award, order, or determination thereupon shall be binding and conclusive."

View of the premises.

Determination to be binding and conclusive.

Appeals to quarter sessions for Surrey or Kent.

By sect. 59 it is enacted, "with regard to any appeal in respect of a conviction for carrying on any such dangerous, offensive, or noxious business, so far as relates to the place where such appeal is to be heard, that if the appeal be to the general quarter sessions of the peace for the county of Surrey or the county of Kent, then the jury (if any) to be empanelled in pursuance of this act, and all parties required to attend the quarter sessions for the said counties pursuant to such application, shall be empanelled and required to attend at some general or special adjournment of the said quarter sessions, to be held within six weeks next after the original sessions; and that if the matter relate to the county of Surrey, then such adjournment shall be to some convenient place in the borough of Southwark in the said county; and that if the matter relate to the county of Kent, then such adjournment shall be to some convenient place in the borough of Greenwich in the said county; and such times and places shall be appointed by the justices of the said counties respectively assembled at such original sessions, that from time to time every further meeting of the said sessions for anything to be done upon such application shall be appointed at or within the space of three weeks from the last meeting; and that from time to time it shall be lawful for the justices of the peace for the said counties of Surrey and Kent respectively, and they are respectively hereby empowered and required, to make such adjournment and hold such sessions as there shall be occasion."

Common-law and statutory remedies not affected.

By sect. 60 it is provided, "that this act shall not be deemed to authorise any person to carry on any business (which is contrary to any existing act of parliament, or otherwise contrary to law) either within such limits or other-

wise, or any business which it is unlawful to carry on within any limits, or in any manner contrary to any public, local, or private act of parliament, or otherwise contrary to law; nor to affect, abridge, or restrain the right, the duty, or the power of any person, whether private person or public officer, to prosecute, either civilly or criminally, any person who shall carry on within the limits of this act any offensive, noxious, or dangerous business."

Regulations as to procure removal of offensive trades by purchase, by order in council.

By sect. 61, further for the removal of any offensive, noxious, or dangerous business now carried on it is enacted, "that with regard to any such business, so far as relates to the purchase thereof, or of the premises wherein it shall be carried on, that if two thirds in number of the inhabitant householders of any parish in which such business shall be carried on present a memorial to her Majesty in council, stating the existence of such offensive, noxious, or dangerous business in such parish or the neighbourhood thereof, and praying the removal of such business therefrom, and thereby engaging to provide compensation to the person carrying on the same, either at the expense of the memorialists or by means of a rate, to be levied on the inhabitants of the said parish, or such part thereof as may be affected by such business; and it shall be lawful for her Majesty to refer the matter to the Lords of the Committee of Privy Council for Trade to consider the character of such business, whether it be offensive, noxious, or dangerous; and if it appears to be so, and that there are no means of rendering it otherwise by the adoption of methods available without unreasonable sacrifice on the part of the person by whom it is carried on, then it shall be lawful for her Majesty, by order in council, to direct that the removal of such business may be purchased either at the expense of the memorialists or by means of a rate as aforesaid, as to her Majesty shall seem fit, and also to direct the sheriff of the county, or other proper person in the parish or liberty in which such business is carried on, to summon a jury, according to the provisions of an act made and passed in the fourth year of the reign of her present Majesty, intituled 'An Act to enable Her Majesty's Commissioners of Woods to make a New Street from Coventry Street to Long Acre, and for other Improvements in the Metropolis,' to determine what compensation shall be paid to the party carrying on such business for the removal thereof, and to the owner and occupier of the premises for the restriction of the use of his buildings for such purpose; and that if within three months after the verdict of such jury shall be given and judgment thereon, the inhabitants of such parish or neighbourhood pay or tender such compensation, then, within three months from the payment or tender of such compensation, it shall cease to be lawful for the party carrying on such business to continue the same, and for any owner or occupier thereof either to carry on, or to permit to be carried on, such business in the same or any part of the same premises."

As to the funds for defraying such compensation.

How rate to be levied.

By sect. 62 it is enacted, "with regard to the funds for defraying such compensation, so far as relates to the raising thereof, that if her Majesty shall by such order direct the compensation to be paid by means of a rate, then it shall be lawful for the overseers of the parish to raise such sum as shall be necessary, either as a separate rate, in the nature of a poor's rate, or as part of a poor's rate, on the inhabitants at large of such parish; or if in pursuance of the memorial of the inhabitants of such part of the said parish as shall be affected by the said business to be appointed by such order in council, that such last-mentioned inhabitants do defray such compensation, then it shall be lawful for the said overseers to raise such sum as shall be necessary for that purpose; and that if such rate be so levied either on the inhabitants at large of such parish, or on the inhabitants of such part thereof as aforesaid, then such rate may be levied and recovered as poor's rates are levied and recoverable."

Exemption of public gas-works.

By sect. 63 it is provided that, "with regard to public gas-works, and other works heretofore established within the limits of this act, so far as relates to the operation of the provisions of this act in reference to businesses dangerous in respect of fire or explosion, or offensive or noxious, that such provisions shall

not be deemed to apply to any such public gas-works; and that if by any act of parliament now in force relating to gas-companies to which such works belong, to any extension of such works, or any additional works, or any other works, be authorised to be erected or substituted, then such provisions shall be deemed to apply to any such extension, addition, or substitution within the limits of the district now lighted from such first-mentioned works; and that such provisions shall not be deemed to apply to any premises entered or used for the purpose of distillation or the rectification of spirits under the survey of the Commissioners of Excise or their officers." Extension of works. Distilleries.

The 18 & 19 Vic. c. 122,[1] repeals the rest of the above statute, and is as follows:—"An Act entitled an Act to Amend the Laws relating to the Construction of Buildings in the Metropolis, and its Neighbourhood."

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[1] A contract to build contrary to the provisions of the act is illegal, and cannot be enforced. *Stevens v. Gourley*, 29 L. J. C. P. 1.

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"THE METROPOLITAN BUILDING ACT, 1855,"

18 & 19 VIC. c. 122.

PRELIMINARY.

Short Title.

By sect. 1, "this act may be cited for all purposes as 'The Metropolitan Building Act, 1855.'"

Commencement of act.

By sect. 2, "this act shall, except in cases where it is otherwise expressly provided, come into operation on the first day of January, 1856."

Interpretation of certain terms in this act.

By sect. 3, "in the construction of this act (if not inconsistent with the context) the following terms shall have the respective meanings hereinafter assigned to them; (that is to say,)

'The Treasury,' shall mean the Commissioners of her Majesty's Treasury:

'Public building' shall mean every building used as a church, chapel, or other place of public worship; also every building used for purposes of public instruction; also every building used as a college, public hall, hospital, theatre, public concert-room, public ball-room, public lecture-room, public exhibition-room, or for any other public purposes:

'External wall' shall apply to every outer wall or vertical enclosure of any building not being a party-wall:

'Party-wall' shall apply to every wall used or built in order to be used as a separation of any building from any other building, with a view to the same being occupied by different persons:

'Cross wall' shall apply to every wall used or built in order to be used as a separation of one part of any building from another part of the same building, such building being wholly in one occupation:

'Party structure' shall include party-walls, and also partitions, arches, floors, and other structures separating buildings, stories, or rooms which belong to different owners, or which are approached by distinct staircases or separate entrances from without:

The 'area' of every building shall be deemed to be the superficies of a horizontal section of such building made at the point of its greatest surface, including the external walls and such portion of the party-walls as belong to the building, but excluding any attached building the height of which does not exceed the height of the ground story:

'The base of the wall' shall mean the course immediately above the footings:

'Owner' shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant-at-will:

'Builder' shall apply to and include the master-builder, or other person employed to execute, or who actually executes any work upon any building:

'District surveyor' shall mean every such surveyor who is appointed in pursuance of this act, or whose appointment is hereby confirmed, and shall include any deputy or assistant surveyor appointed under this act:

In all cases in which the name of an officer having local jurisdiction in respect of his office is referred to without mention of the locality to which the jurisdiction extends, such reference is to be understood to indicate the officer having jurisdiction in that place within which is situate the building or other subject-matter, or any part thereof to which such reference applies:

'Person' shall include 'a body corporate.'

Limits of Act.

Act to extend to all places within limits defined by 18 & 19 Vic. c. 120, s. 250.

By sect. 4, "this act shall extend to all places within the limits of the metropolis as defined by an act passed in the present session of parliament, intituled 'An Act for the better Local Management of the Metropolis,' and to all other places to which such last-mentioned act may be extended, unless such places are, in making such extension, expressly excepted from the operation of this act; but nothing herein contained shall affect the exercise of any powers vested by any act of parliament in the Commissioners of Sewers of the city of London for the time being.

Division of Act.

By sect. 5, "this act shall be divided into five parts:

(1.) The first part relating to the regulation and supervision of buildings:
(2.) The second part relating to dangerous structures:
(3.) The third part relating to party structures:
(4.) The fourth part relating to miscellaneous provisions:
(5.) The fifth part relating to the repeal of former acts, and to temporary provisions."

PART I.—REGULATION AND SUPERVISION OF BUILDINGS.

Buildings, &c. herein named exempt from operation of part i. of this act.

By sect. 6, "the following buildings and works shall be exempt from the operation of the first part of this act:—

Bridges, piers, jetties, embankment walls, retaining walls, and wharf or quay walls:

Her Majesty's royal palaces, and any building in the possession of her Majesty, her heirs and successors, or employed for her Majesty's use or service:[1]

Common gaols, prisons, houses of correction, and places of confinement under the inspection of the Inspector of Prisons, and Bethlehem Hospital, and the house of occupations adjoining:

The Mansion House, Guildhall, and Royal Exchange of the city of London:

The offices and buildings of the Governor and Company of the Bank of England already erected, and which now form the edifice called 'The Bank of England,' and any offices and buildings hereafter to be erected for the use of the said Governor and Company, either on the site of or in addition to and in connexion with the said edifice:

The buildings of the British Museum:

The offices and buildings of the Honourable East India Company already erected, and any offices or buildings hereafter to be erected, for the use of the said Company, on the site of or in addition to such existing offices and buildings:

Greenwich Hospital and the buildings in the parish of Greenwich vested in the Commissioners of Greenwich Hospital for the purposes of the said hospital:

All county lunatic asylums, sessions houses, and other public buildings belonging to or occupied by the justices of the peace of the county or city in which the same are situated:

The erections and buildings authorised by an act passed in the ninth year

[1] A building intended to be the deposit for the arms, &c. of the London Militia is within this exemption. *Joy v. Hammon*, 27 L. J. M. C. 25.

of the reign of his late Majesty King George the Fourth, for the purposes of a market in Covent Garden :

The Cattle Market, with its appurtenances, erected in pursuance of the Metropolitan Cattle Market Act, 1851 :

The buildings belonging to any canal, dock, or railway company,[1] and used for the purposes of such canal, dock, or railway, under the provisions of any act of parliament :

All buildings, not exceeding in height thirty feet, as measured from the footings of the walls, and not exceeding in extent one hundred and twenty-five thousand cubic feet, and not being public buildings, wholly in one occupation, and distant at least eight feet from the nearest street or alley, whether public or private, and at the least thirty feet from the nearest buildings and from the ground of any adjoining owner :

All buildings not exceeding in extent two hundred and sixteen thousand cubic feet, and not being public buildings, and distant at least thirty feet from the nearest street or alley, whether public or private, and at the least sixty feet from the nearest buildings and from the ground of an adjoining owner :

All party fence-walls and greenhouses so far as regards the necessary woodwork of the sashes, doors, and frames :

Openings made into walls or flues for the purpose of inserting therein ventilating valves of a superficial extent not greater than forty square inches, if such valves are not nearer than twelve inches to any timber or other combustible material :

Application of act, except exemptions before mentioned.

By sect. 7, "with the exemptions hereinbefore mentioned, this act shall apply to all new buildings, and whenever mention is herein made of any building it shall, unless the contrary appear from the context, be deemed to imply a new building."

Building, when deemed to be new.

By sect. 8, "a building shall be deemed to be new whenever the enclosing walls thereof have not been carried higher than the footings previously to the said first day of January one thousand eight hundred and fifty-six : any other building shall be deemed to be an old building."[2]

Alterations of and additions to old buildings.

By sect. 9, "any alteration, addition, or other work made or done for any purpose, except that of necessary repair not affecting the construction of any external or party-wall, in, to, or upon any old building, or in, to, or upon any new building after the roof has been covered in, shall, to the extent of such alteration, addition, or work, be subject to the regulations of this act ; and whenever mention is hereinafter made of any alteration, addition, or work in, to, or upon any building, it shall, unless the contrary appears from the context, be deemed to imply an alteration, addition, or work to which this act applies." [*See* 27 L. J. Q. B. 207; 29 L. J. C. P. 1.]

Rebuilding old buildings.

By sect. 10, "whenever any old building has been taken down to an extent exceeding one half of such building, such half to be measured in cubic feet, the rebuilding thereof shall be deemed to be the erection of a new building ; and every portion of such old building that is not in conformity with the regulations of this act shall be forthwith taken down."

Division of old buildings separated by irregular partitions.

By sect. 11, "whenever any old buildings are separated by timber or other partitions not in conformity with this act, then, if such partitions are removed to the extent of one half thereof, such buildings shall as respects the separation thereof be deemed to be new buildings, and be forthwith divided from each other in the manner directed by this act."

Walls.

Structure and thickness of walls.

By sect. 12, "walls shall be constructed of such substances and of such thickness and in such manner as are mentioned in the first schedule annexed hereto." [See *Stevens v. Gourley*, 29 L. J. C. P. 1.]

[1] Enclosed arches under a railway are within the exemptions. *North Kent Railway Company v. Badyer*, 27 L. J. M. C. 106.

[2] *Per Crowder, J.*, and *Byles, J.* This section applies only to buildings which were begun before 1st Jan. 1856. 29 L. J. C. P. 1.

Recesses and Openings.

By sect. 13, "the following rules shall be observed with respect to recesses and openings in walls:— Rules as to recesses and openings.

Recesses and openings may be made in external walls, provided,—

1. That the backs of such recesses are not of less thickness than eight and a half inches; and,
2. That the area of such recesses and openings do not, taken together, exceed one half of the whole area of the wall in which they are made:

Recesses may be made in party-walls, provided that,

1. The backs of such recesses are not of less thickness than thirteen inches; and,
2. That every recess so formed is arched over, and that the area of such recess do not, taken altogether, exceed one half of the whole area of the wall of the story in which they are made; and,
3. That such recesses do not come within one foot of the inner face of the external walls:

But no openings shall be made in any party-wall except in accordance with the rules of this act.

The word 'area,' as used in this section, shall mean the area of the vertical face, or elevation of the wall, pier, or recess to which it refers."

Miscellaneous.

By sect. 14, "loophole frames may be fixed within one inch and a half of the face of any external wall; but all other woodwork fixed in any external wall, except bressummers and story-posts under the same, and frames of doors and windows of shops on the ground story of any building, shall be set back four inches at the least from the external face of such wall." As to timber in external walls.

By sect. 15, "the following rules shall be observed with respect to bressummers and timbers:— Rules as to bressummers.

1. Every bressummer must have a bearing in the direction of its length of four inches at the least at each end, upon a sufficient pier of brick or stone, or upon a timber or iron story-post fixed on a solid foundation, in addition to its bearing upon any party-wall; and the ends of such bressummer shall not be placed nearer to the centre line of the party-walls than four and a half inches:
2. No bond timber or wood plate shall be built into any party-wall, and the ends of any beam or joist bearing on such wall shall be at the least four and a half inches distant from the centre line of the party-walls:
3. Every bressummer bearing upon any party-wall must be borne by a templet or corbel of stone or iron tailed through at least half the thickness of such wall, and of the full breadth of the bressummer."

[*See*, as to timber in walls, s. 20, r. 17.]

By sect. 16, "if any gutter, any part of which is formed of combustible materials, adjoins an external wall, then such wall must be carried up so as to form a parapet one foot at the least above the highest part of such gutter, and the thickness of the parapet so carried up must be at the least eight and a half inches, reckoned from the level of the under side of the gutter-plate." Height and thickness of parapets to external walls.

By sect. 17, "every party-wall[1] shall be carried up above the roof, flat, or gutter of the highest building adjoining thereto, to such height as will give a distance of fifteen inches measured at right angles to the slope of the roof, or fifteen inches above the highest part of any flat or gutter, as the case may be; and every party-wall shall be carried up above any turret, dormer, lantern-light, or other erection of combustible materials fixed upon the roof or flat of any building within four feet from such party-wall, and shall extend at the least twelve inches higher and wider on each side than such erection; and every party-wall shall be carried up above any part of any roof opposite thereto, and within four feet from such party-wall." Height of party walls above roof.

[1] As to parties being tenants in common in such a wall, see *Stedman v. Smith*, 26 L. J. Q. B. 314; and, generally, *see* 5 Taunt. 20; 8 B. & C. 257–259, n; 3 Nev. & P. 257.

As to chases in party-walls.

By sect. 18, "in a party-wall[1] no chase shall be made wider than fourteen inches, nor more than four and a half inches deep from the face of the wall, nor so as to leave less than eight and a half inches in thickness at the back or opposite side thereof, and no chase may be made within a distance of seven feet from any other chase on the same side of the wall."

As to construction of roofs.

By s. 19, "the roofs of buildings shall be constructed as follows; that is to say,

1. The flat, gutter, and roof of every building, and every turret, dormer, lantern-light, skylight, or other erection placed on the flat or roof thereof, shall be externally covered with slates, tiles, metal, or other incombustible materials, except the doors, door-frames, windows, and window-frames of such dormers, turrets, lantern-lights, skylights, or other erections:
2. The plane of the surface of the roof of a warehouse or other building used either wholly or in part for purposes of trade or manufacture, shall not incline from the external or party-walls upwards at a greater angle than forty-seven degrees with the horizon."

Rules as to chimneys and flues.

By sect. 20, "the following rules shall be observed as to chimneys and flues:

1. Chimneys built on corbels of brick, stone, or other incombustible materials may be introduced above the level of the ceiling of the ground story if the work so corbelled out does not project from the wall more than the thickness of the wall, but all other chimneys shall be built on solid foundations, and with footings similar to the footings of the wall against which they are built:
2. Chimneys and flues having proper doors of not less than six inches square may be constructed at any angle, but in every other chimney or flue the angles shall be constructed of an obtuseness of not less than one hundred and thirty degrees, and shall be properly rounded:
3. An arch of brick or stone or a bar of wrought iron must be built over the opening of every chimney to support the breast thereof, and if the breast projects more than four and a half inches from the face of the wall, and the jamb on either side is of less width than seventeen and a half inches, the abutments must be tied in by an iron bar or bars turned up and down at the ends, and built into the jambs for at least eight and a half inches on each side:
4. The inside of every flue, and the back or outside, unless forming part of the outer face of an external wall, must be rendered, pargeted, or lined with fireproof piping:
5. The jambs of every chimney must at the least be eight and a half inches wide on each side of the opening thereof:
6. The breast of every chimney, and the front, withe, partition, and back of every flue, must at the least be four inches in thickness:
7. The back of every chimney opening, from the hearth up to the height of twelve inches above the mantel, must at the least be eight and a half inches thick if in a party-wall, or four and a half inches thick if not in a party-wall:
8. The thickness of the upper side of every flue, when its course makes with the horizon an angle of less than forty-five degrees, must be at the least eight and a half inches:
9. Every chimney-shaft shall be carried up in brick or stone-work all round, at the least four inches thick, to a height of not less than three feet above the roof, flat, or gutter adjoining thereto, measured at the highest point in the line of junction with such roof, flat, or gutter:
10. The brickwork or stonework of any chimney-shaft, excepting that of the furnace of any steam-engine, brewery, distillery, or manufactory, shall not be built higher above the roof, flat, or gutter adjoining

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[1] As to Court of Equity decreeing specific performance of a building contract to pull down and rebuild a party-wall, see *Seawell v. Webster*, 29 L. J. C. P. 71.

thereto, measured from the highest point in the line of junction with such roof, flat, or gutter, than a height equal to six times the least width of such chimney-shaft at the level of such highest point in the line of junction, unless such chimney-shaft is built with and bonded to another chimney-shaft not in the same line with the first, or otherwise rendered secure:

11. There shall be laid level with the floor of every story before the opening of every chimney a slab of stone, slate, or other incombustible substance, at the least twelve inches longer than the width of such opening, and at the least eighteen inches wide in front of the breast thereof:
12. On every floor, except the lowest floor, such slab shall be laid wholly upon stone or iron bearers, or upon brick trimmers; but on the lowest floor it may be bedded on the solid ground:
13. The hearth or slab of every chimney shall be bedded wholly on brick, stone, or other incombustible substance, and shall be solid for a thickness of seven inches at the least beneath the upper surface of such hearth or slab:
14. No flue shall be built against any party structure, unless a withe is properly secured thereto, at the least four inches in thickness:
15. No chimney-breast or shaft built with or in any party-wall shall be cut away unless the district surveyor certifies that it can be done without injuriously affecting the stability of any building:
16. No chimney-shaft, jamb, breast, or flue shall be cut into except for the purpose of repair, or doing some one or more of the following things:
    - Of letting in or removing or altering flues, pipes, or funnels for the conveyance of smoke, hot air, or steam, or of letting in, removing, or altering smoke-jacks:
    - Of forming openings for soot-doors, such openings to be fitted with a close iron door and frame:
    - Of making openings for the insertion of ventilating valves, subject to the following restriction, That no opening shall be made nearer than twelve inches to any timber or combustible substance.
17. No timber or woodwork shall be placed,
    - In any wall or chimney-breast nearer than twelve inches to the inside of any flue or chimney opening;
    - Under any chimney opening within eighteen inches from the upper surface of the hearth of such chimney opening;
    - Within two inches from the face of the brickwork or stonework about any chimney or flue, where the substance of such brickwork or stonework is less than eight and a half inches thick, unless the face of such brickwork or stonework is rendered;

    And no wooden plugs shall be driven nearer than six inches to the inside of any flue or chimney opening, nor any iron holdfast or other iron fastening nearer than two inches thereto."

Rules as to close fires and pipes for conveying vapour, &c.[1]

By sect. 21, "the following rules shall be observed as to close fires, and pipes for conveying heated vapour or water; (that is to say,)

1. The floor under every oven or stove used for the purpose of trade or manufacture, and the floor around the same for a space of eighteen inches, shall be formed of materials of an incombustible and non-conducting nature:
2. No pipe for conveying smoke, heated air, steam, or hot water shall be fixed against any building on the face next to any street, alley, mews, or public way:
3. No pipe for conveying heated air or steam shall be fixed nearer than six inches to any combustible materials:

[1] As to escape of smoke, *see* 4 C. B. 783.

4. No pipe for conveying hot water shall be placed nearer than three inches to any combustible materials:
5. No pipe for conveying smoke or other products of combustion shall be fixed nearer than nine inches to any combustible material:

And if any person fails in complying with the rules of this section he shall for each offence incur a penalty not exceeding twenty pounds, to be recovered before a justice of the peace."

Rules as to accesses and stairs in certain buildings.

By sect. 22, "the following rules shall be observed with respect to accesses and stairs:

In every public building, and in every other building containing more than 125,000 cubic feet, and used as a dwelling-house for separate families, the floors of the lobbies, corridors, passages, and landings, and also the flights of stairs, shall be of stone or other fire-proof material, and carried by supports of a fire-proof material."

Rules as to habitable rooms.

By sect. 23, "the following rules shall be observed with respect to habitable rooms in any building; (that is to say,)

1. Every habitable room hereafter constructed in any building, except rooms in the roof thereof and cellars and underground rooms, shall be in every part at the least seven feet in height from the floor to the ceiling:
2. Every habitable room hereafter constructed in the roof of every building shall be at the least seven feet in height from the floor to the ceiling throughout not less than one half the area of such room:
3. Cellars and underground rooms shall be constructed in manner directed by the said act for the better local management of the metropolis:[1]

And whosoever knowingly suffers any room that is not constructed in conformity with this section to be inhabited shall, in addition to any other liabilities he may be subject to under this act, incur a penalty not exceeding twenty shillings for every day during which such room is inhabited; and any room in which any person passes the night shall be deemed to be inhabited within the meaning of this act."

As to party arches over public ways.

By sect. 24, "every party-arch, and every arch or floor over any public way, or any passage leading to premises in other occupation, shall be formed of brick, stone, or other incombustible materials: If an arch of brick or stone is used, it shall, in cases where its span does not exceed nine feet, be of the thickness of four and a half inches at the least; but when its span exceeds nine feet, be of the thickness of eight and a half inches at the least: If an arch or floor of iron or other incombustible material is used, it shall be constructed in such manner as may be approved by the district surveyor."

As to arches under public ways.

By sect. 25, "every arch under any public way shall be formed of brick, stone, or other incombustible materials: If an arch of brick or stone is used, it shall, in cases where its span does not exceed ten feet, be of the thickness of eight and a half inches at the least; where its span does not exceed fifteen feet, it shall be of the thickness of thirteen inches at least; and where its span exceeds fifteen feet, it shall be of such thickness as may be approved by the district surveyor: If an arch or other construction of iron or other incombustible material is used, it shall be constructed in such manner as may be approved by the district surveyor."[2]

Rules as to projections.

By sect. 26, "the following rules shall be observed as to projections:

1. Every coping, cornice, facia, window-dressing, portico, balcony, verandah, balustrade, and architectural projection, or decoration whatsoever, and also the eaves or cornices to any overhanging roof, except the cornices and dressings to the window fronts of shops, and except the eaves and cornices to detached and semi-detached dwelling-houses distant at least fifteen feet from any other building, and from the ground of any adjoining owner, shall, unless the Metropolitan Board otherwise

[1] *See* s. 103, and City of London Sewers' Act, 1851.
[2] *See* Metropolitan Management Act, s. 101.

permit, be of brick, tile, stone, artificial stone, slate, cement, or other fire-proof material:

2. In streets or alleys of a less width than thirty feet, any shop front may project beyond the external wall of the building to which it belongs for five inches and no more, and any cornice of any such shop front may project thirteen inches and no more; and in any street or alley of a width greater than thirty feet, any shop front may project ten inches and no more, and the cornice may project for eighteen inches from the external walls, but no more:
3. No part of the woodwork of any shop front shall be fixed nearer than four and a half inches from the line of junction of any adjoining premises, unless a pier or corbel of stone, brick, or other fire-proof material, four and a half inches wide at the least, is built or fixed next to such adjoining premises as high as such woodwork is fixed, and projects an inch at the least in front of the face thereof:
4. The roof, flat, or gutter of every building, and every balcony, verandah, shop front, or other projection, must be so arranged and constructed, and so supplied with gutters and pipes, as to prevent the water therefrom from dropping upon or running over any public way:
5. Except in so far as is permitted by this section in the case of shop fronts, and with the exception of water-pipes and their appurtenances, copings, cornices, facias, window-dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works hereinafter mentioned."[1]

Rules as to the separation of buildings, and limitation of their areas.

By sect. 27, "the following rules shall be observed as to the separation of buildings, and limitation of their areas:

1. Every building shall be separated by external or party-walls from any adjoining building:
2. Separate sets of chambers or rooms tenanted by different persons shall, if contained in a building exceeding three thousand six hundred square feet in area, be deemed to be separate buildings, and be divided accordingly, so far as they adjoin vertically by party-walls, and so far as they adjoin horizontally by party-arches or fire-proof floors:
3. If any building in one occupation is divided into two or more tenements, each having a separate entrance and staircase, or a separate entrance from without, every such tenement shall be deemed to be a separate building for the purposes of this act:
4. Every warehouse, or other building used either wholly or in part for the purposes of trade or manufacture, containing more than two hundred and sixteen thousand cubic feet, shall be divided by party-walls in such manner that the contents of each division thereof shall not exceed the above-mentioned number of cubic feet."

Rules as to uniting buildings.

By sect. 28, "the following rules shall be observed as to uniting buildings:

1. No buildings shall be united unless they are wholly in the same occupation:
2. No buildings shall be united, if when so united they will, considered as one building only, be in contravention of any of the provisions of this act:
3. No opening shall be made in any party-wall dividing buildings, which, if taken together, would contain more than two hundred and sixteen thousand cubic feet, except under the following conditions:—

   Such opening shall not exceed in width seven feet or in height eight feet:

   Such opening shall have the floor, jambs, and head formed of brick, stone, or iron, and be closed by two wrought-iron doors, each

[1] Notwithstanding this clause, a magistrate has power to order the removal of a projection contrary to the Metropolis Paving Act. *Reg. v. Bingham*, 17 Q. B. 884. *See* Metropolitan Local Management Act, ss. 119, 120, 143.

one fourth of an inch thick in the panel, at a distance from each other of the full thickness of the wall, fitted to rebated frames, without woodwork of any kind:

4. Whenever any buildings which have been united cease to be in the same occupation, any openings made in the party-walls dividing the same shall be stopped up with brick or stone-work of the full thickness of the wall itself, and properly bonded therewith."

As to open spaces near dwelling-houses.

By sect. 29, "every building used or intended to be used as a dwelling-house, unless all the rooms can be lighted and ventilated from a street or alley adjoining, shall have in the rear or on the side thereof an open space exclusively belonging thereto of the extent at least of one hundred square feet."

Construction of public buildings.

By sect. 30, "notwithstanding anything herein contained, every public building,[1] including the walls, roofs, floors, galleries, and staircases, shall be constructed in such manner as may be approved by the district surveyor,[2] or in the event of disagreement may be determined by the Metropolitan Board; and, save in so far as respects the rules of construction, every public building shall throughout this act be deemed to be included in the term building, and be subject to all the provisions of this act, in the same manner as if it were a building erected for a purpose other than a public purpose."[3]

District Surveyors.

Buildings to be supervised by district surveyors.

By sect. 31, "with the exemptions hereinbefore mentioned, every building and every work done to, in, or upon any building, shall be subject to the supervision of the district surveyor appointed to the district in which the building is situate."

Power to Metropolitan Board of Works established under 18 & 19 Vic. c. 120.[4]

By sect. 32, "the following things may be done by the Metropolitan Board of Works established by the said act for the better local management of the metropolis, by order, at their discretion; (that is to say,)

1. They may alter the limits of any district, or unite any two or more districts together, and in any such case place such altered district under the supervision of any existing or of any future district surveyor, with power from time to time to alter any district so made, and do all such matters and things as are necessary for carrying into effect the power hereby given:
2. They may dismiss any existing district surveyor, with the consent of one of her Majesty's principal secretaries of state; they may suspend any such surveyor as last aforesaid; they may dismiss or suspend any future district surveyor; and in case of any suspension or during any vacancy they may appoint a temporary substitute:
3. Whenever any vacancy occurs in the office of any existing or future district surveyor, they may appoint another qualified person in his place:
4. They may pay such amount of compensation as they think fit to any district surveyor who may be deprived of his office, in pursuance of the power hereby given of altering the limits of districts:

But, subject to the provisions herein contained, the several places which at the time when this act comes into operation are constituted districts under an act passed in the eighth year of the reign of her present Majesty, chapter eighty-four,[5] and intituled 'An Act for Regulating the Construction and Use of Buildings in the Metropolis and its Neighbourhood,' for the purposes of that act, shall continue to be districts for the purposes of this act, and the several persons who at the time when this act comes into operation are district surveyors under the provisions of the said act shall continue to be district surveyors under this act."

Examination by Institute of British Architects.

By sect. 33, "the Institute of British Architects may from time to time cause to be examined, by such persons and in such manner as they think fit, all candidates presenting themselves for the purpose of being examined as to their competency to perform the duties of district surveyor, and shall grant

[1] *See* s. 3.
[2] *See* s. 22.
[3] Metropolitan Local Management Act, ss. 75, 81, 124.
[4] Id. ss. 43–49; and 18 & 19 Vic. c. 120.
[5] 7 & 8 Vic. c. 84, s. 66.

certificates of competency to the candidates found deserving of the same; and no person who has not already filled the office of district surveyor, or has not already obtained a certificate of competency in pursuance of the said act of the eighth year of the reign of her present Majesty, chapter eighty-four, shall be qualified to be appointed to that office, unless he has received a certificate of competency from the said Institute of British Architects, or has been examined in such other manner as the said Metropolitan Board may direct, and been found competent in such examination."

District surveyor to have and maintain an office.

By sect. 34, "every district surveyor shall have and maintain an office at his own expense in such part of his district as may be approved by the Metropolitan Board of Works."

District surveyor may appoint deputy, with consent.

By sect. 35, "if any district surveyor is prevented by illness, infirmity, or any other unavoidable circumstance from attending to the duties of his office, he may, with the consent of the Metropolitan Board of Works, appoint some other person as his deputy to perform all his duties for such time as he may be prevented from executing them."

Assistant surveyor may be appointed on emergency.

By sect. 36, "if at any time it appears to the Metropolitan Board of Works that, on account of the pressure of business in any district, or on any other account, the surveyor of that district cannot discharge his duties promptly and efficiently, then such board may direct any other district surveyor to assist the surveyor of such district in the performance of his duties, or appoint some other person to give such assistance, and such assistant surveyor shall be entitled to receive all fees payable in respect of the services performed by him."

District surveyor not to act in case of works under his professional superintendence.

By sect. 37, "if any building is executed, or any work done to, in, or upon any building, by or under the superintendence of any district surveyor acting professionally or on his own private account, it shall not be lawful for such surveyor to survey any such building for the purpose of this act, or to act as district surveyor in respect thereof or in any matter connected therewith, but it shall be his duty to give notice thereof to the said Metropolitan Board, who shall then appoint some other district surveyor to act in respect of such matter."

Notices to District Surveyors.

Notices to be given to district surveyor by builder.

By sect. 38, "two days before the following acts or event, (that is to say,)

Two days before any building, or any work to, in, or upon any building, is commenced, and also, if the progress of any such building or work is after the commencement thereof suspended for any period exceeding three months, two days before such building or work is resumed, and also if during the progress of any such building or work the builder employed thereon is changed, then two days before any new builder enters upon the continuance of such building or work,

It shall be the duty of the builder engaged in building or rebuilding such building, or in executing such work, or in continuing such building or work, to give to the district surveyor notice in writing stating the situation, area, and height, and intended use of the building or buildings about to be commenced, or to, in, or upon which any work is to be done, and the number of such buildings, if more than one, and also the particulars of any such proposed work, and stating also his own name and address, but any works to, in, or upon the same building that are in progress at the same time may be included in one notice."

District surveyor to cause rules of this act to be observed.

By sect. 39, "every district surveyor shall, upon the receipt of any such notice as aforesaid, and also upon any work affected by the rules of this act, but in respect of which no notice has been given, being observed by or made known to him, and also from time to time during the progress of any works affected by the rules and directions of this act, as often as may be necessary for securing the due observance of such rules, survey any building or work hereby placed under their supervision, and cause all the rules of this act to be duly observed."[1]

Notice to be

By sect. 40, "every notice given in pursuance of this act shall be deemed,

[1] *See* s. 105.

evidence of intended works.

in any question relative to any building or work, to be *primâ facie* evidence as against such builder of the nature of the building or work proposed to be built or done."

Penalty on builders neglecting to give notice.

By sect. 41, "if any builder neglects to give notice in any of the cases aforesaid, or executes any works of which he is hereby required to give notice before giving the same, or having given due notice of any works executes the same before the expiration of two days from the time of giving such notice, such builder shall for every such offence incur a penalty not exceeding twenty pounds, to be recovered before a justice of the peace."

District surveyor may enter and inspect buildings affected by this act.

Penalty for refusal.

By sect. 42, "at all reasonable times during the progress of any building or work affected by this act it shall be lawful for the district surveyor to enter and inspect such building or work; and if any person refuses to admit such surveyor to inspect such building or work, or refuses or neglects to afford such surveyor all reasonable assistance in such inspection, in every such case the offender shall incur for each offence a penalty not exceeding twenty pounds, to be recovered before a justice of the peace."

District surveyor may enter buildings to ascertain as to exempted buildings.

By sect. 43, "the district surveyor may at all reasonable times enter any premises, with the exception of buildings hereinbefore exempted by name, for the purpose of ascertaining whether any buildings erected in such premises are in such a situation or possess such characteristics as are hereinbefore required in order to exempt them from the operation of this act, and he may do all such things as are necessary for the above purpose; and if any person refuses to admit such surveyor to enter such premises or to inspect any such building, or neglects to afford to him all reasonable assistance in such inspection, in every such case the offender shall incur for each offence a penalty not exceeding twenty pounds, to be recovered before a justice of the peace."

In case of emergency, works may be commenced without notice.

By sect. 44, "if by reason of any emergency any act or work is required to be done immediately, or before notice can be given as aforesaid, then it shall be lawful to do the act or work so required to be done, upon condition that before the expiration of twenty-four hours after such act or work has been begun, notice thereof is given to the district surveyor."

Proceedings by District Surveyors in case of Irregularity.

Notice by district surveyor in case of irregularity.

By sect. 45, "in the following cases; (that is to say,)

If, in erecting any building or doing any work to, in, or upon any building, anything is done contrary to any of the rules of this act, or anything required by this act is omitted to be done; or,

In cases where due notice has not been given,—

If the district surveyor, on surveying or inspecting any building or work, finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules of this act, or whether anything required by the rules of this act has been omitted to be done;

In every such case the district surveyor shall give to the builder engaged in erecting such building, or in doing such work, notice in writing, requiring such builder, within forty-eight hours from the date of such notice, to cause anything done contrary to the rules of this act to be amended, or to do anything required to be done by this act, but which has been omitted to be done, or to cause so much of any building or work as prevents such district surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid to be to a sufficient extent cut into, laid open, or pulled down."

On noncompliance with notice, justice to summon builder, and make order to comply with requisition.

By sect. 46, "if the builder to whom such notice is given makes default in complying with the requisition thereof within such period of forty-eight hours, the district surveyor may cause complaint of such non-compliance to be made before a justice of the peace, and such justice shall thereupon issue a summons requiring the builder so in default to appear before him; and if upon his appearance, or in his absence, upon due proof of the service of such summons, it

[1] *See* s. 6. [2] Id. s. 103.

appears to such justice that the requisitions made by such notice or any of them are authorised by this act, he shall make an order on such builder commanding him to comply with the requisitions of such notice, or any of such requisitions that may in his opinion be authorised by this act, within a time to be named in such order."

Penalty on noncompliance with order of justice.

By sect. 47, "if such order is not complied with, the builder on whom it is made shall incur a penalty not exceeding twenty pounds a-day, to be recovered before a justice of the peace, during every day of the continuance of such non-compliance, and in addition thereto the district surveyor may, if he thinks fit, proceed with a sufficient number of workmen to enter upon the premises, and do all such things as may be necessary for enforcing the requisitions of such notice, and for bringing any building or work into conformity with the rules of this act, and all expenses incurred by him in so doing and in any such proceedings as aforesaid may be recovered from the builder on whom such order was made, in a summary manner, before a justice of the peace, or may be recovered from the owner of the premises in the same manner in which expenses incurred by the commissioners hereinafter named in respect of dangerous buildings are hereinafter directed to be recovered from any owner;[1] and if the owner cannot be found, or if, on demand, he refuses or neglects to pay the aforesaid expenses, the district surveyor shall have the same power of taking and selling the building in respect of which the order is made, and of applying the proceeds, as is thereby given to the commissioners."[2]

Penalty on workmen, &c. doing anything contrary to rules of act.

By sect. 48, "if any workman, labourer, servant, or other person employed in or about any building, wilfully, and without the privity or consent of the person causing such work to be done, does anything in or about such building contrary to the rules of this act, he shall for each such offence incur a penalty not exceeding fifty shillings."

Fees of District Surveyors.

Payments to district surveyors in respect of matters in first part of second schedule.

By sect. 49, "there shall be paid to the district surveyors, in respect of the several matters specified in the first part of the second schedule hereto, the fees therein specified, or such other fees, not exceeding the amounts therein specified, as may from time to time be directed by the Metropolitan Board of Works; but one fee only shall be chargeable with respect to any such works done in, to, or upon any building as are in pursuance of the provisions hereinbefore contained included in one notice; and if in consequence of any reduction being made by the said Metropolitan Board in the amount of the said scheduled fees the income of any existing district surveyor is diminished, the Metropolitan Board shall grant to him compensation in respect of such diminution."

Metropolitan Board may appoint special fees for services not provided for.

By sect. 50, "if any special service is required to be performed by the district surveyor under the first part of this act, for which no fee is specified in the said schedule, the Metropolitan Board of Works may order such fee to be paid for such service as they think fit, and the district surveyor shall have the same remedy for recovering such special fee as if the same were expressly named in the said schedule."

Periods when surveyors entitled to fees.

By sect. 51, "at the expiration of the following periods; (that is to say,)

Of one month after the roof of any building surveyed by any district surveyor under this act has been covered in;

Of fourteen days after the completion of any such work as is by this act placed under the supervision of the district surveyor;

Of fourteen days after any special service in respect of any building has been performed;

The district surveyor shall be entitled to receive the amount of fees due to him from the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from the owner or occupier of the building so erected or in

[1] Ss. 73–97, 103.

[2] Id. s. 73.

respect of which such work has been done or service performed; and if any such builder, owner,[1] or occupier refuses to pay the same, such fees may be recovered in a summary manner before a justice of the peace, upon its being shown to the satisfaction of such justice that a proper bill specifying the amount of such fees was delivered to such builder, owner, or occupier, or sent to him in a registered letter addressed to his last known residence."

Returns by District Surveyors.

District surveyor to make monthly returns to Metropolitan Board of Works.

By sect. 52, "every district surveyor shall, within seven days after the first day of every month, make a return to the Metropolitan Board of Works, in such manner as they may appoint, of all notices and complaints received by him relative to the business of his district, and the results thereof, and of all matters brought by him before any justice of the peace, and of all the several works supervised and special services performed by him in the exercise of his office within the previous month, and of all fees charged or received in respect thereof, and specify in such return the description and locality of every building built, rebuilt, enlarged, or altered, or on which any work has been done under his supervision, with the particular nature of every work in respect of which any fee has been charged or received."

Return duly signed to be a certificate that works are agreeable to act.

By sect. 53, "every such return shall be signed by such surveyor, and shall be deemed to be a certificate that all the works enumerated therein as completed have been done in all respects agreeably to this act, according to the best of his knowledge and belief, and that they have been duly surveyed by him."

Superintending architect to audit accounts of fees charged by district surveyors, and to report in case of excess.

By sect. 54, "the officer hereinafter mentioned as the superintending architect of metropolitan buildings, or such other officer as the Metropolitan Board of Works appoint, shall from time to time examine the said monthly returns made by the district surveyors; and in case any fees therein specified appear to such officer to be unauthorised by this act, or to exceed in amount the rates hereby made payable, or in case any such account appears to be in any respect fraudulent or untrue, he shall make his report in writing to that effect to the Metropolitan Board of Works, who shall thereupon take such steps in the matter as they deem expedient."

Powers of Metropolitan Board of Works.

Power for Metropolitan Board of Works to modify rules.

By sect. 55, "the Metropolitan Board of Works may, by order, made with the consent of her Majesty in council, alter, in such manner as they may think fit, the rules for the regulation of the thickness of walls contained in the first schedule hereto."

Buildings to which rules of act are inapplicable.

By sect. 56, "whenever any builder is desirous of erecting any iron building, or any other building to which the rules of this act are inapplicable, he shall make an application to the Metropolitan Board of Works, stating such desire, and setting out a plan of the proposed building, with such particulars as to the construction thereof as may be required by the said board; and the latter, if satisfied with such plan and particulars, shall signify their approval of the same, and thereupon such building may be constructed according to such plan and particulars; but it shall not be lawful for such board to authorise any warehouse or other building used either wholly or in part for the purposes of trade or manufacture to be erected of greater dimensions than 216,000 cubic feet, unless it is divided by party-walls in manner hereinbefore required."

Power of Metropolitan Board to make general rules.

By sect. 57, "the said Metropolitan Board may, for the purpose of regulating the proceedings of such applicants as aforesaid, from time to time issue such general rules as to the time and manner of making such applications, as to the plans to be presented, as to the expenses to be incurred, and as to any other matter or thing connected therewith, as they may think fit."

[1] That is, as being in receipt of the rents and profits. *Per Lord Campbell* in *Evelyn v. Whichcord*, 27 L. J. M. C. 211.

By sect. 58, "the approval by the Metropolitan Board of Works of any plans or particulars, in pursuance of the foregoing provisions, shall be signified by writing under the hand of the superintending architect of metropolitan buildings, and countersigned by the chairman of such board, or by any other officer appointed by the board." Approval of board, how signified.

By sect. 59, "the said Metropolitan Board may from time to time prepare or sanction forms of the various notices required by this act, and may from time to time make such alterations therein as they deem requisite; and they shall cause every such form to be sealed with the seal of the board, or marked with some other distinguishing mark; and any notice made in a form sanctioned by the board shall in all proceedings be held sufficient in law." Board to issue forms of notices.

By sect. 60, "all expenses incurred in and about the obtaining such approval of the Metropolitan Board of Works as aforesaid shall be paid by the builder to the said superintending architect, or to such other person as the said board may appoint, and in default of payment may be recovered in a summary manner." Expenses of orders to be borne by builders.

By sect. 61, "a copy of any plans and particulars, approved by the Metropolitan Board of Works, shall be furnished to the surveyor within whose district the building to which such plans and particulars relate is situate, and thereupon it shall be the duty of such district surveyor to ascertain that the same is built in accordance with the said plans and particulars." District surveyor to see plans carried into execution.

By sect. 62, "the Metropolitan Board of Works may, for the purpose of aiding in the execution of this act, appoint some fit person, to be called the 'Superintending Architect of Metropolitan Buildings,' together with such number of clerks as they think fit; such architect and clerks shall be removable by the said Metropolitan Board, and shall perform such duties as the said board direct: but it shall not be lawful for any superintending architect to practise as an architect, or to follow any other occupation." Power to Metropolitan Board to appoint superintending architect and clerks.

By sect. 63, "if the superintending architect is prevented by illness, infirmity, or any other unavoidable circumstance from attending to the duties of his office, he may, with the consent of the Metropolitan Board of Works, appoint some other person as his deputy to perform all his duties for such time as he may be temporarily prevented from executing them." Superintending architect may appoint deputy, with consent.

By sect. 64, "there shall be paid to such superintending architect and clerks such salaries as the said Metropolitan Board may from time to time direct." Salaries to architect and clerks.

Expenses.

By sect. 65, "the said Metropolitan Board may at any time hereafter, by order, cause such fixed salary as they may determine to be paid to any district surveyor by way of remuneration instead of fees, provided the amount of such remuneration be not less than the amount of the average of the fees for the last three years; and thereupon such surveyor shall pay all fees received by him under this act into the hands of the said superintending architect." Power of Metropolitan Board to pay salaries.

By sect. 66, "all monies received by the superintending architect in pursuance of this act shall be accounted for and paid by him into the hands of the treasurer of the said Metropolitan Board, at such time and in such manner as the said board may direct." Monies received by superintending architect to be paid to the Metropolitan Board.

By sect. 67, "the said Metropolitan Board may at any time hereafter provide, either wholly or partially, for the payment of salaries to the district surveyors, or to any of them, out of the rates leviable by such board, in pursuance of the said act for the better local management of the metropolis, and may thereupon abolish or reduce any fees hereby made payable to the district surveyors." Metropolitan Board may pay salaries out of rates.

By sect. 68, "all expenses of carrying into execution this act, not hereby otherwise provided for, shall be deemed to be expenses incurred by the said Metropolitan Board in the execution of the said act for the better local management of the metropolis, and shall be raised and paid accordingly." Expenses, how borne.

PART II.—DANGEROUS STRUCTURES.

Survey to be made of dangerous structures. 8 Vic. c. 84, s. 40.

By sect. 69, "whenever it is made known to the commissioners hereinafter named that any structure (including in such expression any building, wall, or other structure, and anything affixed to or projecting from any building, wall, or other structure), is in a dangerous state, such commissioners shall require a survey of such structure to be made by the district surveyor, or by some other competent surveyor, and it shall also be the duty of the district surveyor to make known to the said commissioners any information he may receive with respect to any structure being in such state as aforesaid."

Definition of "Commissioners."

By sect. 70, "in cases where any such structure is situate within the city of London or the liberties thereof, hereinafter included under the expression 'the city of London,' the expression 'the commissioners' shall mean 'the Commissioners of Sewers of the city of London;' but when such structure is situate elsewhere it shall mean 'the Commissioners of Police of the Metropolis,' or such one of them as may be authorised by one of her Majesty's principal secretaries of state to act in the matter of this act."

Surveyor on completion of survey to give certificate.

By sect. 71, "upon the completion of his survey the surveyor employed shall certify to the said commissioners his opinion as to the state of any such structure as aforesaid."

Proceedings to be taken in respect of certificate.

By sect. 72, "if such certificate is to the effect that such structure is not in a dangerous state, no further proceedings shall be had in respect thereof, but if it is to the effect that the same is in a dangerous state, the commissioners shall cause the same to be shored up, or otherwise secured, and a proper hoard or fence to be put up for the protection of passengers, and shall cause notice in writing to be given to the owner or occupier of such structure requiring him forthwith to take down, secure, or repair the same, as the case requires."

On non-compliance with notice, justice to summon owner, &c., and make order to comply with requisition.[1]

By sect. 73, "if the owner or occupier to whom notice is given as last aforesaid fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or on his default the occupier, of any such structure, to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all or so much of such structure as is in a dangerous condition to be taken down, repaired, or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure[2] by virtue of the second part of this act shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs."

If owner cannot be found, commissioners may sell structure, giving the surplus to owner, &c.

By sect. 74, "if such owner cannot be found, or if, on demand, he refuses or neglects to pay the aforesaid expenses, the said commissioners, after giving three months' notice of their intention to do so, by posting a printed or written notice in a conspicuous place on the structure in respect of which or of part of which they have incurred expense, or on the land whereon it stands, may sell such structure, and they shall, after deducting from the proceeds of such sale the amount of all expenses incurred by them, restore the surplus (if any) to the owner."

Payments by

By sect. 75, "all payments hereby directed to be made by or to the commis-

[1] *See post*, s. 105. The order to take down and repair ought to show on the face of it that the owner had been summoned to answer the complaint upon which the order was issued, and the justice may decide on the validity of the order. 28 L. J. M. C. 155.

[2] See *Ex-parte Overseers of Saffron Hill*, 18 Jur. 1104; and *Chancellor v. Robinson*, 4 Ex. Rep. 163.

sioners shall, in the cases of payments in respect of any structure situate within the city of London, be made by or to the Chamberlain of the City out of or to the consolidated rate made by the Commissioners of Sewers, and in the cases of payments in respect of any structure situate elsewhere within the limits of this act, be made by or to the Receiver of Metropolitan Police, in the same manner in which payments are made by or to such chamberlain and receiver respectively in the ordinary course of their business; but no commissioner or other officer shall be liable in respect of any loss that may be sustained by any person in consequence of the exercise by the said commissioners of the powers hereby given them, unless such loss happens through the wilful default of such commissioner or other officer." or to the commissioners, how made.

By sect. 76, "in cases where any surplus is hereby made payable to any owner, if no demand for the same is made by any person entitled thereto within one year, then the same shall be paid into the Bank of England in the name and with the privity of the Accountant-General of the Court of Chancery, to be placed to his account there to the credit of the owner (describing him so far as the commissioners can), subject to the control of the court, and to be paid out to the owner on his applying by petition, and proving his title thereto." Surplus how to be applied if no demand made for it.

By sect. 77, "there shall be paid to the district surveyor, or to such other surveyor as aforesaid, in respect of his services under the second part of this act, such fees, not exceeding the amounts specified in the second part of the second schedule hereto, as may from time to time be directed by the said Metropolitan Board." Fees to district surveyor.

By sect. 78, "if any special service is required to be performed by the district surveyor, or by such other surveyor as aforesaid, under the second part of this act, for which no fee is specified in the said schedule, the said Metropolitan Board may order such fee to be paid for such service as they think fit." Metropolitan Board may appoint special fees for services not provided for.

By sect. 79, "all fees paid to the district surveyor, or to such other surveyor as aforesaid, by virtue of the second part of this act, shall be deemed to be expenses incurred by the said commissioners in the matter of the dangerous structure in respect of which such fees are paid, and shall be recoverable by them from the owner accordingly." Fees to be deemed part of expenses.

By sect. 80, "in cases where a structure has been surveyed by a district surveyor, or such other surveyor as aforesaid, to be dangerous to its inmates, a justice of the peace may, if satisfied of the correctness of such certificate, upon the application of the said commissioners, by order under his hand direct any inmates of such structure to be removed therefrom by a constable or other peace officer, and if they have no other abode he may require them to be received into the workhouse established for the reception of the poor of the place in which such structure is situate." Justice of peace may cause inmates to be removed from dangerous structures.

By sect. 81, "subject to the approval of one of her Majesty's principal secretaries of state, the said commissioners may appoint such persons, at such salaries, and make such regulations as they think fit for carrying into execution the second part of this act; and all expenses incurred by them, not hereby otherwise provided for, shall, in the case of expenses incurred by the said Commissioners of Police, be deemed to be expenses incurred by them in respect of the police force of which they are commissioners, and be payable accordingly; and all expenses incurred by the said Commissioners of Sewers shall be paid out of the said consolidated rate." Powers of commissioners to appoint officers.

PART III.—PARTY STRUCTURES.

Preliminary.

By sect. 82, "in the construction of the following provisions relating to party structures, such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure shall be called 'the building owner,' and the owner of the other premises shall be called 'the adjoining owner.'" Definition of building owner and adjoining owner.

Rights of Building and Adjoining Owners.

Rights of building owner.

By sect. 83, "the building owner shall have the following rights in relation to party structures; (that is to say),

(1.) A right to make good or repair any party structure that is defective or out of repair:[1]

(2.) A right to pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same:

(3.) A right to pull down any timber or other partition that divides any buildings, and is not conformable with the regulations of this act, and to build instead a party-wall conformable thereto:

(4.) In the case of buildings having rooms or stories the property of different owners intermixed, a right to pull down such of the said rooms or stories or any part thereof as are not built in conformity with this act, and to rebuild the same in conformity with this act:

(5.) In the case of buildings connected by arches or communications over public ways or over passages belonging to other persons, a right to pull down such of the said buildings, arches, or communications, or any part thereof, as are not built in conformity with this act, and to rebuild the same in conformity with this act:

(6.) A right to raise any party structure permitted by this act to be raised, or any external wall built against such party structure, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney-stacks belonging to the adjoining owner on or against such party structure or external wall:

(7.) A right to pull down any party structure that is of insufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal finishings and decorations thereof:

(8.) A right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation:

(9.) A right to cut away any footing or any chimney-breasts, jambs, or flues projecting from any party-wall, in order to erect an external wall against such party-wall, or for any other purpose, upon condition of making good all damage occasioned to the adjoining premises by such operation:

(10.) A right to cut away or take down such parts of any wall or building of an adjoining owner as may be necessary in consequence of such wall or building overhanging the ground of the building owner, in order to erect an upright wall against the same, on condition of making good any damage sustained by the wall or building by reason of such cutting away or taking down:

(11.) A right to perform any other necessary works incident to the connexion of party structure with the premises adjoining thereto:

But the above rights shall be subject to this qualification, that any building which has been erected previously to the time of this act coming into operation shall be deemed to be conformable with the provisions of this act if it is conformable with the provisions of an act passed in the fourteenth year of his late Majesty King George the Third, chapter seventy-eight, or with the provisions of the said act of the eighth year of her present Majesty, chapter eighty-four."

Rights of adjoining owner.

By sect. 84, "whenever the building owner proposes to exercise any of the foregoing rights with respect to party structures, the adjoining owner may

[1] See *Wheeler v. Gray*, 27 L. J. C. P. 267.

require the building owner to build on any such party structure certain chimney-jambs, breasts, or flues, or certain piers or recesses, or any other like works for the convenience of such adjoining owner; and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner, or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right; and any difference that arises between any building owner and adjoining owner in respect of the execution of such works as aforesaid shall be determined in manner in which differences between building owners and adjoining owners are hereinafter directed to be determined."

By sect. 85, "the following rules shall be observed with respect to the exercise by building owners and adjoining owners of their respective rights:—

Rules as to exercise of rights by building and adjoining owners.[1]

(1.) No building owner shall, except with the consent of the adjoining owner, or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure, unless he has given at the least three months' previous notice to the adjoining owner by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode:

(2.) The notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced:

(3.) No building owner shall exercise any right hereby given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner:

(4.) Upon the receipt of such notice the adjoining owner may require the building owner to build, or may himself build on any such party structure, any works to the construction of which he is hereinbefore mentioned to be entitled:

(5.) Any requisition so made by an adjoining owner shall be in writing or printed, and shall be delivered personally to the building owner within one month after the date of the notice being given by him, or be sent by post in a registered letter addressed to him at his last known place of residence: It shall specify the works required by the adjoining owner for his convenience, and shall, if necessary, be accompanied with explanatory plans and drawings:

(6.) If either owner does not, within fourteen days after the delivery to him of any notice or requisition, express his consent thereto, he shall be considered as having dissented therefrom, and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner:

(7.) In all cases not hereby specially provided for, where a difference arises between a building owner and adjoining owner in respect of any matter arising under this act, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference; but any time so appointed for doing any work shall not commence until after the expiration of such period of three months, as is hereinbefore mentioned:

(8.) Any award given by such one surveyor, or by such three surveyors, or

[1] A landlord of premises adjoining those of his tenant may enter against the latter's will, and with notice, under ss. 83–85, 108. *Wheeler v. Gray*, 27 L. J. C. P. 267; affirmed in Ex. Ch. 28 id. 200.

any two of them, shall be conclusive, and shall not be questioned in any court, with this exception, that either of the parties to the difference may appeal therefrom to the county court within fourteen days from the date of the delivery of any such award as aforesaid, and such county court may, subject as hereinafter mentioned, rescind or modify the award so given, in such manner as it thinks just:

(9.) If either party to the difference makes default in appointing a surveyor for ten days after notice has been given to him by the other party in manner aforesaid to make such appointment, the party giving the notice may make the appointment in the place of the party so making default:

(10.) The costs incurred in obtaining any such award as aforesaid shall be paid by such party as such one surveyor, or three surveyors, or any two of them, may determine:

(11.) If the appellant from any such award as aforesaid, on appearing before the county court, declares his unwillingness to have the matter decided by such court, and proves to the satisfaction of the judge of such court that in the event of the matter being decided against him he will be liable to pay a sum, exclusive of costs, exceeding fifty pounds, and gives security, to be approved by such judge, duly to prosecute his appeal and to abide the event thereof, all proceedings in the county court shall thereupon be stayed; and it shall be lawful for such appellant to bring an action in one of her Majesty's superior courts of law at Westminster against the other party to the difference; and the plaintiff in such action shall deliver to the defendants an issue or issues whereby the matters in difference between them may be tried; and the form of such issue or issues, in case of dispute, or in case of the non-appearance of the defendant, shall be settled by the court in which the action is brought; and such action shall be prosecuted, and issue or issues tried in the same manner, and subject to the same incidents in and subject to which actions are prosecuted and issues tried in other cases within the jurisdiction of such court, or as near thereto as circumstances admit.

(12.) If the parties to any such action agree as to the facts, a special case may be stated for the opinion of any such superior court as aforesaid, and any case so stated may be brought before the court in like manner and subject to the same incidents in and subject to which other special cases are brought before such court, or as near thereto as circumstances admit; and any costs that may have been incurred in the county court by the parties to such action as is mentioned in this section shall be deemed to be costs incurred in such action and be payable accordingly."

Power for building owner to make entry on premises to effect works.

By sect. 86, "whenever any building owner has become entitled, in pursuance of this act, to execute any work, it shall be lawful for him, his servants, agents, or workmen, at all usual times of working, to enter on any premises for the purpose of executing and to execute such work, removing any furniture, or doing any other thing that may be necessary, and if such premises are closed he or they may, accompanied by a constable or other officer of the peace, break open any doors in order to such entry; and any owner or other person that hinders or obstructs any workman employed for any of the purposes aforesaid, or wilfully damages or injures the said work, shall incur for every such offence a penalty not exceeding ten pounds, to be recovered before a justice of the peace."

Penalty on persons obstructing.

Security to be given by building owner, if required by adjoining owner.

By sect. 87, "any adjoining owner may, if he thinks fit, by notice in writing given by himself or his agent, require the building owner, before commencing any work which he may be authorised by this act to execute, to give such security as may be agreed upon, or in case of difference may be settled by the judge of the county court, for the payment of all such costs and compensation in respect of such work as may be payable by such building owner."

Rules as to expenses in re-

By sect. 88, "the following rules shall be observed as to expenses in respect of any party structure; (that is to say,)

As to expenses to be borne jointly by the building owner and adjoining owner : spect of party structure.

(1.) If any party structure is defective or out of repair, the expense of making good or repairing the same shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such structure:

(2.) If any party structure is pulled down and rebuilt by reason of its being so far defective or out of repair as to make it necessary or desirable to pull down the same, the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such structure:

(3.) If any timber or other partition dividing any building is pulled down, in exercise of the right hereinbefore vested in a building owner, and a party structure built instead thereof, the expense of building such party structure, and also of building any additional party structures that may be required by reason of such partition having been pulled down, shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such party structure, and to the thickness required to the respective buildings parted thereby:

(4.) If any room or stories, or any part of rooms or stories, the property of different owners, and intermixed in any building, are pulled down, in pursuance of the right hereinbefore vested in any building owner, and rebuilt in conformity with this act, the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such rooms or stories:

(5.) If any arches or communications, or any parts thereof, are pulled down, in pursuance of the right hereinbefore vested in any building owner, and rebuilt in conformity with this act, the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such arches or communications:

As to expenses to be borne by building owner:

6. If any party structure or external wall built against the same is raised, in pursuance of the power hereinbefore vested in any building owner, the expense of raising the same, and of making good all such damage, and of carrying up to the requisite height all such flues and chimneys as are hereinbefore required to be made good and carried up, shall be borne by the building owner:

(7.) If any party structure which is of proper materials and sound, or not so far defective or out of repair as to make it necessary or desirable to pull down the same, is pulled down and rebuilt by the building owner, the expense of pulling down and rebuilding the same, and of making good all such damage as is hereinbefore required to be made good, shall be borne by the building owner:

(8.) If any party structure is cut into by the building owner, the expense of cutting into the same, and of making good any damage hereinbefore required to be made good, shall be borne by such building owner:

(9.) If any footing, chimney-breast, jambs, or floor is cut away, in pursuance of the powers hereinbefore vested in any building owner, the expense of such cutting away, and of making good any damage hereinbefore required to be made good, shall be borne by the building owner."

By sect. 89, "within one month after the completion of any work which any building owner is by this act authorised or required to execute, and the expense of which is in whole or in part to be borne by an adjoining owner, such Account of expenses of works to be

delivered to adjoining owner within one month.

building owner shall deliver to the adjoining owner an account in writing of the expense of the work, specifying any deduction to which such adjoining owner or other person may be entitled in respect of old materials, or in other respects; and every such work as aforesaid shall be estimated and valued at fair average rates and prices, according to the nature of the work and the locality, and the market price of materials and labour at the time."

Adjoining owner may appeal against account.

By sect. 90, "at any time within one month after the delivery of such account, the adjoining owner, if dissatisfied therewith, may declare his dissatisfaction to the party delivering the same, by notice in writing given by himself or his agent, and specifying his objections thereto; and upon such notice having been given a difference shall be deemed to have arisen between the parties, and such difference shall be determined in manner hereinbefore provided for the determination of differences between building and adjoining owners."[1]

Building owner may recover, if no appeal made.

By sect. 91, "if within such period of one month as aforesaid the party receiving such account does not declare in manner aforesaid his dissatisfaction therewith, he shall be deemed to have accepted the same, and shall pay the same, on demand, to the party delivering the account, and if he fails to do so the amount so due may be recovered as a debt."

Penalty on delay of payment by adjoining owner.

By sect. 92, "where the adjoining owner is liable to contribute to the expenses of building any party structure, until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in such structure."

As to expenses incurred on requisition of adjoining owner.

By sect. 93, "where any building owner has incurred any expenses on the requisition of an adjoining owner, the adjoining owner making such requisition shall be liable for all such expenses, and in default of payment the same may be recovered from him as a debt."

Penalty on building owner failing to execute required works.

By sect. 94, "where any building owner is, by the third part of this act, liable to make good any damage he may occasion to the property of the adjoining owner by any works authorised to be executed by him, or to do any other thing upon condition of doing which his right to execute such works is hereby limited to arise, and such building owner fails within a reasonable time to make good such damage or to do such thing, he shall incur a penalty, to be recovered before a justice of the peace, not exceeding twenty pounds for each day during which such failure continues."

Consent how given on behalf of persons under disability.

By sect. 95, "where, in pursuance of this act, any consent is required to be given, any notice to be served, or any other thing to be done by, on, or to any owner under disability, such consent may be given, such notice may be served, and such thing may be done by, on, or to the following persons, on behalf of such persons under disability; (that is to say,)

By, on, or to a husband, on behalf of his wife:

By, on, or to a trustee, on behalf of his cestui que trust:

By, on, or to a guardian or committee, on behalf of an infant, idiot, or lunatic."

Consent how given on behalf of persons not to be found.

By sect. 96, "where any consent is required to be given or any other thing to be done by any owner, in pursuance of this act, if there is no owner capable of giving such consent or of doing such thing, and no person empowered by this act to give such consent or to do such thing on behalf of such owner, or if any owner so capable, or any person so empowered, cannot be found, the judge of the county court shall have power to give such consent or do or cause to be done such thing on behalf of such owner, upon such terms and subject to such conditions as he may think fit, having regard alike to the nature and purpose of the subject matter in respect of which such consent is to be given, and to the fair claims of the parties on whose behalf such consent is to be given; and such judge shall have power to dispense with the service of any notice which would otherwise be required to be served."

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[1] *See* ss. 37, 85, rules 7–12.

PART IV.—MISCELLANEOUS PROVISIONS.

Payment of expenses by owners.

By sect. 97, "where it is hereby declared that expenses are to be borne by the owner of any premises (including in the term 'owner' the adjoining and building owner respectively), the following rules shall be observed with respect to the payment of such expenses:—

(1.) The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue due from him in respect of such premises during the period of his occupancy:

(2.) If there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest:

(3.) If any difference arises as to the amount of contribution, such difference shall be decided by arbitration, to be conducted in manner directed by the Companies' Clauses Consolidation Act, 1845; and for that purpose the clauses of the said act with respect to the settlement of disputes by arbitration shall be incorporated with this act:

(4.) If some of the owners liable to contribution cannot be found, the deficiency so arising shall be divided amongst the parties that can be found:

(5.) Any occupier of premises who has paid any expenses under this act may deduct the amount so paid from any rent payable by him to any owner of the same premises; and any owner of premises who has paid more than his due proportion of any expenses may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises:

(6.) If default is made by any owner or occupier in payment of any expenses hereby made payable by him in the first instance, or if default is made by any owner in payment of any other expenses or monies due from him by way of contribution or otherwise in pursuance of this act, then, in addition to any other remedies hereby provided, such expenses and monies, if arising in respect of any matter within the provisions of the third part of this act, may be recovered as a debt in due course of law, but if arising in respect of any other matter under this act may be recovered in a summary manner."

Rules as to service of notices, summonses, and orders.

By sect. 98, "the following rules shall be observed with respect to the giving or service of any notice, summons, or order directed to be given or served under this act in cases not hereinbefore provided for:—

(1.) A notice, summons, or order may in all cases be served personally:

(2.) A notice, summons, or order may be served on any builder by leaving the same or sending it in a registered letter addressed to him at his place of address as stated by him to the district surveyor, or by putting up such notice, summons, or order on a conspicuous part of the building or premises to which the same relates:

(3.) A notice, summons, or order may be served on the owner or occupier of any premises, by leaving the same with the occupier of such premises, or with some inmate of his abode, or if there is no occupier by putting up such notice, summons, or order on a conspicuous part of the building or premises to which the same relates; and it shall not be necessary to name the owner or occupier of such premises; nevertheless, when the owner of any such premises and his residence, or that of his agent, are known to the party by whom or on whose behalf any notice, summons, or order is intended to be served, it shall be the duty of such party to send every such notice, summons, or

order by the post in a registered letter addressed to the residence or last-known residence of such owner or of his agent:

(4.) A notice, summons, or order may be served on any district surveyor by leaving the same at his office."

As to things authorised to be done by a county court.

By sect. 99, "whenever anything is hereby authorised to be done by a county court it may be done as follows; that is to say, if such thing arises in respect of any structure or other subject-matter situate within the city of London or the liberties thereof, by the Sheriff's Court established by a local act passed in the eleventh year of the reign of her Majesty, chapter seventy-one, intituled 'An Act for the more easy Recovery of Small Debts and Demands within the City of London or the Liberties thereof,' and if such thing arises in respect of any structure or other subject-matter situate elsewhere, by the county court having jurisdiction within the district in which such structure or other subject-matter is situate."

11 & 12 Vic. c. 71.

Manner of determining differences.

By sect. 100, "in cases where jurisdiction is hereby given to a county court, such court may from time to time make such order in respect to matters so brought before it as it may think fit, with power to settle the time and manner of executing any work, or of doing any other thing, and to put the parties to the case upon such terms as respects the execution of the work as it thinks fit: it shall also have power to award or refuse costs according to circumstances, and to settle the amount thereof."

Form of proceedings in county court.

By sect. 101, "proceedings in any county court in respect of any matter arising under this act shall be conducted in the same manner as proceedings are conducted in any case within the ordinary jurisdiction of such court, or as near thereto as circumstances permit; and orders made by the judge of any such court may be enforced by execution, committal, or otherwise, in a similar manner to that in which the orders of such court are ordinarily enforced."

Appeal from decision of county court.

By sect. 102, "if either party in any case over which jurisdiction is hereby given to a county court feels aggrieved with the decision of such court in respect of any point of law, or the admission or rejection of any evidence, he may appeal therefrom in the same manner and upon the same terms in and upon which he might have appealed from the decision of such court in any case within the ordinary jurisdiction of such court, or as near thereto as circumstances permit; but no such appeal shall be allowed unless the value of the matter in difference between the parties exceeds fifty pounds; and the opinion of the judge before whom the case is tried as to such value shall be conclusive."

Recovery of penalties.

By sect. 103, "all penalties under this act, and all fees, monies, costs, or expenses by this act directed to be recovered in a summary manner, may be recovered in manner directed by an act passed in the eleventh and twelfth years of the reign of her present Majesty Queen Victoria, chapter forty-three, intituled 'An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and Orders;'[1] and whenever anything is hereby authorised or required to be done by or before a justice of the peace it may be done as follows; (that is to say,) if such thing arises in respect of any building or wall situate within the city of London, by or before one or more justice or justices of the peace for the said city, or by any metropolitan police magistrate, and if such thing arises in respect of any building or wall situate elsewhere within the limits of this act, by or before any metropolitan police magistrate."

Application of penalties.

By sect. 104, "any justice of the peace in any case over which jurisdiction is hereby given to him may make such order as to the costs of any proceedings of which he has cognisance as he thinks just; he may also direct the whole or any part of any penalty imposed by him under this act to be applied in or

[1] By s. 11 of this act complaint must be laid within six months from the time when the matters of such complaint arose. When it is for non-payment of expenses, the time of limitation must be from the time of the demand, and not from the completion of the works. 28 L. J. M. C. 25.

towards payment of the costs of the proceedings; and subject to such direction, all penalties shall be paid into the hands of the treasurer of the said Metropolitan Board, to be applied in such manner as the said board thinks fit."

Provisions as to limitation of time when due notice has not been given.

By sect. 105, "in cases where any building has been erected or work done without due notice being given to the district surveyor, the district surveyor may, at any time within one month after he has discovered that such building has been erected or work done, enter the premises for the purpose of seeing that the regulations of this act have been complied with, and the time during which the district surveyor may take any proceeding, or do anything authorised or required by this act to be done by him, in respect of such building or work, shall begin to run from the date of his discovering that such building has been erected or work done."

Power to appeal to superior courts.

By sect. 106, "in every case, except in respect of fees of a district surveyor, in which jurisdiction is hereinbefore given to a justice of the peace, if either party to any such case is dissatisfied with the determination of the justice so convicting, in respect of any point of law, or of the admission or rejection of any evidence, such party may, upon giving notice within seven days to the other party of his intention to appeal, appeal therefrom to any of the superior courts of common law at Westminster; subject to this restriction, that no such appeal shall be made by any district surveyor except with the consent of the justice before whom the case is tried, and that no such appeal shall be made by any other party to the case, except upon giving such security for costs, and, if the case requires it, in addition thereto, such undertaking in respect of desisting in the meantime from any works complained of, or in respect of any other matter or thing arising in the case, as the justice thinks fit."

Form of appeal.

By sect. 107, "any appeal so made shall be in the form of a special case, to be agreed on by both parties, or, if the parties cannot agree, to be settled by the justice from whose decision the appeal is made; and such case shall be transmitted by the appellant to the rule department of the master's office in the court in which the appeal is to be brought, and be heard in manner provided by the practice of such court."

Notice of action.

By sect. 108, "no writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of this act until the expiration of one month next after notice[1] in writing has been delivered to him, or left at his office or usual place of abode, stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in such last-mentioned notice; and unless such notice is proved the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards, and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere; and the defendant shall be at liberty to plead the general issue, and give this act and all special matter in evidence thereunder."

PART V.—REPEAL OF FORMER ACTS AND TEMPORARY PROVISIONS.

Repeal.

Repeal of 7 & 8 Vic. c. 84,

By sect. 109, "from and after the commencement of this act, the following acts, that is to say, an act passed in the eighth year of the reign of her present

[1] Under 14 Geo. 3, c. 78, s. 43, it was held in trespass that want of notice could be shown under "not guilty." *Wells v. Ody*, 26 Mee. & W. 128. In *Wheeler v. Gray*, 27 L. J. C. P. 267, the want of notice was considered a defence under a plea of not guilty by statute.

except ss. 54 to 63, and 9 & 10 Vic. c. 5.

Majesty, chapter eighty-four, and intituled 'An Act for regulating the Construction and the Use of Buildings in the Metropolis and its Neighbourhood,' with the exception of the sections relating to dangerous and noxious businesses, and numbered respectively fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, and sixty-three, and an act passed in the ninth year of the reign of her present Majesty, chapter five, and intituled 'An Act to amend an Act for regulating the Construction and Use of Buildings in the Metropolis and its Neighbourhood,' are throughout the limits of this act and elsewhere hereby repealed, subject to the following provisions; (that is to say,)

1. That such repeal shall not affect any proceedings authorised to be taken by the said acts or either of them in respect of any act, omission, penalty, matter, or thing, and pending before the official referees or any other tribunal at the time of the commencement of this act:
2. That in cases where any act, omission, or thing has occurred previously to the time of the commencement of this act, in respect of which, if this act had not passed, proceedings might have been taken under the said acts or either of them, then proceedings in respect of such act, omission, or thing may be had under this act in manner following; that is to say, if the matter in question is anything relating to the rights of building and adjoining owners in respect of party structures, proceedings may be had in the county court; but if the matter is question relates to the recovery of any penalty or to any other thing proceedings may be had before any justice of the peace:
3. That so much of the act of the fourteenth year of King George the Third, chapter seventy-eight, as was excepted from the operation of the said act of the eighth year of her present Majesty, chapter eighty-four, (that is to say,) the sections numbered respectively seventy-four, seventy-five, seventy-six, seventy-seven, seventy-eight, eighty, eighty-one, eighty-two, eighty-three, eighty-four, eighty-five, and eighty-six, shall continue in full force."

[These sections of the 14 Geo. 3, c. 78, relate exclusively to regulations in case of fire, and therefore do not properly form part of the statute law relating to building.]

As to contracts made previously to passing of act.

By sect. 110, "any contract made previously to the passing of this act for the erection of a new building shall be carried into effect in the same manner as if this act had been passed at the time of the making thereof, and the necessary deviations from the terms of such contract may be made accordingly; and if any dispute arises in respect of any loss sustained by any party to such contract by reason of such necessary deviation, such dispute shall be determined by the county court; and whenever any costs or expenses have been paid by any owner in pursuance of this act, then as to any structure held under any lease or agreement made previously to the commencement of this act it shall be lawful for such owner to recover the same from the persons hitherto liable by law, or by such existing lease or contract, to maintain or repair the structure in respect of which such costs and expenses have been incurred."

Liabilities under contract between landlord and tenant not to be affected.

By sect. 111, "nothing herein contained shall vary or affect the rights or liabilities as between landlord and tenant under any contract between them."

As to iron buildings constructed before this act comes into operation.

By sect. 112, "in cases where any iron building has been constructed or is in the progress of construction previously to the time at which this act comes into operation, and doubts are entertained whether such building is permitted by law, any person interested in such building may make an application to the commissioners of works and buildings, to signify their approval of such building; and the commissioners of works and buildings, upon being satisfied of the stability of such building, may approve of the same, and upon such approval being given such building shall be deemed to have been constructed in manner permitted by law, and this section shall come into operation immediately after the passing of this act."

By sect. 113, "the official referees and registrar of metropolitan buildings may, within six months from the time at which this act comes into operation, apply to the Commissioners of her Majesty's Treasury for compensation in respect of the loss they have sustained by reason of the abolition of their offices; and the commissioners shall take any such application into consideration, and award such compensation, either by way of a gross sum or annual payment, as they think just, having regard to the nature of the office, the time during which the applicant has held the same, and generally to the special circumstances of each case; and any compensation so given shall be paid out of monies to be provided by parliament; and such compensation, when made by annual payment, shall be subject to this proviso, that if any such official referee or registrar is at any time thereafter appointed to any public office in respect of which he receives a salary, the payment of the compensation awarded to him under this act shall be suspended so long as he receives such salary, if the amount thereof is greater than such compensation, or if not shall be diminished by the amount of such salary." Compensation to official referees and registrar.

By sect. 114, "any person, except the said official referees and registrar, who at the time when this act comes into operation is employed in the office of metropolitan buildings, may within six months from such time apply to the Metropolitan Board of Works for employment, and such board shall thereupon take such application into consideration, and they shall either employ the applicant at a salary not less in amount than that which he enjoyed when in the said office of metropolitan buildings, or at a less salary, awarding to him compensation in respect of such diminution of salary, or they shall award to him such compensation, if any, as they, or in the event of the applicant feeling aggrieved with their decision, as the Commissioners of the Treasury think just, having regard to the nature of the office, the time during which it has been held by the applicant, and generally to the special circumstances of the case; and any expenses incurred by the said board in carrying into effect this section shall be deemed to be expenses incurred in the execution of the said act for the better local management of the metropolis, and be raised accordingly; nevertheless, if any such clerk or servant as aforesaid at any time thereafter is appointed to any public office, or to any office under the said Metropolitan Board, in respect of which he receives a salary, the payment of the compensation awarded to him under this act shall be suspended so long as he receives such salary, if the amount thereof is greater than the amount of such compensation, or if not, shall be diminished by the amount of such salary; but, notwithstanding anything herein contained, the Metropolitan Board may, in the event of their employing any person mentioned in this section, dismiss him, with the consent of the Treasury." Compensation to clerks in office of metropolitan buildings.

FIRST SCHEDULE.

Preliminary.

1. Every building shall be enclosed with walls constructed of brick, stone, or other hard and incombustible substances, and the foundations shall rest on the solid ground, or upon concrete or upon other solid substructure. Structure of buildings.

2. Every wall constructed of brick, stone, or other similar substances shall be properly bonded and solidly put together with mortar or cement, and no part of such wall shall overhang any part underneath it, and all return walls shall be properly bonded together. Construction of walls of brick, stone, &c.

3. The thickness of every stone wall in which the beds of the masonry are not laid horizontally shall be one-third greater than the thickness prescribed for stone walls in the rules hereinafter contained. Extra thickness of certain stone walls.

4. The thickness of every wall, as hereinafter determined, shall be the minimum thickness. Thickness of walls.

5. The height of every topmost story shall be measured from the level of its floor up to the under side of the tie of the roof, or up to half the vertical height of the rafters, when the roof has no tie; and the height of every other Height of story.

story shall be the clear height of such story, exclusive of the thickness of the floor.

Height of external and party-walls.

6. The height of every external and party-wall shall be measured from the base of the wall to the level of the top of the topmost story.

Length of walls.

7. Walls are deemed to be divided into distinct lengths by return walls, and the length of every wall is measured from the centre of one return wall to the centre of another; provided that such return walls are external, party, or cross walls of the thickness hereinafter required, and bonded into the walls so deemed to be divided.

Footings of walls.

8. The projection of the bottom of the footing of every wall, on each side of the wall, shall be at least equal to one half of the thickness of the wall at its base: and the diminution of the footing of every wall shall be formed in regular offsets, and the height from the bottom of such footing to the base of the wall shall be at the least equal to one-half of the thickness of the wall at its base.

PART I.—RULES FOR THE WALLS OF DWELLING-HOUSES.

Thickness of walls of dwelling-houses.

1. The external and party-walls of dwelling-houses shall be made throughout the different stories of the thickness shown in the following table, arranged according to the heights and lengths of the walls, and calculated for walls up to one hundred feet in height, and supposed to be built of bricks not less than eight and a-half inches and not more than nine and a-half inches in length, the heights of the stories being subject to the condition hereinafter given.

2. TABLE.

I.	II.	III.	IV.
Height up to 100 Feet.	Length up to 45 Feet. Two Stories, 21½ Inches. Three Stories, 17½ Inch. Remainder, 13 Inches.	Length up to 80 Feet. Two Stories, 26 Inches. Two Stories, 21½ Inches. Two Stories, 17½ inches. Remainder, 13 Inches.	Length unlimited. One Story, 30 Inches. Two Stories, 26 Inches. Two Stories, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.
Height up to 90 Feet.	Length up to 45 Feet. Two Stories, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length up to 70 Feet. One Story, 26 Inches. Two Stories, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length unlimited. One Story, 30 Inches. Two Stories, 26 Inches. One Story, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.
Height up to 80 Feet.	Length up to 40 Feet. One Story, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length up to 60 Feet. Two Stories, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length unlimited. One Story, 26 Inches. Two Stories, 21½ Inches. Two Stories, 17½ Inch. Remainder, 13 Inches.
Height up to 70 Feet.	Length up to 40 Feet. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length up to 55 Feet. One Story, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length unlimited. One Story, 26 Inches. Two Stories, 21½ Inches. One Story, 17½ Inches. Remainder, 13 Inches.
Height up to 60 Feet.	Length up to 30 Feet. One Story, 17½ Inches. Remainder, 13 Inches.	Length up to 50 Feet. Two Stories, 17½ Inches. Remainder, 13 Inches.	Length unlimited. One Story, 21½ Inches. Two Stories, 17½ Inches. Remainder, 13 Inches.

2. TABLE — (*continued*).

I.	II.	III.	IV.
Height up to 50 Feet.	Length up to 30 Feet. Wall below the Topmost Story, 13 Inches. Topmost Story, 8½ Inch. Remainder, 8½ Inches.	Length up to 45 Feet. One Story, 17½ Inches. Rest of Wall below Topmost Story, 13 Inches. Topmost Story, 8½ Inch. Remainder, 8½ Inches.	Length unlimited. One Story, 21½ Inches. One Story, 17½ Inches. Remainder, 13 Inches.
Height up to 40 Feet.	Length up to 35 Feet. Wall below Two Topmost Stories, 13 Inch. Two Topmost Stories, 8½ Inches. Remainder, 8½ Inches.	Length unlimited. One Story, 17½ Inches. Rest of Wall below Topmost Story, 13 Inches. Topmost Story, 8½ Inches. Remainder, 8½ Inches.	
Height up to 30 Feet.	Length up to 35 Feet. Wall below Two Topmost Stories, 13 Inch. Two Topmost Stories, 8½ Inches. Remainder, 8½ Inches.	Length unlimited. Wall below Topmost Story, 13 Inches. Topmost Story, 8½ Inches. Remainder, 8½ Inches.	
Height up to 25 Feet.	Length up to 30 Feet. From Base to Top of Wall, 8½ Inches.	Length unlimited. Wall below Topmost Story, 13 Inches. Topmost Story, 8½ Inches. Remainder, 8½ Inches.	

3. In using the above table the height of the wall is to be reckoned on the first vertical column on the left hand of the table, and the length of the wall on the corresponding horizontal column. The thickness of the wall in each story is given in inches, and begins with the wall from the base upwards. Explanation of tables.

4. If any external or party-wall, measured from centre to centre, is not more than twenty-five feet distant from any other external or party-wall to which it is tied by the beams of any floor or floors, other than the ground floor, or the floor of any story formed in the roof, the length of such wall is not to be taken into consideration, and the thickness of the wall will be found in the second vertical column in the above table. Qualification in case of certain walls.

5. If any story exceeds in height sixteen times the thickness prescribed for the walls of such story in the above table, the thickness of each external and party-wall throughout such story shall be increased to one-sixteenth part of the height of the story; but any such additional thickness may be confined to piers properly distributed, of which the collective widths amount to one-fourth part of the length of the wall. Condition in respect of stories exceeding a certain height.

6. No story enclosed with walls less than thirteen inches in thickness shall be more than ten feet in height. Restriction in case of certain stories.

7. The thickness of any wall of a dwelling-house, if built of materials other than such bricks as aforesaid, shall be deemed to be sufficient if made of the thickness required by the above tables, or of such less thickness as may be approved by the Metropolitan Board, with this exception, that in the case of walls built of stone in which the beds of the masonry are not laid horizontally no diminution shall be allowed in the thickness required by the foregoing rules for such last-mentioned walls. Thickness of walls built of materials other than such bricks as aforesaid.

8. All buildings, excepting public buildings, and such buildings as are Rule as to

buildings not being public buildings or buildings of the warehouse class.

hereinafter defined to be buildings of the warehouse class, shall, as respects the thickness of their walls, be subject to the rules given for dwelling-houses.

PART II.—RULES FOR THE WALLS OF BUILDINGS OF THE WAREHOUSE CLASS.

Definition of warehouse class.

1. The warehouse class shall comprise all warehouses, manufactories, breweries, and distilleries.

Thickness at base.

2. The external and party-walls of buildings of the warehouse class shall at the base be made of the thickness shown in the following table, calculated for walls up to one hundred feet in height, and supposed to be built of bricks not less than eight and a-half inches, and not more than nine and a-half inches in length.

3. TABLE.

I.	II.	III.	IV.
Height up to 100 Feet.	Length up to 55 Feet. — Base, 26 Inches.	Length up to 70 Feet. — Base, 30 Inches.	Length unlimited. — Base, 34 Inches.
Height up to 90 Feet.	Length up to 60 Feet. — Base, 26 Inches.	Length up to 70 Feet. — Base, 30 Inches.	Length unlimited. — Base, 34 Inches.
Height up to 80 Feet.	Length up to 45 Feet. — Base, 21½ Inches.	Length up to 60 Feet. — Base, 26 Inches.	Length unlimited. — Base, 30 Inches.
Height up to 70 Feet.	Length up to 30 Feet. — Base, 17½ Inches.	Length up to 45 Feet. — Base, 21½ Inches.	Length unlimited. — Base, 26 Inches.
Height up to 60 Feet.	Length up to 35 Feet. — Base, 17½ Inches.	Length up to 50 Feet. — Base, 21½ Inches.	Length unlimited. — Base, 26 Inches.
Height up to 50 Feet.	Length up to 40 Feet. — Base, 17½ Inches.	Length up to 70 Feet. — Base, 21½ Inches.	Length unlimited. — Base, 26 Inches.
Height up to 40 Feet.	Length up to 30 Feet. — Base, 13 Inches.	Length up to 60 Feet. — Base, 17½ Inches.	Length unlimited. — Base, 21½ Inches.
Height up to 30 Feet.	Length up to 45 Feet. — Base, 13 Inches.	Length unlimited. — Base, 17½ Inches.	
Height up to 25 Feet.	Length unlimited. — Base, 13 Inches.		

Explanation of table.

4. The above table is to be used in the same manner as the table previously given for the walls of dwelling-houses, and is subject to the same qualifications

and conditions respecting walls not more than twenty-five feet distant from each other.

Thickness at top of walls and through intermediate space.

5. The thickness of the walls of buildings of the warehouse class at the top, and for sixteen feet below the top, shall be thirteen inches; and the intermediate parts of the wall between the base and such sixteen feet below the top shall be built solid throughout the space between straight lines drawn on each side of the wall, and joining the thickness at the base to the thickness at sixteen feet below the top, as above determined; nevertheless, in walls not exceeding thirty feet in height the walls of the topmost story may be eight inches and a-half thick.

Condition in respect of stories exceeding a certain height.

6. If in any story of a building of the warehouse class the thickness of the wall, as determined by the rules hereinbefore given, is less than one-fourteenth part of the height of such story, the thickness of the wall shall be increased to one-fourteenth part of the height of the story; but any such additional thickness may be confined to piers properly distributed, of which the collective widths amount to one fourth part of the length of the wall.

Thickness of walls built of materials other than such bricks as aforesaid.

7. The thickness of any wall of a building of the warehouse class, if built of materials other than such bricks as aforesaid, shall be deemed to be sufficient if made of the thickness required by the above tables, or of such less thickness as may be approved by the Metropolitan Board, with this exception, that in the case of walls built of stone in which the beds of the masonry are not laid horizontally no diminution shall be allowed in the thickness required by the foregoing rules for such last-mentioned walls.

MISCELLANEOUS.

Cross-walls.

1. The thickness of a cross-wall shall be two-thirds of the thickness herein-before required for an external or party-wall of the same dimensions, and belonging to the same class of buildings, but never less than eight and a-half inches, and no wall subdividing any building shall be deemed to be a cross-wall unless it is carried up to two thirds of the height of the external or party-walls, and unless the recesses and openings therein do not exceed one half of the vertical surface of the wall in each story.

Extra thickness of certain stone walls.

2. The thickness of every stone wall in which the beds of the masonry are not laid horizontally shall be one-third greater than the thickness prescribed in the rules aforesaid.

3. Buildings to which the preceding rules are inapplicable require the special sanction of the Metropolitan Board of Works.

SECOND SCHEDULE.

Fees Payable to District Surveyors.

Part I.

Fees for New Buildings.

	s.	*d.*
For every building not exceeding 400 square feet in area, and not more than two stories in height	30	0
For every additional story	5	0
For every additional square of 100 feet or fraction of such square . But no fee shall exceed 10*l.*	2	6
And for every building not exceeding 400 square feet in area, and of one story only in height, the fees shall be	15	0

Fees for Additions or Alterations.

	s.	d.
For every addition or alteration made to any building after the roof thereof has been covered in, the fee shall be half of the fee charged in the case of a new building.		
For inspecting the arches or stone floors over or under public ways .	10	0
For inspecting the formation of openings in party-walls . . .	10	0

PART II.

For inspecting dangerous structures, by direction of the Commissioners of Police or Sewers.	£2	0	0

N.B.—In the Schedule "area" shall include the area of any attached building.

By 24 & 25 Vic. c. 37, s. 1, "the first part of the Metropolitan Building Act, 1855, containing the regulations relating to the construction of buildings in the metropolis shall not, nor shall any provision therein contained apply to any buildings erected or to be erected by or under the sanction of the Commissioners for the Exhibition of 1851, on any lands belonging to them, and purchased in pursuance of any power vested in them by charter or act of parliament, with the exception of such streets or blocks of buildings as may be erected by them, or with their sanction, as private dwelling-houses."

By sect. 2, this act may be cited as "The Metropolitan Building Act of 1861."

END OF VOL. II.

LONDON:
STRANGEWAYS AND WALDEN, 28 CASTLE STREET, LEICESTER SQUARE.